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## Human Rights Due Diligence and Fashion industry: a patchwork of measures for buyers and suppliers



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# Table of Contents

- Introduction..... 3
  
- Chapter I. Designing a Human Rights Due Diligence (HRDD) within the fashion industry..... 5
  - I. Shaping a responsible business: a regulatory overview..... 5*
    - A. Hard law: a limited impact..... 5
      - 1. International human-rights law: States v. Non-States actors..... 5
      - 2. European human-rights law and its indirect implication..... 6
    - B. Soft law: basis for self-regulated companies..... 7
      - 1. International ‘invitation’ to take action..... 7
      - 2. Self-regulation through Code of Conduct (CoC)..... 9
    - C. HRDD: the ultimate trend..... 10
      - 1. The concept: between standard and progress..... 10
      - 2. Toward mandatory human rights due diligence..... 11
  - II. HRDD: Mapping the risks..... 13*
    - A. Prima facie legal risks of HR violations: focus on the supply-chain..... 13
      - 1. Garment factories..... 13
      - 2. Gold, diamonds, precious stones and animal skins..... 14
    - B. Non-legal incentives for HRDD..... 15
      - 1. Employees and investors..... 15
      - 2. Consumer, reputation and economic value..... 15
  - III. Companies’ Toolbox for implementing HRDD..... 16*
    - A. Social audit and certification..... 16
      - 1. Social audits..... 16
      - 2. Certifications..... 17
    - B. HRDD reporting..... 17
    - C. HRDD and supply agreements..... 18
  
- Chapter II. Contracting for human rights with suppliers..... 21
  - I. Negotiating equal and inclusive terms..... 21*
    - A. More equal and trustful partnership..... 21
      - 1. Looking for the right balance..... 21
      - 2. Tailor-made approach..... 22
    - B. Inclusive partnerships..... 23
  - II. Stabilizing human rights clauses..... 24*
    - A. *Ex ante* clauses..... 24
      - 1. Scope and coverage..... 24
      - 2. Verifiability criteria..... 25
    - B. *Ex post* clauses..... 26
      - 1. Traditional remedies..... 26
      - 2. HRDD remedies..... 27

III. Victims: accessing remedies.....	29
A. Recognition of the victim as a third-party beneficiary (TPB).....	29
1. Concept of TPB.....	29
2. TPB's case law.....	29
B. Non-States based grievance mechanisms.....	31
1. Company-level complaint mechanisms.....	31
2. Multi-stakeholder mechanisms.....	32
3. Adequate Remedies.....	33
Chapter III. Kering and HRDD: French headquarters and Italian supply chain.....	34
I. CSR: France, Italy and Kerings.....	34
A. Kering's French headquarters.....	34
1. General French CSR framework.....	34
2. French duty of vigilance: the HRDD 'à la française'.....	35
a. An ambitious law.....	35
b. Enforcement mechanism.....	36
c. Grievance mechanisms.....	37
B. Kering's Italian supply chain.....	38
1. General Italian CSR framework.....	38
2. Due diligence and Model 231/2001.....	40
3. Grievance mechanisms.....	41
C. General Kering's CSR vision.....	42
II. HRDD within Kerings.....	43
A. HRDD: Internal and International commitments.....	43
B. Identification and Assessment.....	44
C. Findings and internal processes.....	45
D. Operational-level grievance mechanisms.....	45
E. Accountability: reporting.....	46
III. HRDD within Kering's supply chain.....	46
A. Contract framework.....	46
B. Collaborative approach.....	48
C. Monitoring and rating.....	48
D. Responses to non-compliance Responses to non-compliance.....	49
IV. Insights from Kering's Sustainability team.....	50
Conclusion.....	51

## Introduction

Has your face mask been made under forced labour? Following the outbreak of the coronavirus disease (Covid-19), the face mask has become the ultimate fashion accessory. However, some Chinese companies are accused of making Uighurs, a Muslim ethnic minority, “*to work against their will*”<sup>2</sup> in order to satisfy the growing demand of personal protective equipment (PPE) in Western countries.

The violation of human rights, “*inherent to all human beings*”<sup>3</sup>, has always been associated with business’ misconduct. Take the cotton, a raw material presents in every textile, in every home. Can anyone assert that no child was abused during the production process<sup>4</sup>? This question refers equally to garment, footwear and jewelry industries. Luxury is not spared by this intrinsic danger. Having full control over the supply chain and “*every potential weak link*”<sup>5</sup> remains the best way for a brand to guarantee transparent and traceable raw materials and manufacturing processes.

The luxury industry is committed to enforcing ‘Corporate Social Responsibility’ (CSR), a “*concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis [...] over and above their legal obligations*”<sup>6</sup>. CSR applies to all companies, independently of their size, either a Multinational company (MNC) or a Small and Medium Enterprise (SME). In fact, both may use cross-border supply chains employing workers all around the world and subject to diverse legal systems, more or less compliant with international human rights. So, due to media exposure related to human rights abuses, brands started to design their own legal framework aimed at shielding their reputation from potential suppliers’ violations. Nevertheless, serious human rights abuses persist in global supply chains, despite the existence, for years, of companies’ codes of conduct and social auditing systems.

In this context, the United Nations Guiding Principles (UNGPs) invite companies to reflect on their responsibility to respect human rights<sup>7</sup> through the concept of Human Rights Due Diligence (HRDD). This notion refers to an ongoing and customized managerial process based on identification, prevention, mitigation of human rights risks and accountability<sup>8</sup>. While CSR is business-oriented and voluntarily designed to safeguard a company’s reputation, HRDD is person-oriented and does not compromise with the protection of human rights<sup>9</sup>. This is why, HRDD must not only be personalized by each company, but inside the enterprise itself, each commercial partnership, each decision should be applied through the lens of such concept. Above all, companies must address their human rights impact, communicate it and remedy in a proportional way, when an abuse arises.

Thus, the question this thesis explores is what are the tools at disposal of luxury brands for incorporating an effi-

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2 M. XIAO, H. WILLIS, C. KOETTL, N. RENEAU, D. JORDAN, *China Is Using Uighur Labor to Produce Face Masks*, in *The New-York-Times*, 2020.

3 UNITED NATIONS (UN) website, *Human Rights* available at <https://www.un.org/en>.

4 J. GAPPER, *Forced labour is the price of a cheap cotton T-shirt in Financial Times*, 2020.

5 *Ibidem*.

6 EUROPEAN COMMISSION (EC), *Corporate Social Responsibility, a new definition, a new agenda for action* of October 25, 2011, Brussels, MEMO/11/.

7 UN Human Rights Council, endorsement of the United Guiding Principles for Business and Human Rights (UNGPs), New-York and Geneva, of June 16, 2011, no. 11 to 24, HR/PUB/11/04.

8 OHCHR, *Human Rights “Issues Paper” on legislative proposals for mandatory human rights due diligence by companies*, 2020, p. 2.

9 R. McCORQUODALE, *Corporate Social Responsibility, Corporate Social Responsibility and International Human Rights Law in Journal of Business Ethics*, 2009, p. 391.

cient due diligence system protecting both human rights and the company. This is particularly relevant in times of economic pressure caused by the pandemic and resulting in brands simply leaving “behind corporate social responsibility promises as well as human rights obligations<sup>10</sup>”.

I will argue that a more equal partnership between buyer and supplier will turn into a winwin strategy as long as brands develop a “smart mix<sup>11</sup>” of measures able to respect human rights and offer adequate answers in case of breach. In that sense, I will question the role of supply agreements being an instrument fostering a corporate human rights culture.

First, I will explore the concept of HRDD in light of the fashion and luxury industry’s current legal framework, why company should protect human rights and how they can do so (chapter I). Second, I will assess the incorporation of HRDD into supply agreements throughout the negotiation phase up to the drafting of contractual terms and the ex-post clauses in case of a breach (chapter II). Third, I will put the theory into practice through a case study on the Kering Group, analyzing its HRDD strategy in light of the French and Italian frameworks (chapter III).

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10 ECCHR, Policy Paper, *Garment supply chain in intensive care? Human rights due diligence in times of (economic) crises*, 2020, p.2.

11 OHCHR, Human Rights “Issues Paper”, *ibidem*, p. 1.

# Chapter I. Designing a Human Rights Due Diligence (HRDD) within the fashion industry

After having set out the regulatory framework leading to the implementation of human rights due diligence (HRDD) (I), I will focus on identifying the risks underlying the fashion industry (II) and the toolbox at disposal of the company to integrate, track and communicate their findings (III).

## I. Shaping a responsible business: a regulatory overview

The companies, eager to undertake a responsible activity, will be slightly affected by international and European law (A) but substantially influenced by soft law (B) while embarking in HRDD journey (C).

### A. Hard law: a limited impact

The international human-rights law is still confined to States (1), while European law tries to produce some limited impact on companies (2).

#### 1. International human-rights law: States v. Non-States actors

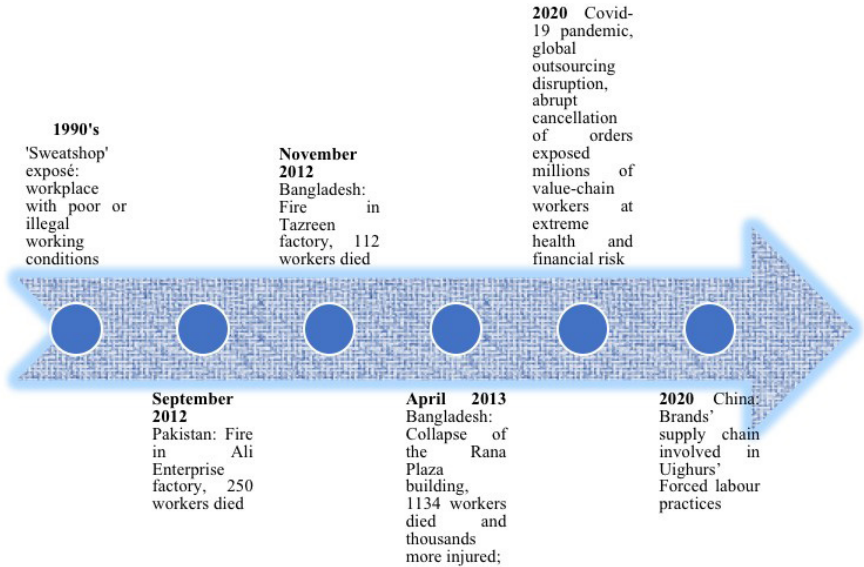


Figure 1 - Examples of human costs in the fashion industry<sup>12</sup>

The concept of corporate human rights obligations is highly controversial. The debate was crystallized in the 60's by authors such as Friedmann or Cassese. According to the latter, multinational corporations have no international

<sup>12</sup> J. C. LIPSON, *Promising Justice: Contract (as) Social Responsibility in Wisconsin Law review*, 2019, p. 1140; CLEAN CLOTHES CAMPAIGN, *Report, Fig Leaf For Fashion: How social auditing protect*

rights and duties because States are not eager to grant them<sup>13</sup>. On the contrary, Friedmann considered transnational corporations as full-fledged actors of modern international law<sup>14</sup>.

In international fora, despite numerous attempts to impose international duties and obligations on business-actors, multilateral treaties have only succeeded to impose obligations on States so far<sup>15</sup>.

Currently, the level of involvement and enforcement of obligations regarding human-rights depends on the ratification of the conventions by States. Although the international regulatory impact is limited, international conventions fix standards of behaviors for companies

When referring to international human rights, the general understanding focuses on the International Bill of Human Rights which gathers the Universal Declaration of Human Rights (UDHR)<sup>16</sup>, the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR)<sup>17</sup> and its two Optional Protocols. The Covenants emphasize the impact of the UDHR, a non-binding document, which sets forth fundamental rights greatly relevant for the fashion and luxury sector, including: the right to work in just and favorable conditions; protection of minority rights; prohibition of arbitrary deprivation of life; prohibition of torture, cruel or degrading treatment or punishment; slavery and forced labour; discrimination; the right to social protection and the right to an adequate standard of living.

Moreover, a series of international human rights treaties and other instruments have expanded the body of international human rights law. However, Di Benedetto highlights the lack of international dispute settlement mechanisms granting enforcement powers to national courts when “*there are countries that play a fundamental role in the global economy (...) which have not ratified the optional protocols of the mentioned treaties*”<sup>18</sup>.

## **2. European human-rights law and its indirect implication**

At European level, two complementary human rights protection systems have been established.

On the one hand, the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, 1951) gives effect to certain of the rights proclaimed in the UDHR, so to refer breaches of such rights before the European Court of Human Rights (ECtHR). On the other hand, the European Union (EU) promotes and protects human rights as set in the Treaty on the Functioning of the European Union (TFEU) to which the Charter of Fundamental Rights (The Charter), proclaimed in 2000, is annexed and is legally binding on the EU institutions and national governments since 2009. Nonetheless, article 51 proclaims: “*The provisions of the Charter are addressed (...) to the Member States only when they are implementing Union Law*”<sup>19</sup>.

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13 A. CASSESE, *International law in a divided world*, New-York, 1986, p.103 in M. T. KAMMINGA, *Corporate obligations under International Law*, paper presented at the 71st Conference of the International Law Association plenary session on Corporate Social Responsibility and International Law, Berlin, 2004, p.1.

14 W. FRIEDMANN, *The changing structure of International Law*, California, 1964, p. 230.

15 M. T. KAMMINGA, *Ibidem*, p. 2-3.

16 UN General Assembly, Resolution 217 A (III) OF 10 DECEMBER 1948

17 UN General Assembly, Resolution 2200 A (XXI) of 16 December 1966

18 F. DI BENEDETTO, *Corporate social responsibility and antitrust compliance in the fashion industry in Papers di diritto europeo*, II ed. *The fashion industry in The European Union*, Verona, 2016, p.5.

19 Charter of Fundamental Rights of The European Union of 26 October 2012, C 326/02.

As for international law, the Charter's application, consistent with the ECHR, is subject to the willingness of the Member States. Nevertheless, the EU secondary law tries to fill many gaps by adopting regulations or directives directly interesting the fashion industry and human rights.

In that sense, the Directive 2015/95/EU, concerning non-financial reporting<sup>20</sup>, requires large public interest entities with over 500 employees (listed companies, banks and insurance companies) to disclose certain non-financial information related to the social and environmental impacts of their activities.

Furthermore, in 2017, the EU has adopted an important regulation regarding companies involved in the trade of minerals and their adverse impact on human-rights<sup>21</sup>, which enters into force in January 2021. Luxury brands, and especially jewelry ones, are directly concerned by this new regulation and will have until next year to adapt.

## **B. Soft law: basis for self-regulated companies**

So far, the enterprises' strategies rely on international initiatives (1), internally translated in codes of conduct (2).

### **1. International 'invitation' to take action**

Despite the voluntary approach of the EU, the prevailing rule remains to leave Corporate Social Responsibility (CSR) to self-regulation.

In the last few decades, many international initiatives were promoted by the UN and the Organisation for Economic Cooperation and Development (OECD) to advance human rights through business. Their impact is relative as they do not foresee mandatory rules, they rather list recommendations. In that sense, corporate self-regulation was first advocated through the OECD's guidelines for Multinational Enterprises and the International Labor Organisation (ILO)'s Tripartite Declaration of Principles Concerning Multinational Enterprises, back in 1976 and 1977, respectively<sup>22</sup>.

The UN also played a crucial role. The UN Global Compact, the world's largest corporate sustainability initiative, was established in 1999 through former UN Secretary-General Kofi Annan. Notably, firms were required to abide by the ten principles addressing human-rights, labour standards, environmental protection and anti-corruption. All these initiatives were aligned with the UN Sustainable Development Goals (SDGs)<sup>23</sup>.

Described as a voluntary "*promotional endeavor*"<sup>24</sup> lacking monitoring mechanism, the commitments of Chiefs Executive Officers (CEO) to implement universal sustainability principles and to achieve SDGs by 2030, have been sometimes considered as an instrument for "*bluewash*", meaning "*wrapping themselves in the flag of the United Nations*"<sup>25</sup>.

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20 Directive (EU) no. 2014/95 of the European Parliament and of the Council of 22 October 2014 amending Directive (EU) no. 2013/34 as regards disclosure of non-financial and diversity information by certain large undertakings and groups Text with EEA relevance.

21 Regulation (EU) no. 2017/821 of the European Parliament and of the Council of 17 May 2017, laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas. <sup>22</sup> M. T. KAMMINGA, *Ibidem*, p.1.

22 M. T. KAMMINGA, *Ibidem*, p.1.

23 UN General Assembly, Resolution A/RES/70/1, Transforming our world: the 2030 Agenda for Sustainable Development, 25 September 2015.

24 G. KNIGHT, J. SMITH, *The Global Compact and Its Critics: Activism, Power Relations, and Corporate Social Responsibility in Discipline and Punishment in Global Politics*, 2008, p.254.

25 K. BRUNO, J.KARLINER, *Tangled Up In Blue* in *CorpWatch*, 2000, available at <https://corpwatch.org/article/tangled-blue>.



In 2011, aware of such shortcomings, the UN Human Rights Council endorsed the UN Guiding principles on Business and Human Rights (UNGP), which became the cornerstone of international, national and corporate initiatives. Promoted by John Ruggie, UN Special representative on Human rights and transnational corporations and other business enterprises, the guidelines established the so-called “*Protect, respect and remedy*”<sup>26</sup> framework, based on a triangular relation (see next page).

<b>States: Duty to Protect</b> <sup>27</sup>	<b>Companies: Duty to respect</b> <sup>28</sup>	<b>Victims: Right to effective remedy</b> <sup>29</sup>
States must establish: <ul style="list-style-type: none"> <li>- Effective policies,</li> <li>- Legislation,</li> <li>- Regulation</li> <li>- Adjudication</li> </ul>	Companies Must: <ul style="list-style-type: none"> <li>- Prevent from causing,</li> <li>- Address,</li> <li>- Mitigate</li> </ul>	States must ensure victims’ remedies through: <ul style="list-style-type: none"> <li>- Judicial, legislative or other appropriate means</li> </ul>
In order to: <ul style="list-style-type: none"> <li>- Prevent,</li> <li>- Investigate,</li> <li>- Punish,</li> <li>- Redress</li> </ul>	Human rights violations, wherever they operate  Introduction of <b>human rights due diligence</b> in business activities, as a general operative standard going beyond legal compliance	Remedies may include (e.g): <ul style="list-style-type: none"> <li>- Apologies,</li> <li>- Restitution,</li> <li>- Rehabilitation,</li> <li>- Financial or non financial compensation,</li> <li>- Punitive sanctions (criminal or administrative)</li> </ul>
Corporate human-rights abuses		Companies must establish <ul style="list-style-type: none"> <li>- Grievance mechanism.</li> </ul>

The UNGP apply to all States and all forms of business enterprises, both national and international. Butler praised the UNGP, because they “*provided the basis for international institutions to invoke quasi-legal arguments seeking to command corporations even though the principles were originally intended to be nonbinding*”<sup>30</sup>.

A large number of international and regional organizations endorsed the UNGP, too. In May 2011, the OECD guidelines for Multinational Enterprises<sup>31</sup> were modified in accordance with the UNGP, and established implementation and conflict resolution mechanisms through the National Contact Point (NCP).

Independently of the sizes of companies, the international recommendations were mostly transposed internally through codes of conduct (CoC).

26 UNGP, ibidem.  
 27 UNGP no.1-10.  
 28 UNGP no. 11-24.  
 29 UNGP no. 25-31  
 30 J. BUTLER, The corporate keepers of international law in The American Journal of International Law, 2019, p.201.  
 31 OECD, Guidelines for Multinational Enterprises, Paris, 2011.

## 2. Self-regulation through Code of Conduct (CoC)

Given the lack of international regulatory framework, both the UN and the OECD encourage companies to incorporate the recommendations on human rights by adopting initiatives within their activities. One way is through the adoption of CoC, code of ethics or code of business standards within the firms themselves, known as “*private voluntary regulation*”<sup>32</sup>, instruments able “*to govern employee behavior and establish a socially responsible organizational culture*”<sup>33</sup>.

Initially, codes emerged because of concerns over poor working conditions<sup>34</sup> in the context of global production systems<sup>35</sup>.

In the 90’s, because of ‘sweatshop’ conditions found within their supply chains, Levi Strauss and Nike decided to respond to social pressure, directly affecting their reputation, through CoC<sup>36</sup>.

Since then, most companies have developed their own code as an internal and external ‘public expression of intention’ to do better. Back in 1999, a review of major apparel companies’ CoC revealed mention to key areas such as child labor, working conditions, employees’ rights, offering good theoretical perspectives but “*little operational direction*”<sup>37</sup>. Moreover, “*the seriousness of code violation*”<sup>38</sup> by suppliers was questioned because of the low monitoring standard.

Codes can merely serve as ‘advertisements’ rather than actual tools for change. In fact, the effectivity of such codes varies according to their quality<sup>39</sup>. In practice, if the company management’s “*active commitment is a precondition for the successful implementation of the [codes]*”<sup>40</sup>, the motivation to comply with them will not necessarily be shared by all the stakeholders in the chain. In that sense, CoC are not a solve all solution.

First, CoC are unilaterally adopted, casting doubt on the legal obligations arising. In practice, if not legally binding, neither the corporation nor its supplier will be held responsible for human rights violations. Second, the terms used in the codes are usually too vague “*to extract clear obligations from the text*”<sup>41</sup>. Third, the CoC may result in exportation of culture and values inconsistent with outsourcing countries. On top of that, the real ability of CoC in improving working conditions can be questioned. For example, a Chinese worker providing for the whole family,

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32 R. LOCKE, T. KOCHAN, M. ROMIS, F. QIN, *Beyond corporate codes of conduct: Work organization and labour standards at Nike’s suppliers in International Labour Review*, 2007, p.22.

33 P. M. ERWIN, *Corporate Codes of Conduct: The Effects of Code Content and Quality on Ethical Performance in Journal of Business Ethics*, 2011, p.535.

34 R. G. KOCER, L. FRANSEN, *Codes of Conduct and the Promise of a Change of Climate in Worker Organization in European Journal of Industrial Relations*, 2009, p.238.

35 S. BARRIENTOS, S. SMITH, *Do workers benefit from ethical trade? Assessing codes of labour practice in global production systems in Third World Quarterly*, 2007, p.713.

36 S. J. FRENKEL, D. SCOTT, *Compliance, collaboration and codes of labor practice: the Adidas connection in California Management Review*, 2002, p.29-49.

37 M. A. EMMELHAINZ, R. J. ADAMS, *The Apparel Industry Response to ‘Sweatshop’ Concerns: A Review and Analysis of Codes of Conduct in The Journal of Supply Chain Management*, 1999, p.56.

38 *Ibidem*.

39 P. M. ERWIN, *Ibidem*, p. 536.

40 E. DELBUFALO, M. BASTL, *Multi-principal collaboration and supplier’s compliance with codes-ofconduct, in The International Journal of Logistics Management*, 2017, p.1238.

41 E. SAFFOURI VELASCO, *Corporate Social Responsibility and supply contracts: from soft law to hard law: A global perspective in International Commercial Law Research Paper*, 2018, p.5.

will have to work much longer if paid on a piece-rate basis. Working “only” 37 hours a week may result in damaging consequences<sup>42</sup>.

The effectivity of such code will rely on the ability to “*identify the responsibility at the appropriate level and to sanction abuses*”<sup>43</sup>. Therefore, even if CoC include international standards, they lack international mechanism to “*hold violators liable*”<sup>44</sup>. So claimants will look for domestic remedies, offering disparate judicial solutions.

Finally, the risk of CoC is to Disguise “*the fact that their core principles and practises may be left unchanged*”<sup>45</sup>. This is particularly true during the ongoing pandemic, bringing to light the urgent need of setting regulatory rules.

### **C. HRDD: the ultimate trend**

HRDD is a globally endorsed concept (1) progressively hitting the road of mandatory rules (2).

#### **1. The concept: between standard and progress**

On the basis of the above mentioned UNGP, the concept of human-rights due diligence gained international exposure.

In June 2020, the Office of the United Nations High Commissioner for Human Rights (OHCHR) defined HRDD as an “*ongoing, cyclical process that takes account of the dynamic nature of human rights situations*”, critical part of fulfilling “*the corporate responsibility to respect*”<sup>46</sup>.

By identifying, assessing and responding upon its human-rights risks, companies could achieve concrete results: prevent violations and protect human rights.

A shift has been operated between the initial responsibility of States for operations led by non-states actors and the self-responsibility of companies “*making the obligation to respect human rights more than a passive duty of avoiding harm*”<sup>47</sup>. Thus, HRDD refers to an obligation of means rather than result, the breach of which consists in “*failing to take the necessary, diligent steps towards that end*”<sup>48</sup>.

The UNGP no.17 identifies four steps:

1. identifying and assessing actual and potential human rights impacts;
2. integrating and acting upon the findings;
3. tracking the effectiveness of action taken;

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42 P. LUND-THOMSEN, *The Global Sourcing and Codes of Conduct Debate: Five Myths and Five Recommendations* in *International Institute of Social Studies*, 2008, p.1010.

43 F. DI BENEDETTO, *Ibidem*, p.6.

44 J. M. SMITS, *Enforcing Corporate Social Responsibility Codes under Private Law: On the Disciplining Power of Legal Doctrine* in *Indiana Journal of Global Legal Studies*, 2017, p.105.

45 G. CHANDLER, *The evolution of the business and human rights debate* in *Business and Human Rights: Dilemmas and Solutions*, 2003, p.26.

46 OHCHR, *Mandatory Human Rights Due Diligence Regimes*, 2020, p.1.

47 H. CULLEN, *The irresistible rise of human rights due diligence: Conflict minerals and beyond* in *George Washington International Law Review*, 2016, p. 749.

48 T. KOIVUROVA, *Due Diligence* in *Max Planck Encyclopedia of Public International Law*, 2010, p.1.

#### 4. communicating how impacts are addressed

As the garment and luxury industry are concerned, besides the UNGP, companies can also rely on a non-exhaustive list of OECD recommendations, including the Guidelines for Multinational Enterprises<sup>49</sup>, the Due Diligence for responsible business<sup>50</sup>, the Guidance for responsible supply chains in the garment industry<sup>51</sup> and the International Organisation for Standardization (ISO 26000)<sup>52</sup>.

However, a 2019 survey highlights that HRDD is a “*key weakness for most companies*” as “*49% of companies score zero against every human rights due diligence indicator*”<sup>53</sup>.

Covid-19 has sadly demonstrated how lacking due diligence has impacted the garment industry. Billions of euros of orders have been canceled, putting workers in the supply chain at risk, when already facing low social safety. As financial risks are shifted towards suppliers, brands contributed to lowering employment and wages standards<sup>54</sup>.

## 2. Toward mandatory human rights due diligence

In January 2020, the European Commission (EC) released a survey on mandatory HRDD in the supply chain. 75,37% of businesses interviewed recognized that a single harmonized legislation would provide benefit for their activities<sup>55</sup>. Interestingly, most of the respondents recognized the failure of self-initiatives in managing their human rights impact. A part of them called out for legal certainty and non-negotiable standards throughout their commercial relationship<sup>56</sup>. Consequently, the EU Commissioner for Justice, Didier Reynders committed to legislate on mandatory corporate environmental and HRDD<sup>57</sup>.

So far, the EU has already foreseen due diligence with the above-mentioned EU-conflict Minerals Regulation by following a five-step framework, consisting in:

- [Establishing] a strong company management system;
- [Identifying] and [assessing] risk in the supply chain;
- [Designing] and [implementing] a strategy to respond to identified risks;
- [Reporting] annually on supply chain due diligence<sup>58</sup>

The UN itself undertook international negotiations to adopt mandatory due diligence and qill present at the occasion of the 10 years anniversary of the UNGP (2011-2021) “*an ambitious vision and roadmap for implementing*

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49 OECD, Guidelines, *ibidem*.

50 OECD, Due Diligence Guidance for Responsible Business Conduct, Paris, 2018.

51 OECD, Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector, Paris 2018.

52 ISO, Discovering ISO 26000: Guidance on Social Responsibility, 2010.

53 CORPORATE HUMAN RIGHTS BENCHMARK, *Key Findings*, 2019, p.8.

54 M. CURLEY, Human Rights Due Diligence: Making it mandatory – and effective, in EUIdeas, 2020.

55 EC, *Study on due diligence requirements through the supply chain*, Final Report, Brussels, 2020, p.142. <sup>56</sup> *Ivi*, p.17.

56 *Ivi*, p.17.

57 EU Parliament’s Responsible Business Conduct Working Group, *European Commission promises mandatory due diligence legislation in 2021 in Business and Human Rights Resource Centre*, 2020. <sup>58</sup> EC, *The Regulation explained* available at: <https://ec.europa.eu/trade/policy/in-focus/conflict-mineralsregulation/regulation-explained/>.

58 EC, *The Regulation explained* available at: <https://ec.europa.eu/trade/policy/in-focus/conflict-minerals-regulation/regulation-explained/>.

the UNGPs more widely and more broadly between now and 2030<sup>59</sup>”. The negotiations on a treaty started in 2014<sup>60</sup>. Furthermore, national legislative initiatives have been undertaken and supported by the OHCHR which recalls that they “*have a potential vital role to ‘play as part of a “mart mix” of measures to effectively foster business respect for human rights*”<sup>61</sup>”

European legislative overview:

<b>Country (Year)</b>	<b>Legislation/Regulation/Initiative</b>	<b>Object</b>
United Kingdom (2015)	Modern Slavery Act <sup>62</sup>	Transparency supply chain clause introducing annual reporting requirement on human rights and slavery.
France (2017)	Law 2017-399 on « <i>Devoir de Vigilance</i> » <sup>63</sup> .	Adoption and enforcement of diligence plan based on identification and prevention of potential human rights, labor or environmental breaches that might be caused by French companies or their suppliers
Netherlands (2019)	Dutch Child Labour Due Diligence Bill <sup>64</sup>	Companies will be requested to investigate and adopt a plan of action in case of a reasonable suspicion of child labor in the importation of goods and services.
Norway (2020)	Ongoing assessment on proposal for an “ <i>Act regulating Enterprises’ transparency about supply chains, duty to know and due diligence</i> ” <sup>65</sup> .	Norwegian Ethics Information Committee presented its report to the government.
Switzerland (2020)	Proposal of Swiss civil society initiative on mandatory human rights due diligence.	Referendum to be held <sup>66</sup>

59 OHCHR, UN Guiding Principles on Business and Human Rights at 10 “Business and human rights: towards a decade of global implementation” available at <https://www.ohchr.org/EN/Issues/Business/Pages/UNGPsBizHRsnext10.aspx>.

60 UN General Assembly, Resolution 26/9, Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, 14 July 2014.

61 OHCHR, Legislative proposals for mandatory human rights due diligence by companies in UN Human Rights Issues Paper, 2020, p.1.

62 UK, Public General Acts, Modern Slavery Act, C30 of 26 March 2015.

63 Law 2017-399 Relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre of 27 March 2017.

64 Dutch Senate, Child Labour Due Diligence Act of May 14, 2019.

65 Norwegian Government, Report from the Norwegian Ethics Information Committee, Supply Chain Transparency, 2019, available at <https://www.regjeringen.no/contentassets/6b4a42400f3341958e0b62d40f484371/ethics-information-committee---part-i.pdf>.

66 A. CROCKETT, E. SAVOUREY, O. ELGIE, J. TEMME, Switzerland to hold referendum on proposed human rights due diligence in Business and Human Rights Centre, 2020.

Germany (2020)	Draft Law by Ministry for Economic Cooperation and Development (BMZ).	Proposal on sustainable supply chains including elements on human rights due diligence <sup>67</sup> .
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This general track is followed in the political debates in the UK, Denmark, Finland and Luxembourg<sup>68</sup>. All these legislations present a common feature: identifying the risks

## II.HRDD: Mapping the risks

UNGP no. 17 and 18 invite companies to undertake a first initial step to identify and assess the actual and potential impact of their activities on human rights, in order to “(...) *understand the specific impacts on specific people, given a specific context of operations*”<sup>69</sup>. The risks can be legally related to the supply chain (1) and/or related to other non-legal incentives (2).

### A. *Prima facie* legal risks of HR violations: focus on the supply-chain

An integrated supply-chain represents a competitive asset by lowering the costs and improving access to raw materials<sup>70</sup>. However, a breakdown at the supply level will necessarily affect the buyer’s activity. Even worse, the buyer can have a direct role in spreading human rights violations. In Lambooy’s words: “*a chain consisting of many links does not constitute an excuse for the companies involved not to act diligently*”<sup>71</sup>.

Sadly, working conditions in developing countries or the use of child labor have been publicly disclosed<sup>72</sup>. So, by employing approximately 60 million people, the fashion and luxury industry play a crucial role in creating large-scale social changes for millions of people<sup>73</sup>. However, consciousness and mitigation of risks should be tackled carefully within the supply-chain, especially in the garment industry (1), the mining and animal sectors (2).

### 1. Garment factories

Major human rights violations have taken place within the garment industry. With reference to cases cited in [Figure 1](#) the specific human rights breached are added below:

<b>Year/Country of suppliers</b>	<b>International human rights violated</b>
1990’s: Indonesia, Saipan, Cambodia, Pakistan	Low wages, inhumane working conditions, forced labor, child labor.

67 S. WILKS, J. BLANKENBACH, Will Germany become a leader in the drive for corporate due diligence on human rights in Business and Human Rights Centre, 2020.

68 *Europe takes a big step towards companies having ‘duty of care’ on Human Rights*, in *EU Reporter*, 2019, available at <https://www.eureporter.co/economy/2019/06/12/europe-takes-a-big-step-towards-companies-having-duty-of-care-on-humanrights/>

69 UNGP no.18, commentary, p. 20.

70 D. E. BOYD, R. E. SPEKMAN, J. W. KAMAUFF, P. WERHANE, *Corporate Social Responsibility in Global Supply Chains: A Procedural Justice Perspective in Long Range Planning*, 2007, p. 341. <sup>71</sup> T. LAMBOOY, *Corporate Due Diligence as a Tool to Respect Human Rights*, in *Netherlands Quarterly of Human Rights*, 2010, p.445.

71 T. LAMBOOY, *Corporate Due Diligence as a Tool to Respect Human Rights*, in *Netherlands Quarterly of Human Rights*, 2010, p.445.

72 S. TOMASEKOVA, *Exploring the Barriers to Employee Engagement with Corporate Social Responsibility in the Fashion Industry*, Master’s Thesis, Utrecht University, September 2019, p. 7.

73 GLOBAL FASHION AGENDA and THE BOSTON CONSULTING GROUP, *Pulse of the fashion industry*, 2017, p.15.

2012: Pakistan	Unhealthy, unsafe and poor working conditions.
2012: Bangladesh	Unhealthy, unsafe and poor working conditions.
2013: Bangladesh	Unhealthy, unsafe and poor working conditions.
2020: China	Forced labour, moder slavery, discrimination.

In these cases, western brands identified as buyers were directly accused of taking advantage of ‘poor’ workers.

Other concerns relate to:

- tax avoidance practices, usually associated with a deficient redistribution of wealth<sup>74</sup>;
- women workforce, representing in Bangladesh 85% of garment workers, paid way below the minimum wage despite work overtime<sup>75</sup>.

These issues affect the luxury industry as well. In fact, following the above-mentioned tragedies, many luxury brands decided to relocate to Eastern Europe and Turkey, where low living wages were reported<sup>76</sup>.

## **2. Gold, diamonds, precious stones and animal skins**

The implementation of HRDD is of particular interest in the mining industry in conflict and high-risks areas. The jewelry industry is directly concerned when extracting, trading or handling gold, diamonds and precious stones. Adverse impacts may be associated with financing, facilitating or exacerbating conflict. Armed-conflict, child labor, corruption, poor or inhumane working conditions are just a few potential human rights violations that a brand could face when outsourcing those raw materials.

The transparency of the supply chain is at stake and has been tackled through different legislative initiatives, including the U.S Dodd-Frank Act (2010)<sup>77</sup> and the EU Conflict Minerals Regulation (2017)<sup>78</sup>. The OECD also released a Guidance on due diligence for responsible supply chains of minerals from conflict-affected areas (2016)<sup>79</sup>.

Other potential risks can be found while sourcing animal skins. Focusing only on the human aspect, farming practices surrounding the animals can be subjected to unfair labor practices and human rights relatives to those workers who maintain, breed, raise, transport, handle and slaughter animals<sup>80</sup>. Consequently, the company has to clearly identify the potential risks surrounding its activities in order to send a strong message that it “*does not fear being held accountable when labor rights abuses are found in its supply chain.*”<sup>81</sup> Other incentives may influence business to adopt a HRDD.

74 T. HOSKIN, *The Vile Excess and Inequality of the Global Fashion Industry* in Huck, 2016, available at <https://www.huckmag.com/perspectives/reportage-2/vile-excess-inequality-global-fashion-industry/>

75 S. TOMASEKOVA, *Ibidem*, p.7.

76 CLEAN CLOTHES CAMPAIGN, *Report Stitched Up: Poverty wages for garment workers in eastern Europe and Turkey*, 2014, p.6 and T. HOSKIN, *Luxury brands: higher standards or just a higher mark- up?* In *The Guardian*, 2014.

77 U.S, Public Law 111-203, *Dodd-Frank Wall-Street Reform and Consumer Protection Act* of July 21,2010.

78 EC, *Focus, Ibidem*.

79 OECD, *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, Paris, 2016.

80 KERING, *Standards for raw materials and manufacturing processes*, 2019 (update), p. 148.

81 B. STAUFFER, *Follow the thread: the need for supply chain transparency in the garment and footwear industry*, in *Human Rights Watch*, 2017.

## B. Non-legal incentives for HRDD

Reputational risks, investor requirements and consumer expectations<sup>82</sup> influence brands' strategies.

### 1. Employees and investors

Primary stakeholders are those vital to the growth and survival of a business, such as customers, employees, suppliers, communities and investors. Freeman's stakeholder theory<sup>83</sup> suggests that unsatisfied primary stakeholders will withdraw their contributions, which are essential to a firm's performance.

In fact, engaging in CSR for a brand will boost employees' engagement. A recent survey reveals that more than half of the workers consider "*that a job where they can make an impact [is] important to their happiness*"<sup>84</sup>, while investing in the 'triple bottom line'<sup>85</sup> would attract and retain new employees. Consequently, human rights violations will influence negatively primary stakeholders.

Furthermore, a growing number of investors consider environmental, social and governance (ESG) performances a successful financial business strategy. Studies suggest that investors believe in a positive correlation between sustainability and financial performances and link their investment to the improved revenue performance and operational efficiency generated by sustainability practices<sup>86</sup>.

### 2. Consumer, reputation and economic value

Never have consumers been more socially aware and attentive to sustainable and ethical brands as today. Human rights abuses condemn the brand to a devaluation of its value and reputation.

In 2013, the Rana Plaza disaster became a turning point in shaping consumers' choices. As the reality behind western clothes was revealed, consumers stressed out the unconditional necessity to know where their clothes were made, by whom and under which conditions. Transparency became crucial to re-build consumers' trust.

So, to attract new consumers, brands have to pay attention to "*environment, sustainability, animal welfare, production and labor practices, positive impact on communities*"<sup>87</sup>. Such reasoning directly applies to luxury goods.

Currently, the pandemic is putting human-rights at the "*frontline in the fight against Covid-19*"<sup>88</sup> and businesses' reactions are scrutinized. In some cases, buyers adopted measures resulting in human rights violations. In fact, on the one hand some retailers chose to cancel orders and withheld payments due to their suppliers, on the other hand, some accelerated the production rate to respond to the growing demand, resulting in health issues with

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82 EC, Study, Ibidem, p.16.

83 E. FREEMAN, Strategic Management, A Stakeholder Approach, Cambridge University Press, 1984.

84 S. TOMASEKOVA, Ibidem, p.12.

85 CSR strategy attributed to John Elkington focusing on Profit, People, Planet.

86 THE BOSTON CONSULTING GROUP, *Total societal impact: a new lens for strategy*, 2017, p.6

87 DELOITTE, *Global powers of luxury good*, 2019, p.8.

88 S. EASTWOOD, J. FORD, L. REYNOLDS, *Business and Human Rights: Mandatory Human Rights due diligence: European Commission to introduce a legislative initiative by 2021* in Mayer-Brown, 2020.



workers unable to respect social distancing at the workplace. Such bad exposure directly impacted their brands' value and undermined the trust of consumers<sup>89</sup>. Once again, the weapon drawn to adopt a responsible business conduct has been HRDD<sup>90</sup>.

### III. Companies' Toolbox for implementing HRDD

Once the general regulatory framework set and the identification of actual or potential human rights risks mapped, the next step is integrating those findings across processes, tracking and monitoring their effectiveness and finally communicating how impacts are being addressed<sup>91</sup>. To do so, enterprises may rely on third-party audits, certifications (A), reporting (B) and contracts (C).

#### A. Social audit and certification

##### 1. Social audits

UNGP no. 20 states: *"In order to verify whether adverse human rights impacts are being addressed, business enterprises should track the effectiveness of their response"*. To do so, audits are promoted within the supply chain to ascertain compliance with the buyer's commitments.

Three reasons are put forward:

- signaling the brand's commitment to CSR;
- ensuring suppliers' adherence to CSR guidelines;
- measuring progress in CSR implementation<sup>92</sup>

However, the current debate relates to CoC's monitoring and whether the compliance audits can be trusted *"to make accurate and honest assessments"*<sup>93</sup>. For instance, the Clean Clothes Campaign uncovered the particular secrecy surrounding audit activities and warned *"that corporate-controlled social audits (...) can even exacerbate dangerous working conditions and obstruct, delay and/or undermine more credible and effective remedial measures"*<sup>94</sup>.

What happened at the Rana Plaza Bangladesh or at the Ali Enterprises factory in Pakistan strengthen this ambiguity. Both buildings were audited and classified as safe just before the incident by several auditing companies, relaying on standards of leading compliance initiatives, like Social Accountability International (SAI). Even worse, in Pakistan, the assessment was made despite no visits undertaken by the auditors<sup>95</sup>.

Nonetheless, audit firms were not held accountable. Thus, human rights audits failed to protect workers, who are still left apart during the process despite being the target of such compliance initiatives. In addition, time constraint and the methodology adopted by auditors (e.g. simple checking-list) prevent the workers from complaining about

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89 A. CLEGG, *How companies can protect their reputation during a pandemic* in *Financial Times*, 2020.

90 OECD, *COVID-19 and Responsible Business Conduct*, 2020.

91 OHCHR, *Corporate Human Rights Due Diligence, identifying and leveraging emerging practices*, available at <https://www.ohchr.org/EN/Issues/Business/Pages/CorporateHRDueDiligence.aspx>

92 D. E. BOYD and others, *Ibidem*, pp.344-345.

93 R. LOCKE and others, *Ibidem*, p.23.

94 CLEAN CLOTHES CAMPAIGN, *Report, Fig Leaf For Fashion*, *Ibidem*, p.7.

95 *Ivi*, p.6.

“freedom of association, sexual harassment and gender discrimination<sup>96</sup>”. Also, once the report issued, workers do not have the “opportunity to comment on or to identify some omissions<sup>97</sup>”.

To avoid such failures, non-profit organizations promote:

- audit by independent third parties;
- off-site worker interviews;
- transparent reports and reviewing the methodologies used on a regular basis<sup>98</sup>.

Another way brand can ascertain their human rights strategy is through certification.

## 2. Certifications

Traditionally, certifications are used to provide features or characteristics for a specific product, based on standards usually stricter than mandatory requirements<sup>99</sup>.

When talking about human rights, certification can be used to establish and implement a vigilance plan. They can also serve a strong communication purpose, based on an independent and impartial third-party. Once contractually inserted, a violation of the certification rules will “result in legal liability<sup>100</sup>”.

Considering the broad scale of size, structure and models, there is no unified certification standard. So, companies can choose the model that better satisfies their needs<sup>101</sup>. For instance, companies can rely on: ISO 26000, dedicated to social responsibility and offering assessment of compliance; OHSAS 18001, an international regulatory standard formulating targets and policies in line with legislations and potential risks in the workplace, which regards safety and health of workers.

However, critics arose in the past years. The Social Accountability International SA8000 certification, dedicated to demonstrating fair treatment of workers, was put under the spotlights after the Ali Enterprise fire<sup>102</sup>.

Finally, both audits and certifications have been found “to be ineffective tools for detecting, reporting, or correcting environmental and labour problems<sup>103</sup>” while calling for a wider and ongoing process. Anyways, communicating the strategy is essential.

## B. HRDD reporting

UNGP no. 21 states: “Business enterprises whose operations or operating contexts pose risks of severe human rights impacts should report formally on how they address them”. Such reporting should stress how risks are identified

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96 *Ivi*, p.76. <sup>97</sup> *Ibidem*.

97 *Ibidem*.

98 *Ivi*, pp.90-91.

99 J. YANG, *Contract Law Aspects of Sustainable Companies' Certification in the global value chain*, in *European Review of Contract Law*, 2019, p.38.

100 *Ivi*, p.41.

101 *Ivi*, p. 39.

102 CLEAN CLOTHES CAMPAIGN, *Report, Fig Leaf for Fashion*, *Ibidem*, p.12.

103 R. MCCQUORDALE, L. SMIT, S. NEELY, R. BROOKS, *Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises*, in *Business and Human Rights Journal*, 2017, p.211.

and addressed<sup>104</sup>.

The EU Non-Financial Reporting Directive (2014/95) requests companies to report on necessary non-financial information to better picture the development, performance, position and impact of the business activity. The minimum coverage includes environmental, social and employees' issues, respect for human rights, anti-corruption and bribery<sup>105</sup>. Nevertheless, the directive does not foresee any sanction and allows member States to adopt their own, which complicates matters further.

Companies can also directly rely on the United Guiding Principles Reporting Framework (UNGPRF) and the human-rights integrated report to enhance the way they “*think, plan and report*”<sup>106</sup> on their activities through disclosure of financial and non-financial information<sup>107</sup>.

Yet, companies are not well aware on what to report regarding their human rights impact which remains “*one of the weakest areas of companies' reporting*”<sup>108</sup>. In practice, emphasis is put on charitable activities or limited to specific issues, such as supply chain labor rights<sup>109</sup>. The danger is to report “*for nothing more than image enhancement*”<sup>110</sup>.

As of today, the widespread instrument concentrating all those efforts remain the supplier's contract.

### C. HRDD and supply agreements

Brands can integrate HRDD through the so-called contract social responsibility terms when explicitly seeking «*to achieve social, economic, or environmental goals through the performance of such terms*”<sup>111</sup>. This can be operationalized via a supply agreement, i.e. contract by which one party undertakes to furnish to another, periodically or on a continuous basis, some products against the payment of a remuneration.

Contract social terms rely on a triangular relation “*deliberately [contemplating] the welfare of persons not parties to the contract*”<sup>112</sup>. Indeed, when traditional commercial terms are bilateral (buyer-seller), the human rights terms target a third (unknown)-party beneficiary (TPB).

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104 UNGP no. 21, commentary, p.25.

105 R. LEOPIZZI, A. IAZZI, A. VENTURELLU, S. PRINCIPALE, *Nonfinancial risk disclosure: The “state of the art” of Italian companies*, in *Corporate Social Responsibility and Environment Management*, 2019, p.359.

106 SHIFT, MAZARS, *The UNGP reporting framework and integrated reporting*, 2017, available at <https://www.ungpreporting.org/resources/the-ungp-reporting-framework-and-integrated-reporting/>.

107 R. KARMELE, *Understanding and Managing Human Rights Risks is a key elements of integrated thinking*, 2017, available at <https://integratedreporting.org/news/understanding-and-managing-human-rights-risks-is-a-key-element-of-integrated-thinking/>.

108 SHIFT, *ibidem*.

109 *Ibidem*.

110 F. MANES-ROSSI, A. TIRON-TUDOR, G. NICOLO, G. ZANELLATO, *Ensuring More Sustainable Reporting in Europe Using Non-Financial Disclosure: De Facto and De Jure Evidence in Sustainability*, 2018, p.5.

111 J. C. LIPSON, *ibidem*, p.1116. <sup>112</sup> *Ibidem*, p.1117.

112 *Ibidem*, p.1117.

EXAMPLE: CONTRACT SOCIAL TERMS WITHIN THE FASHION INDUSTRY

- Brand A orders the production of its new collection to its long-term manufacturer, Brand B, localized in India.
- Both agree on commercial terms (bilateral agreement).
- Brand A inserts human rights terms to the contract, notably to ensure decent working conditions of the supplier's employees. The latter become Third-party Beneficiary.



Figure 2: Example of contract social responsibility

Progressively, brands have started to attach their own CoC to the agreement<sup>113</sup>. Of course, contracts are legally binding. However, as underlined by Velasco “*incorporating CoCs standards into a contract does not provide a straightforward solution since new problems come into being*”<sup>114</sup>.

First, the vagueness of such terms makes very difficult their enforcement by courts or arbitration tribunals. In the fashion industry, often, human rights related terms are not directly negotiated but imposed on the supplier, undermining the freedom to conduct business<sup>115</sup>.

Second, *pacta sunt servanda* confers effects only between the two parties to the agreement. What about the TPB from the social contract? Appropriately, the so-called TPB (potentially workers serving the supplier) will try to hold the company accountable for a breach of a contract, to which they are not party<sup>116</sup>.

This point led to establishing contractual remedies. In effect, human rights clauses impact management and brand’s reputation. Consequently, if traditional contract law allows to quantify the damages, in contract social terms, how to quantify adverse reputation? Furthermore, the contractual termination will not be easy to reach if the brand has not explicitly made the breach of clause a fundamental one. And even if the contact ends, one question remains: is this the best solution in a business partnership to promote human rights?

Finally, some scholars questioned the incorporation of monitoring tools in such contracts. Accordingly, the different levels of control would make difficult to compare the performance of different supply chains, questioning “*the seriousness of their buyers’ commitment toward CSR*”<sup>117</sup>. Furthermore, frequent monitoring would affect the commercial trust and would consequently impact the supplier’s performance

113 Ibidem, p.1117.

114 E. SAFFOURI VELASCO, *Ibidem*, p.6.

115 G. NOTO LA DIEGA, *Can the law fix the problems of fashion? An empirical study on social norms and power imbalance in the fashion industry in Journal of Intellectual Property Law & Practice*, 2019, p.1.

116 E. SAFFOURI VELASCO, *Ibidem*.

117 D. E. BOYD and others, *Ibidem*, p.344.

Absent an international mandatory HRDD, the contract, although imperfect, remains the only way to impose legally binding obligations to both the buyer and the supplier. Such contract offers room for improvement in order to implement HRDD and protect human rights in global supply chains.

To conclude, the negotiation phase, the drafting process, the recognition of TPB and contractual breaches deserve to be rethought in light of the UNGP.

## Chapter II. Contracting for human rights with suppliers

Despite the lack of international mandatory HRDD, the UNGP and OECD guidelines can shape suppliers' agreements throughout the negotiation phase (I), the adoption of preventive and remedial clauses (II) and by ensuring access to justice for the actual victim (III).

### I. Negotiating equal and inclusive terms

As promoted by the UNGP, HRDD should be “*initiated as early as possible in the development of a new activity of relationship*”<sup>118</sup>. Prevention or mitigation of risks has to be undertaken through bilateral (A) and multilateral dialogues (B).

#### A. More equal and trustful partnership

Negotiation based on an equal partnership (1) will allow to build mutual trust while providing for an accurate identification of salient risks (2).

##### 1. Looking for the right balance

The Covid-19 outbreak emphasized the urgent need to “*raise the bar on supplier relationships*”<sup>119</sup>. It is true that the fashion industry is characterized by an imbalance of powers. Going beyond the developed/developing rationale, it affects “*the whole supplychain and hinders freedom of expression, freedom to conduct business*”<sup>120</sup>.

The pre-contractual phase can bring out the disparity between buyer and supplier. This is why negotiations should help identifying appropriate measures enabling the prevention and mitigation of adverse human rights impacts<sup>121</sup>. Purchasing practices have been identified as having “*among the most profound impacts on human rights*”<sup>122</sup> through “*price negotiation, inaccurate forecasting, late orders, short lead times and last minutes changes*”<sup>123</sup>. By putting suppliers under pressure, buyers have a direct impact on “*poor working conditions and low pay for workers*”<sup>124</sup>. In other words, despite the best intentions, buyers can contribute to human rights violations and undermine their suppliers' ability to comply with labor rights standards.

The fast-fashion supply agreement ‘*on demand*’ in Bangladesh has often been pointed out as a ‘bad’ example<sup>125</sup> because:

- the brand notifies the quantity, price, delivery time at its convenience;
- the brand forbids to subcontract without prior written approval;

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118 UNGP no. 17, commentary, p.19.

119 GLOBAL FASHION AGENDA, *CEO Agenda*, *Ibidem*, p.6.

120 G. NOTO LA DIEGA, *Ibidem*, p.18. <sup>121</sup> UNGP no.19.

121 UNGP no.19.

122 THE JOINT ETHICAL TRADING, *Guide to buying responsibly*, 2017, p.4.

123 *Ibidem*.

124 *Ibidem*.

125 S. DADUSH, *Contracting for Human Rights, looking to version 2.0 of the ABA Model Contract Clauses in American University Law Review*, 2019, pp.1537-1538.

- the supplier accepts or rejects without possible negotiation or modification.

When the demand increases:

- the brand multiplies its orders, without increasing the price per unit;
- the supplier accepts the orders and in turn subcontracts to respond to the demand, without the brand's prior approval.

Faced with this contractual breach, should all the burden only be borne by the supplier? Alternatively, a simple increase of the price per unit might have helped the supplier to pay overtime wages to its workers. Moreover, leaving room for negotiation and flexibility can have shaped a trustful partnership.

To address the issue, the OECD invites the buyers to assess whether purchasing methods contribute to harm by tracking controls through “*percentage of orders placed late, percentage of orders changed after order is placed, number of days between the last change and shipment*”. Above all, the companies “*should seek to identify why*<sup>126</sup>”.

Therefore, the parties should put on the negotiating table their mutual commercial expectations, based on their honest capabilities, both in terms of fair price and operative production. Consequently, contractual clauses should provide with a clear description on:

- how the buyer pays the supplier;
- how the supplier pays his workers.

In that way, by limiting the number of suppliers and by developing long-term relationships, the buyer can positively contribute to improve labor standards.

From this trustful and equal partnership will depend the successful identification of the risks.

## **2. Tailor-made approach**

UNGP no. 24 invites enterprises, when necessary, to prioritize actions towards the “*most severe [risks] or where delayed response would make them irremediable*”.

Because addressing all the human rights risks is materially impossible, the UNGP require companies to establish a hierarchy based on the concept of ‘severity’ which “*is relative to the other human rights impacts the business enterprise has identified*<sup>127</sup>”. The contractual negotiation phase can help to draw these ‘tailor-made’ lines.

However, in practice, the simple attachment of company’s CoC raises questions. On the one hand, incorporating CoC human rights standards into supply agreements will create an obligation to comply with it for the supplier. Such clauses will act as a deterrent and “*can (...) induce compliance, simply for fear of losing an important client*<sup>128</sup>”. On the other hand, a too broad code will not respond to the specific risks arising during this new partnership. Moreover, suppliers need to be aware of the content of the CoC<sup>129</sup>. A mere statement to commit to general standards

126 OECD, Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector, *Ibidem*, p.73.

127 UNGP no. 24, commentary, p.27.

128 E. SAFFOURI VELASCO, *Ibidem*, p.8.

129 K. PETERKOVA MITKIDIS, *Sustainability Clauses in International Supply Chain Contracts: Regulation, Enforceability and Effects of Ethical*

is insufficient because runs the risk to establish a “*tick-box approach to contract compliance*<sup>130</sup>”.

Worse yet, lack of understanding and discussion can lead to invalidate the contract for lack of mutuality or consideration<sup>131</sup>. So, in order to ensure an effective HRDD, it is crucial to adapt a contractual orientation to the relative context. This is the reason why identifying the risk should require considerable documentation work, based on “*sector initiatives, new sector-specific regulation and relevant government and non-government reports*<sup>132</sup>”. Keeping in mind that each contractor represents a specific danger, contractual clauses should be clearly and precisely negotiated.

For instance, with regards to child labor, not all work performed by children is considered as such<sup>133</sup>. Likewise, if a company faces risks related to workplace safety, a specific emphasis on those salient risks should be highlighted in the contract. Moreover, the contract should be country-specific, as every State has a different human rights approach, but international standards should always guide the contract.

Finally, doing so will offer a better re-allocation of resources depending on the human rights targets. However, bilateral negotiations need to be complemented by multilateral ones.

## **B. Inclusive partnerships**

The supply agreement will also have consequences for a TPB, e.g. the supplier’s employees. Ethical criteria, labor standards and impeccable understanding of the production system have to be tackled before reaching an agreement. Indeed, contracting means setting in stone all foreseen elements aimed to protect the parties, including the communities involved in the commercial relationship.

The ‘theoretical foundation’ of the community participation in commercial contracts can be found in the right of self-determination, stated in both the ICCPR and the ICESCR, by virtue of which people “(...) *freely pursue their economic, social and cultural development*<sup>134</sup>”. All stakeholders should be consulted in the pre-contractual steps. A “*win-win partnership*”<sup>135</sup> will emerge, placing the brand, not only as a direct partner for the supplier but also for supplier’s employees. Both buyer and supplier will share responsibility in the well-being of all the stakeholders. On top of that, an inclusive approach will “*guard against the risk of empty promises in (...) supplier’s contracts, code of conducts*<sup>136</sup>” and will make human rights clauses more easily reachable.

The goal is to make such clauses enforceable by the victims of corporate human rights violations. Sticking to the example on purchasing practices, workers are directly impacted by the ‘top-down’ approach.

Still, companies may argue that is impossible to deal with so many commercial actors, due to financial constraints and short deadlines. But talking about human rights without engaging concretely with the ‘protected persons’ can

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Requirements in *Nordic Journal of Commercial Law*, 2014, p.13.

130 J. F. SHERMANN III, *The Contractual Balance between can I and Should I?* in *Corporate Social responsibility Initiative of Harvard Kennedy School*, 2020 p.10.

131 Article 2:104 of the European Principles of Contract Law.

132 ECOVADIS, *Sustainability Clauses in Commercial Contracts: The Key to Corporate Responsibility*, 2018, p. 39.

133 J. F. SHERMANN III, *Ibidem*, p.9.

134 UN GENERAL ASSEMBLY, *Resolution 41/128 on the Right to Development* of 4 December 1986.

135 THE JOINT ETHICAL TRADING, *Ibidem*, p.11.

136 Y. FARAH, V. OLUSOLA KUNUJI, *Contractualisation of Human Rights, and public participation- Challenges and prospects in Public Participation and Foreign Investment Law: From the Creation of Rights and Obligations to the Settlement of Disputes*, Brill, 2020, p. 27.



be counterproductive towards achieving an effective HRDD. Unquestionably, adopting an active role rather than a passive one for the stakeholder will enable all the parties to benefit positively from the contract.

To do so, companies should integrate the Ruggie's principles of responsible contracting into their commercial negotiations in order "to manage expectations and foster trust of local communities"<sup>137</sup>. Inclusive negotiations should be based on sharing and disclosing fundamental issues such as the security and safety measures, access to level grievance mechanisms, measures to prevent and mitigate adverse impacts and others relevant human rights information<sup>138</sup>.

The emerging phenomenon of International Framework Agreement (IFA) can also provide some interesting features. Based on international labor rights, such agreements between MNC and global union federations, have "a concrete impact on worker capacity to organize and engage in collective bargaining"<sup>139</sup>. However, trade unions' limited capability and capacity to mobilize resources may undermine the IFA's effectiveness<sup>140</sup>.

Either way, involving local stakeholders will offer an accurate picture of the workplace and allow to build adequate answers while drafting human rights clauses.

## II. Stabilizing human rights clauses

Once passed the negotiation phase, the buyer and the supplier need to stabilize the agreement through social clauses in order to prevent and to mitigate (A) but also to remedy any human-rights violations (B). Principles deriving from European contract law will serve to design the following analysis.

### A. Ex ante clauses

Prevention and mitigation of human rights abuses can be achieved through unambiguous and tailor-made clauses (1) and the introduction of assessment mechanisms (2).

#### 1. Scope and coverage

Socially responsible contracts must seek to achieve social goals through enforceable means<sup>141</sup> tackled as early as possible "(...) given that human rights risks can be increased or mitigated already at the stage of structuring contracts"<sup>142</sup>. Thus, preventive and mitigative clauses must be the focus of the contract. The term 'prevent' should include any action intended to stop a harm from occurring, while the term 'mitigation' should refer to tools aiming to decrease or eliminate the said harm<sup>143</sup>.

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137 J. RUGGIE, UN Special Representative, *Principles for responsible contracts: integrating the management of human rights risks into State-investor contract negotiations: guidance for negotiators*, 2011, p.19.

138 *Ivi*, p.23.

139 C. LEVESQUE, M. HENNEBERT, G. MURRAY, R. BOURQUE, *Corporate Social Responsibility and Worker Rights: Institutionalizing Social Dialogue Through International Framework Agreements* in *Journal of Business Ethics*, 2018, p.215.

140 *Ivi*, p. 227.

141 J. C. LIPSON, *ibidem*, p.1116.

142 UNGP no.17 commentary, p.23.

143 OECD, *Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector*, *Ibidem*, p. 71.

Social clauses are characterized by their scope, depth coverage, verifiability and enforceability<sup>144</sup>. Various options are offered to the parties. The following proposal builds a *fictio juris* for a supplier's agreement based on the Principles of European Contract Law (PECL)<sup>145</sup> with a focus on purchase orders:

- Social clauses need to be clear and precise about their goals. In practice, the parties can choose to turn soft policy into enforceable rules. By attaching his own CoC to the contract, the buyer recalls his human rights commitments and make them legally binding for the parties. However, the efficiency and effectivity of the contractual clauses will depend on the language used. In that sense, vague clauses, from which no specific rights or obligation can be derived, will not be enforced by courts<sup>146</sup>.
- The UNGP and the OECD guidelines can serve as legal basis. That way, simple principles become the law of the parties and HRDD is clearly casted in stone.
- Once personalized risks have been identified and assessed during the pre-contractual phase, contractual clauses should put it into practice. If we stick to our previous example regarding the purchasing activities, Ethical Trading Initiative (ETI) guidelines can help parties to commit “(...) to cover any costs arising from putting the production system under pressure<sup>147</sup>”. Also, the American Bar Association (ABA) model contract clauses suggests that every time the buyer submits an order “it has taken the Supplier's production capacity into account in finalizing the terms<sup>148</sup>”.
- While setting final order placement dates with the supplier, the OECD recommends to “communicate the deadlines to everyone in the purchasing teams, share the purchasing plan with the suppliers and communicate updates<sup>149</sup>”.
- Clear clauses allow the contract to be enforceable beyond the direct supplier. If the enterprise accepts subcontracting, due diligence should be tackled at this sub- level, notably concerning their transparent selection. Disclosure obligations should be imposed to the direct supplier who should communicate his: “intent to subcontract work<sup>150</sup>” along essential information regarding the sub-supplier. On the contrary, if the enterprise does not permit subcontracting, the latter should pay a particular attention to the supplier's capacities, especially when placing orders. Such decisions should not result in negative labor impacts. Indeed, the main problem remains to achieve compliance to tiers suppliers with no direct legal relation<sup>151</sup>.

## 2. Verifiability criteria

After having drafted unambiguous clauses and determined the contractual coverage, assessment and leverage mechanisms should help verifying the commitments. To that end, the parties can engage with external partners through inspections or trainings, for instance.

First, leverage clauses, defined as a way to carry out changes in the wrongful practices of an entity that causes

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144 ECOVADIS, *Ibidem*, p.14.

145 Article 1:101 of the PECL.

146 K. PETERKOVA MITKIDIS, *Ibidem*, p.28.

147 THE JOINT ETHICAL TRADING, *Ibidem*, p.48.

148 DADUSH, *Ibidem*, p.1548.

149 OECD, Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector, *Ibidem*, p.76.

150 *Ivi*, p.40.

151 K. PETERKOVA MITKIDIS, *Ibidem*, p.19.

harm<sup>152</sup>, need to be concretely used “*in order to reinforce the message that they are binding*”<sup>153</sup>. So, once monitoring and inspection rights are provided for in the contract, they should be utilized. Second, the assessment impact should be reported “*across relevant internal functions and processes*”<sup>154</sup>, while taking appropriate measures. Moreover, a follow-up needs to be implemented through tracking and

feedbacks, including by affected stakeholders, based on “*appropriate qualitative and quantitative indicators*”<sup>155</sup>. Performance contracts, surveys and audits, with “*genderdisaggregated data*”<sup>156</sup>, can guide continuous improvement toward specific vulnerable or marginalized groups.

And if human rights clauses are violated, they must be enforced.

## **B. Ex post clauses**

The enforcement of socially responsible contracts can be implemented through both traditional (1) and HRDD remedies (2).

### **1. Traditional remedies**

It is important to highlight that any failure in the value-chain will affect the buyer’s reputation and will relegate him “*to a lower market price, as well as potentially being exposed to consumer lawsuits.*”<sup>157</sup> So, what are the buyer’s options when discovering a contractual breach attributed to the supplier?

According to the PECL:

Article 8:103 states: “[a] *non-performance of an obligation is fundamental to the contract if: (a) strict compliance with the obligation is of the essence of the contract; or (b) the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract, unless the other party did not foresee and could not reasonably have foreseen that result (...)*”.

Are human rights clauses fundamental to the contract?

If so “(1) [t]he aggrieved party is entitled to specific performance of an obligation other than one to pay money, including the remedying of a defective performance”<sup>158</sup>.

In any case, the right to obtain the performance of an obligation does not preclude the parties from seeking to recover damages under article 9:103<sup>159</sup> and article 9:501:

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152 UNGP no.19, commentary, pp.21-23.

153 R. MCCQUORDALE, L. SMIT and others, *Ibidem*, p.216. <sup>154</sup> UNGP no° 19, *Ibidem*.

154 UNGP no° 19, *Ibidem*.

155 UNGP no° 20.

156 *Ivi*, p.23.

157 J.S. MARTIN, *Private Law Remedies, Human Rights, and Supply Contracts in American University Law Review*, 2019, p.1796.

158 Article 9:102 of the PECL.

159 Article 9:103 of the PECL.

- “(1) (...) for loss caused by the other party’s non-performance
- (2) (...) [including]: (a) non-pecuniary loss; and (b) future loss which is reasonably likely to occur”.

However, the correlation between the contractual breach and the loss suffered could be difficult to prove, just as the calculation of the damages<sup>160</sup>. In fact, courts “worry about awarding damages that are “speculative”<sup>161</sup>”, namely not demonstrated upon a reasonable basis, impeding reputational damages to be granted. So, instinctively, terminating the contract sounds the best strategy under Article 9:301: “(...) if the other party’s nonperformance is fundamental”<sup>162</sup>.

Nevertheless, this comes at a high cost for the buyer who loses the investments made and will need to re-build new commercial relationships, which can be “costly and timeconsuming”<sup>163</sup>. Above all, the reputational damages will not be recovered. When discussing human rights clauses, the performance of the clause is more important than the monetary compensation<sup>164</sup>.

This is the reason why, collaborating rather than disrupting commercial relationship is crucial. To that end, the ABA proposes alternative clauses providing for noncompensatory remedies, such as: “(1) validating demands for adequate assurances; (2) obtaining injunctive relief; (3) requiring the seller to remove employees; (4) requiring the seller to terminate subcontracts; and (5) suspending payments during investigation until remediation of the violation of the CHRP”<sup>165</sup>.

Notwithstanding the encouraging initiative, all the responsibility lies on the supplier, which is proved to “encourage cheating by suppliers or the use by suppliers of unauthorized subcontractors”<sup>166</sup>.

Finally, the pandemic has put pressure on some buyers who invoked *force majeure* while cancelling their orders and eventually escaped their responsibilities. Although this legal exoneration can be applied under contract law, the European Center for Constitutional and Human Rights recalls the brand’s obligations “(...) to pay their suppliers promptly, which is recognized as 60 days after receiving an invoice”<sup>167</sup>.

So, on which remedies to rely while implementing HRDD?

## 2. HRDD remedies

HRDD entails collaboration and remedial strategies “through legitimate processes in the remediation of adverse human rights impacts”<sup>168</sup>. A company’s own activities can directly result in infringing human rights (direct causation) or can contribute to it, when associated to other entities, by substantially incentivizing another to violate

160 J.S. MARTIN, *Ibidem*, p. 1808.

161 J. C. LIPSON, *ibidem* p. 1126.

162 Article 9:301 of the PECL.

163 C. CERRUTI, C. MENA, H. SKIPWORTH, E. TAVOLETTI, *Characterizing agile supply partnerships in the fashion industry in International Journal of Operations and Production Management*, 2015, p. 942. <sup>164</sup> Y. FARAH, V. OLUSOLA KUNUJI *Ibidem*, p.2.

164 Y. FARAH, V. OLUSOLA KUNUJI *Ibidem*, p.2.

165 J.S. MARTIN, *Ibidem*, [*Company human rights policies (CHRP)*], p.1802.

166 F. SHERMANN III, *Ibidem*, p.12.

167 ECCHR, *Ibidem*, p.7.

168 OECD, *Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector*, *Ibidem*, p.93.

human rights<sup>169</sup>.

Nevertheless, it is fair to differentiate companies depending on their linkage with the harm. On the one hand, when they directly caused the violation, companies are expected to stop their actions and to remediate the harm, while when their activities contributed to adverse impacts, they should remediate to the extent of their contribution<sup>170</sup>. On the other hand, when the brand is linked to the harm, but did not contribute or cause it, the UNGP expect that it will increase its leverage vis-à-vis the supplier. Even if it is not expected to provide remedy, it could do so if it wishes. In the UN language, leveraging effect can be obtained by “*capacity-building or other incentives to the related entity or collaborating with other actors*”<sup>171</sup>.

Therefore, the parties should collaborate to address the harm. Such approach would engage the parties into mutual dependency and trust going “*beyond a sequence of buyingselling transactions*”<sup>172</sup>. In practice, the parties can agree on a corrective action plan and envisage remedial tools. The buyer can also provide the supplier with “*capacity building resources, such as training or assistance*”<sup>173</sup>. Further steps could include using so-called ‘name-and-shame’ strategies, i.e. “*publicly saying that a person, group or business has done something wrong*”<sup>174</sup> through a database of compliant suppliers.

Being the most severe option, termination can be envisaged only if such leverage does not work.

Here again, serious human rights abuses can justify the quick termination of the relationship and as long as the harm continues, the company should demonstrate its ongoing efforts “*to mitigate the impact and be prepared to accept any consequences – reputational, financial or legal – of the continuing connection*”<sup>175</sup>. Moreover, due diligence contemplates also the subsequent consequences. For instance, when child labor is at stake, ILO-IOE calls out companies to consider the loss of income for families “*and the likelihood that children will be exposed to additional dangers; e.g., being forced into prostitution to replace lost wages*”<sup>176</sup>.

Furthermore, in order to overcome the imbalance of powers, a special clause should be inserted to provide for breaches not only regarding the production process (supply side) but also the purchasing process (demand side).

Consequently, escalation clause may offer an adequate response. The brand will first seek a collaborative way to address the breach through a corrective plan. If it does not work, the cancellation and termination of the contractual relationship will be considered.

The contract should also provide for access to remedy for the actual victims.

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169 OECD, Guidelines, *ibidem*. p.70

170 OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector, *Ibidem*, p.66.

171 UNGP no.19, commentary, p.26.

172 C. CERRUTI and others, *ibidem*, p.925.

173 K. PETERKOVA MITKIDIS, *ibidem*, p.21.

174 Cambridge Online Dictionary, 2019.

175 UNGP no. 19, commentary, *Ibidem*.

176 F. SHERMANN III, *Ibidem*, p. 6.

### III. Victims: accessing remedies

Contractual access to remedy depends on the recognition of the victim as a third-party beneficiary (A) and the establishment of non-state-based grievance mechanisms (B).

#### **A. Recognition of the victim as a third-party beneficiary (TPB)**

After having addressed the general concept of TPB (1), its concrete judicial application will be analyzed (2).

##### **1. Concept of TPB**

The third pillar of the UNGP is consecrated to access to remedy for the victim of human rights violations. Although State is the primary duty bearer, enterprises will not be absolved from their obligations when operating in a State not fulfilling its duties<sup>177</sup>.

The contract has the power to improve accountability in the supply chain. However, ensuring accountability alone without providing access to remedy for the actual victims is not satisfactory. Therefore, access to remedy is, first of all, conditioned by the recognition of the victim as third-party beneficiary (TPB).

Yet, in practice, some CoC mention third-party while explicitly excluding it from the scope of contracts<sup>178</sup>. This disclaimer can be typical in commercial agreements. Consequently, unless third-party are explicitly recognized as beneficiary, they cannot enforce the human rights obligations. Still, finding a balance with other provisions is crucial to provide for concrete remedies<sup>179</sup>.

Of course, a TPB clause can be directly inserted, stripping away the ambiguity. But drafting clear and precise human rights terms can be enough to create explicit content for the victims. In that sense, article 2:107 of the PECL states that: “[a] promise which is intended to be legally binding without acceptance is binding<sup>180</sup>.”

Now, considering that the intention can be explicit or not, such intention can be deduced from the insertion of CoC in the contract. Therefore, there is a presumption of intention to be legally bound by this code<sup>181</sup> for the buyer and the supplier.

A general overview of the case law will enlighten such analysis.

##### **2. TPB's case law**

A general overview of the international and European case law shows how difficult is to recognize the rights of

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177 OECD, Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector, *Ibidem*, p.96.

178 ESSEX BUSINESS AND HUMAN RIGHTS, *Improving path to business accountability for human rights abuses in the global supply chains: a legal guide*, 2017, Essex, p.24.

179 F. SHERMANN III, *Ibidem*, p.13.

180 Article 2:107 of the PECL.

181 A. MICHOU, *Can Soft Words Lead to Strong Deeds? A Comparative Analysis of Corporate Human Rights Commitments' Enforcement in Seattle Journal For Social Justice*, 2020, p.589.

victims simply from CoC attached to the contract.

In U.S *Doe v. Walmart* case<sup>182</sup>, the court discussed the connection between suppliers' employees and Walmart, a multinational retail corporation. Typically, the CoC was attached by Walmart to its worldwide suppliers through agreements. The question was then to understand to what extent an employee, at the supply level, can bring an action against the co-contractor of its own employer. To support their class action regarding labor condition, the alleged victims presented four theories:

1. plaintiffs are TPB of the standards contains in the supply contracts;
2. Walmart is the joint employer
3. Walmart negligently breached a duty to monitor the supplier and protect the plaintiffs from the suppliers' working conditions;
4. Walmart was unjustly enriched by plaintiffs mistreatment.

The Court of Appeal of California rejected each of these claims and stated that the aim of the supply contract was not to protect the workers. Consequently, no duty to protect could arise from the CoC. Furthermore, Walmart had a 'right to inspect' not a duty to do so<sup>183</sup>, diminishing even more its responsibility towards the suppliers' employees.

Similarly, in France, the Court of Appeal of Versailles<sup>184</sup> rejected a claim over an alleged failure to comply to the company's code of ethic in light of its international commitment. In this case, the defendant had adopted the rules descending from the Global Compact. No obligation towards TPB was recognized.

Nevertheless, ambiguities remain in French case law.

The French Cassation Court recognized the unilateral commitment towards his employees coming out from a CEO<sup>185</sup>. Similarly, in the Erika case, the French Criminal Chamber of the Court of Cassation used the code of conduct adopted by Total (defendant) to support criminal liability<sup>186</sup>.

Finally, besides abiding by their respective and proportionate duty to respect human rights, buyer and supplier can contractually support TPB's recognition and provide for undeniable access to remedy. The said clause must be clear and specific when targeting

the party or group recognized as TPB, just like the right protected<sup>187</sup>. Of course, this does not mean writing "a *blank check to claimants*"<sup>188</sup> but at least granting access to grievance mechanisms.

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182 U.S Court of Appeal, Ninth Circuit, *Doe v. Walmart stores*, (*Walmart case*), no. 08-55706, of July 10, 2009.

183 *Ibidem*.

184 *Cour d'Appel de Versailles, 3ème chambre, Association France-Palestine Solidarité 'AFPS' v. Société Alstom Transport*, R.G., n° 11/05331 of March 22, 2013.

185 *Cour de Cassation, Chambre Sociale* no. 01-17501 of November 25, 2003.

186 *Cour de Cassation, Chambre criminelle* no.10-82.938 of September 25, 2012.

187 S. VOGENAUER, *Commentary on the Unidroit Principles of International Commercial Contracts (PICC)* Oxford, 2009, art 2.1.19, para 13.

188 F. SHERMANN III, *Ibidem*, p.14.

## B. Non-States based grievance mechanisms

In 2019, out of 150 severe allegations reviewed, only 3% of the cases had companies providing satisfactory remedy to the victims<sup>189</sup>. However, companies can rely on their own operational-level grievance mechanisms (1) including multi-stakeholder mechanisms (2) while providing for adequate remedies (3).

### 1. Company-level complaint mechanisms

UNGP no. 28 invites States: “(...) to facilitate access to effective non-State-based grievance mechanisms dealing with business-related human rights harms”, while precisising the concept of grievance mechanisms as those “administered by a business enterprise alone or with stakeholders, by an industry association or a multi-stakeholder group”. Such mechanisms are complementary to judicial ones and not a substitute.

Thus, companies can implement non-judicial mechanisms, using adjudicative, dialoguebased or other “culturally appropriate and rights-compatible processes<sup>190</sup>”. Benefits are multiple and provide for accelerated access to remediation at a low-cost, while addressing early and directly adverse impacts for the victims. By doing so, companies will hit two targets with one bullet:

- identify and assess their human rights impact through their ongoing operations;
- address and remediate earlier and directly any adverse impact.

Therefore, contractual clauses should include accessible operational-level grievance instruments, like early-mechanisms, which represent a formalized first-entry point for workers or communities to raise concerns. By doing so, the risk of escalation and aggravation is either avoided or mitigated.

To be contractually implemented, non-judicial mechanisms must meet seven criteria<sup>191</sup>:

1. legitimacy;
2. accessibility;
3. predictability;
4. equability;
5. transparency;
6. dialogue-based and right-compatible;
7. source of continuous learnings.

Thus, any early-warning system will serve “to identify risks (or actual impacts) in an enterprise’s own operations or in its supply chain<sup>192</sup>”.

For instance, a worker hotline would offer the opportunity to raise concerns regarding the building safety. Likewise, whistleblower-channels can provide protection from retaliation for individuals reporting wrongdoing. Concretely,

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189 CORPORATE HUMAN RIGHTS BENCHMARK, *Ibidem*, p.8. <sup>190</sup> UNGP no.28, commentary, p.32.

190 UNGP no.28, commentary, p.32.

191 UNGP no.31 and OECD, Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector, *Ibidem*, p.97.

192 OECD, *Ibidem*, p.99.



where the buyer receives complaints at the supplier level, direct response can be brought, including firing managers, remunerate unpaid overtime wages or establishing new internal procedures between the contractors<sup>193</sup>.

However, the contract should also open the door to multi-stakeholder mechanisms and escalation clauses when complaints are not addressed internally.

## 2. Multi-stakeholder mechanisms

Besides non-judicial dispute resolution processes implemented at the company level, the contractual parties can provide for complementary sources of resolution of conflicts. Multi-actor mechanisms give opportunity to join forces in the name of protecting workers and communities, while ensuring that agreed norms (e.g. contract, CoC or international certifications) are not infringed.

In the garment industry, such mechanisms are particularly interesting when dialogue and mediation is initiated between enterprises, trade-unions and/or civil society. Still, such mechanisms need to comply with the above-mentioned seven criteria. The initiatives foreseen include, *inter alia*: communication tools, trainings, structured investigations, mediation/conciliation, negotiation or adjudication<sup>194</sup>. However, to be effective, it should be clarified who is entitled, and through which means (e.g., phone numbers, email addresses, online forms, etc.), to file the grievance for the breach of a specific standard.

Either way, the program established should “allow for a comprehensive approach and coverage beyond the single corporation<sup>195</sup>”.

Second, mediation offers a neutral and impartial assistance to the company and the complainant in resolving the dispute, while identifying and evaluating options for settlement. Mediation can be directly accessed or derived from escalation, when parties did not reach a satisfactory remedy. In any case, the process needs to be mutually accepted by the parties while offering legitimacy, independency and confidentiality. In that sense, since 2000 the OECD-National Contact Points (NCP), State-based offices, have been receiving complaints from any individual or enterprise, against a company. The NCP plays the role of “[u]ndertaking promotional activities, handling enquiries and contributing to the resolution of issues that arise relating to the implementation of the Guidelines in specific instances<sup>196</sup>”. OECD-NCP focal points will also issue final statements or recommendations and follow-up requirements. Therefore, considering the reputational impact, enterprises will hold an interest in engaging in collaborative processes<sup>197</sup>.

However, the “poor performance<sup>198</sup>” of NCP is underlined, notably at the EU level. Throughout 15 years of existence, only 1% of 250 NCP complaints brought by individuals, communities or NGOs “have resulted in an outcome that

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193 S. DADUSH, *Ibidem*, p.1543.

194 S. ZAGELMEYER, *Non-State based non-judicial grievance mechanisms (NSBGM): An exploratory analysis, A report prepared for the Office of the UN High Commissioner for Human Rights*, Manchester, 2018, p.38. <sup>195</sup> *Ibidem*.

195 *Ibidem*

196 OECD, *Guidelines*, *Ibidem*, p.68.

197 OECD, *Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector*, *Ibidem*, p.101.

198 FRA, *Opinion no. 1/2017, Improving access to remedy in the area of business and human rights at the EU level* of April 10, 2017, Vienna, p.61.

directly improved conditions for the victims of corporate misconduct<sup>199</sup>”. Criticisms include: high standard of proof, impartiality, missed deadlines and lack of transparency<sup>200</sup>.

Substantially, company-level or multi-stakeholder grievance mechanisms should offer adequate remedies.

### 3. Adequate Remedies

A company is obliged to provide or contribute to remedy when it has recognized its role in causing or contributing to human rights violations<sup>201</sup>. Consequently, the remediation process should be proportionate.

In order to specify what is a remedy under European law, it is important to recall that neither article 13 of the ECHR nor article 47 of the EU Charter define it. Both require for remedy to be “*effective’ in practice and in law*”<sup>202</sup>, letting States determine what is effective or not.

The UNGP try to clarify what are adequate remedies<sup>203</sup>, identifying as such: apologies, restitutions, rehabilitations, financial or non-financial compensations, punitive sanctions (criminal, administrative), preventive sanctions (injunctions, guarantees of nonrepetition).

Regarding the financial compensation, contractual clause can incorporate proportionality through a remediation fund, dedicated to repair the victims’ complaints. Like that, the buyer’s natural reluctance to compensate human rights damages to the supplier, could be overcome. This fund will represent “*(...) a superior outlet for money damages—whether paid by the Supplier, the Buyer, or both—as compared with the prospect of one party paying the other*”<sup>204</sup>. Above all, each party will compensate the victim in proportion of the breach.

Finally, contracting for human rights is a concrete way to achieve due diligence. Of course, the contract alone will not absolve the State from its responsibility in protecting human rights but will offer direct access to remedies for the victims. Especially, companies must be consistent when drafting contractual terms, the danger being to “*offload the buyer’s human rights responsibilities onto the supplier*”<sup>205</sup>, while this responsibility cannot be delegated under the UNGPs.

Moving from theory to practice, the Kering Group’s human rights strategy will be assessed in light of the French and Italian systems.

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199 OECD WATCH, *Remedy Remains Rare*, 2015, p.19.

200 *Ivi*, pp.21-49.

201 F. SHERMANN III, *The General Counsel as Partner in Shaping a Corporate Culture That Respects Human Rights in Corporate Responsibility Initiative*, Harvard Kennedy School, 2020, p.19.

202 FRA, COUNCIL OF EUROPE, *Handbook on European Law relating to access to justice*, Luxembourg, 2016, p.92.

203 UNGP no.25, commentary, p.27.

204 S. DADUSH, *ibidem*, p.1552.

205 F. SHERMANN III, *The Contractual Balance between can I and Should I? Ibidem*, p.11.

## Chapter III: Kering and HRDD: French headquarters and Italian supply chain

Kering is one of France's top luxury groups and is defined as a “*pioneering example in sustainable development*”<sup>206</sup>. If France is home to “*the largest luxury goods companies in the world*”<sup>207</sup>, it is also true that the Group relies on a strong Italian craftsmanship, the “*leading luxury goods country in terms of the number of companies*”<sup>208</sup>. So, when it comes to HRDD, a first assessment of Kering's CSR in light of the French and Italian systems must be made (I), before discussing the HRDD within the group (II) and its supply chain (III) and to conclude with some insights from the sustainability's team of the group (IV).

### I. CSR: France, Italy and Kering

Kering has its headquarters in France (A) while the majority of its supply chain is located in Italy (B), influencing its own CSR(C).

#### A. Kering's French headquarters

As a French group, Kering has to deal with the general French CSR system (1), the new duty of vigilance (2) and the dedicated grievance mechanisms (3).

##### 1. General French CSR framework

As of today, there is no French legal definition of CSR. It is better to refer to the abovementioned European Commission's notion<sup>209</sup>.

In practice, France developed initiatives impacting directly Kering. As such, the implementation of the EU extra-financial information-directive 2014/95/EU<sup>210</sup> requiring all companies crossing a certain threshold to publish a general statement of their financial and economic results and “*(...) the effects of its activity on respect for human rights (...)*”<sup>211</sup> applies directly to Kering as a consolidated group<sup>212</sup>.

Same happened with regards to the Law on the growth and transformation of businesses (PACTE law)<sup>213</sup> aimed at re-thinking the social role of the enterprise by incorporating management CSR objectives into the civil code. First, article 1833 of the Civil Code imposes on the board of directors to fix the company's orientations: “*(...) taking into consideration the social and environmental issues of its activity*”<sup>214</sup>. Second, article 1835 of the Civil Code refers to

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206 E. PAVIONE, *Emerging Competitive Strategies in the Global Luxury Industry in the Perspective of Sustainable Development: The Case of Kering Group in Management Dynamics in the Knowledge Economy*, 2016, p.241.

207 DELOITTE, *Ibidem*, p.26.

208 *Ivi*, p.3.

209 See note 6.

210 Ordonnance no. 2017-1180 of July 19, 2017, *Relative à la publication d'informations non financières par certaines grandes entreprises et certains groupes d'entreprises*.

211 Article L. 225-102 and R225-104 of French Commercial Code.

212 Article L. 225-102-1, II of French Commercial Code.

213 Law no. 2019-486 of May 22, 2019, *Relative à la croissance et la transformation des entreprises*.

214 Article 1833 of French Civil Code.

“*la raison d’être*<sup>215</sup>” of the society to be defined through its statutes. Although this new concept is a voluntary one, if the board chooses to incorporate it, the company will have to abide<sup>216</sup>.

When contracting, Kering must also pay attention to the French contract law, which leaves some room for inserting human rights clauses. In fact, Regulation Rome I<sup>217</sup> applies to civil and commercial matters in France. According to article 3, the parties are not precluded “(...) *from incorporating by reference into their contract a non-State body of law or an international convention*<sup>218</sup>”. Thus, a number of CSR instruments could be legitimately incorporated into contractual clauses. The case law confirmed that a natural and ethical obligation will be transformed into a constraining civil one<sup>219</sup>.

Finally, France presented 17 proposals in its 2017 National Action Plan (NAP)<sup>220</sup> on the basis of the UNGP. According to Proposal no. 7, France reaffirms its commitments to the promotion and protection of human rights, especially in the textile and garment industry<sup>221</sup>.

Still, the Vigilance Law is the last major step undertaken in favor of HRDD applying to Kering.

## **2. French duty of vigilance: the HRDD ‘à la française’**

### **a. An ambitious law**

Following the adoption of the UNGP in 2011 and the above-mentioned tragedies in Pakistan and Bangladesh, France adopted the Law on Duty of Vigilance<sup>222</sup>, an ambitious law “*preventing tragic events*” in France and abroad with the explicit goal to “*obtain remediation for the victims*” of human rights violations by multinational companies<sup>223</sup>. The law is considered “*a model for a potential EU-level legislation on these issues*<sup>224</sup>”, covering the value chains and global supply chains<sup>225</sup>.

Article L. 225-102-4 of the French Commercial Code (CC) applies to companies having their headquarters in France and employing, either directly or within its subsidiaries, at least 5000 employees. A general obligation to adopt a vigilance plan is foreseen to identify the risks and “(...) *for the prevention of severe violations of human rights and fundamental freedoms, serious bodily injury or environmental damage or health risks*”, attributed either directly

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215 Article 1835 of French Civil Code.

216 A. DANIS-FATOME, K. DECKERT, M. NIBOYET, L. SINOPOLI, *Private international aspects of Corporate social responsibility in Ius Comparatum – Global Studies in Comparative Law*, Volume XXXII, Switzerland, 2020, p. 353 s.

217 Regulation (EU) no. 593/2008 of The European Parliament and of the Council of June 17, 2008, *On the law applicable to contractual obligations (Rome I)*.

218 *Ivi*, point thirteen.

219 I. DESBARATS, *La RSE « à la française »: où en est-on?* in *Droit social*, 2018, p.3.

220 *Plan National d’Action pour la mise en œuvre des Principes Directeurs des Nations Unies relatifs aux Droits de l’Homme et aux Entreprises*, of April 26, 2017.

221 France, *Ministère de l’économie des finances et de la relance, Rapport Du PCN Sur La Mise En Œuvre Des Principes Directeurs De L’OCDE Dans La Filière Textile-Habillement* of December 2, 2013.

222 Law no. 2017-399 of March 27, 2017, *ibidem*.

223 French *Assemblée Nationale*, draft law no. 2578 of February 11, 2015, p. 4.

224 C. BRIGHT, *Creating a Legislative Level Playing Field in Business and Human Rights at the European Level: is the French Duty of Vigilance Law the Way Forward?* In *EUJ Working Paper*, 2020, p.4.

225 R. C. BROWN, *Due Diligence Hard Law Remedies for MNC Labor Chain Workers in UCLA Journal of International Law and Foreign Affairs*, 2018, p.150.

to the company or indirectly through its subsidiaries<sup>226</sup>, “as well as from the operations of the subcontractors or suppliers with whom it maintains an established commercial relationship, when such operations derive from this relationship<sup>227</sup>.”

Kering employs more than 38,000 employees worldwide across its *maisons*<sup>228</sup> and delivered a revenue of €15.9 billion in 2019<sup>229</sup>. It must present a Vigilance Plan structured with the following elements<sup>230</sup>:

Risk mapping →	Assessment mechanisms of subsidiaries, subcontractors or suppliers →	Mitigation and preventive actions against serious violations →	Alert mechanism: multi-stakeholders reporting of existing/ actual risks →	Monitoring scheme: follow-up and efficiency assesment
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The law adopts an ex ante approach through a preventive plan, requiring companies to “‘know and show’ how they go about respecting human rights in their activities and throughout their supply chain<sup>231</sup>”. Moreover, collaboration with a multitude of stakeholders is promoted during the elaboration of the plan<sup>232</sup>. Still, the real ambition of the law regards its enforcement mechanism.

**b. Enforcement mechanism**

First, article L. 225-102-4 CC<sup>233</sup> provides for an escalation mechanism:

Remediation mechanism →	Penalties
Injunction: formal notice to comply with the obligation within three months ( <i>mise en demeure</i> )	Failure to comply: periodic penalty payment and possibility to enter emergency proceedings ( <i>procedure de référé</i> )

This is to say that victims, NGOs or trade unions are entitled to file a complaint before the relevant French jurisdiction to oblige a company to draw-up, implement and publish the Vigilance Plan. As of January 2020, only two cases have been reported against TOTAL and EDF<sup>234</sup> for alleged lack of human risks identifications and appropriate measures to prevent the violation of human rights respectively in Uganda and in Chile.

226 Article L. 233-16, II CC.  
 227 Art. L. 225-102-4- I CC and Cour de cassation, Chambre Commerciale no.08-19200 of September 15, 2009: the ‘established commercial relationship’ is defined through its regularity, stability and the volume of business.  
 228 Gucci, Saint-Laurent, Balenciaga, Bottega Veneta, Alexander McQueen, Brioni, Boucheron, Pomellato, Dodo, Qeelin, Ulysse Nardin, Girard-Perregaux, Kering Eyewear.  
 229 About KERING GROUP available at <https://www.kering.com/en/>, [in practice few companies are concerned], DUTY OF VIGILANCE RADAR available at <https://vigilance-plan.org/search/>  
 230 Article 225-102-4 CC.  
 231 C. BRIGHT, Ibidem, p.11.  
 232 S. COSSART, J. CHAPLIER, T. BEAU De LOMENIE, The French Law on Duty of Care: A Historic Step towards Making Globalization Work for All in Business and Human Rights Journal, 2017, p.320.  
 233 L. 225-102-4 CC.  
 234 S. BRABANT and E. SAVOUREY, All eyes on France:- French vigilance Law first enforcement cases, current cases and trends in Cambridge Core Blog, 2020.

Second, article L. 225-102-5 CC provides for remedy “for the harm that due diligence would have permitted to avoid<sup>235</sup>”. Based on civil tort law, the liability will be recognized in case of a damage, a breach of one’s obligations and causation between the two<sup>236</sup>. In any case, the claimant will have to justify his interest and to prove the tort.

However, if penalties may encourage enterprises to effectively implement the Plan, the amount allocated by the judge need to be adequate to kickoff positive changes for the companies<sup>237</sup>. Therefore, despite its declared ambition, the law faces its own shortcomings.

First, the Constitutional Council pointed out the broad terms used to characterize the enforcement mechanisms and censured the initial fine foreseen for its lack of legal certainty<sup>238</sup>. Instead, a “potential financial and reputational risk<sup>239</sup>” was preferred through the injunction mechanism. Consequently, companies are invited to adopt all conditions to reach a result rather than guaranteeing it, creating an obligation of means rather than one of result.

Second, access to remedy for foreign victims is limited under the law as a third-party cannot bring actions on behalf of the victim “(...) since only the victim has standing [locus standi]<sup>240</sup>”. Furthermore, class actions are still restricted. Even if the claim goes to court, the term “severe violation of human rights<sup>241</sup>” may raise some questions: how the judge will evaluate and class the risks; how the plan will be assessed? Should the plan refer to potential or established risks<sup>242</sup>?

Finally, a brief overview of companies’ plans revealed some misunderstandings concerning the scope of the law. The plan is seen as a mean to protect the company itself against ‘bad publicity’ rather than protecting human rights outside the company<sup>243</sup>. Although baby steps are undertaken, the law has the merit to impose a mandatory due diligence conciliating the state’s duty to protect and the business’ duty to respect human rights. However, to effectively answer to their obligation, companies must adopt such plan all along their supply-chain. Also, every victim must have access to remedy.

### c. Grievance mechanisms

France established its NCP in 2001 and recognizes non-state based grievance mechanisms for companies. Stakeholders can, for instance, resort to the independent French Ombudsman (‘le défenseur des droits<sup>244</sup>’). Still, a limited access to remedy exists under contract and tortious laws for victims of adverse human rights impacts<sup>245</sup>.

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235 Article L. 225-102-5 CC.

236 Article 1240 of Civil Code.

237 S. BRABANT, E. SAVOUREY, *France’s Corporate Duty Of Vigilance Law: A Closer Look at the Penalties Faced by Companies* in *Revue Internationale De La Compliance Et De L’éthique Des Affaires*, 2017, p.4.

238 Initially, a civil fine up to €10 millions was set, then abandoned for lacking legal certainty according to article 8 of the Declaration of the Rights of Man and of the Citizen of 1789. <sup>239</sup> C. BRIGHT, *Ibidem*, p.7.

239 C. BRIGHT, *Ibidem*, p.7.

240 *Conseil Constitutionnel*, Decision no. 2017-750 DC of March 23, 2017, paragraph 28.

241 Article L. 225-102-4 CC, *Ibidem*.

242 L. MAVOUNGOU, *Les Pouvoirs Privés Économiques à L’épreuve De La Loi Française Sur Le Devoir De Vigilance* in *Revue internationale de droit économique*, 2019, p.59.

243 A. DUTHILLEUL, M. De JOUVENEL, *Evaluation de la mise en œuvre de la loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre*, Paris, 2020, p.34.

244 *Loi organique n° 2011-333, relative au Défenseur des droits* of March 29, 2011.

245 [Criminal liability can be pursued under article 121-2 and 113-6 of the French Criminal Code].

In French contract law, the contentious issue is the place of TPB. In that sense goes the decision of the Court of Appeal of Versailles,<sup>246</sup> which rejects the claim of the plaintiffs as TPB concerning the alleged failure to abide to the company's code of ethic in light of its international commitment. The position of French judges is still unclear.

Sometimes, the concept of misleading advertising has been used. After the Rana Plaza, Auchan was accused of deceiving the consumers regarding the working conditions of clothing production<sup>247</sup>.

Furthermore, the third-part claim toward a contractual fault resulting from the inexecution of the vigilance plan, could be envisaged in light of Regulation Rome II<sup>248</sup>. So, whether the liability is considered from a contractual or tortious perspective, it is the law applicable to this vigilance plan that should apply<sup>249</sup>. Besides, the failure to comply with vigilance obligations may lead to civil liability under articles 1240 and 1241 of the French Civil Code.

Still, victims may need to 'pierce the veil' of the parent's responsibility towards its subsidiaries under the French *lex societatis*, articles 1837 of the Civil Code<sup>250</sup> and L. 210-3 CC<sup>251</sup>. The third-party will have to demonstrate the 'fictive' character of the headquarters if the latter is localized in another place.

Despite limited effect for victims, the Vigilance Law entrusts "new judges" – *the media, social networks and civil society*<sup>252</sup> to encourage companies to implement their due diligence duty.

With more than 87% of its sourcing in Italy<sup>253</sup>, Kering has also to deal with the Italian legal system.

## **B. Kering's Italian supply chain**

Alike France, Italy's CSR strategy is influenced by the EU and UN framework (1) while relying on an innovative administrative and criminal system (2) and grievance mechanisms (3).

### **1. General Italian CSR framework**

Italy, as well, implemented the above-mentioned EU extra-financial information directive<sup>254</sup>. Interestingly, a recent decree completed the law by requiring "to explicit the way to manage and face the same risks disclosed"<sup>255</sup>. While some studies reveal the qualitative increase of non-financial disclosure for Italian companies, it must be said that

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246 *Cour d'Appel de Versailles, ibidem.*

247 EUROPEAN PARLIAMENT, Study no. PE603.475, *Access to legal remedies for victims of corporate human rights abuses in third countries*, 2019, p. 20.

248 Regulation (EC) n. 864/2007 of the European Parliament and The Council of July 11, 2007, *On the law applicable to non-contractual obligations (Rome II)*, article 4§3.

249 A. DANIS-FATOME and others, *Ibidem*, p. 385-386.

250 Article 1837 of Civil Code.

251 Article L. 210-3 CC.

252 S. BRABANT, E. SAVOUREY, *France's Corporate Duty Of Vigilance Law, ibidem*, p.4

253 KERING, *Sustainability Progress Report 2017-2020*, Paris, 2020, p.37.

254 Legislative Decree no. 254 of December 30, 2016, *Attuazione della direttiva 2014/95/UE del Parlamento europeo e del Consiglio del 22 ottobre 2014, recante modifica alla direttiva 2013/34/UE per quanto riguarda la comunicazione di informazioni di carattere non finanziario e di informazioni sulla diversità da parte di talune imprese e di taluni gruppi di grandi dimensioni.*

255 *Ibidem* and Law no. 145 of December 30, 2018, *Bilancio di previsione dello Stato per l'anno finanziario 2019 e bilancio pluriennale per il triennio 2019-2021.*

such disclosure are “based on the past and present perspective, rather than on the future one<sup>256</sup>” while the approach of some companies “could be based on a ‘tick-box’ method in order to be compliant with the law<sup>257</sup>”.

As general CSR, Italy released a National Action Plan (NAP) for 2012-2014 recalling the above-mentioned European Commission’s definition<sup>258</sup>. Intended as a voluntary corporate behavior going beyond simple compliance, CSR offers benefits not only for the company but for “the society as a whole<sup>259</sup>”. Directly influenced by the UNGP and OECD initiatives, Italy established a new NAP on Business and Human Rights (2016-2021)<sup>260</sup>. Were adopted six national priorities on the basis of national area of concerns among which migration, child labor, work exploitation and specific sectors such as the garment industry. Thus, the establishment of corporate HRDD and the protection of human rights at the workplace were promoted. Despite the goodwill of the Italian government in advancing due diligence, the NAP remains a general framework lacking mandatory rules, especially regarding its deadlines, and an efficient monitoring system<sup>261</sup>.

Moreover, considering the large number of supply agreements between SME and Kering, the latter must apply Italian contract law<sup>262</sup>. Nonetheless, studies reveal how luxury companies try to implement CSR into contract but miss opportunities for lack of transparency and traceability across the entire value chain<sup>263</sup>. So, if integrating sustainable practice is easy in SME characterized by a “sense of belonging to a local community<sup>264</sup>”, multinational buyer face challenges in integrating all their suppliers in one and unique CSR culture. Besides, the issue of sub-contracting remains particularly contentious. Italian law no. 192/1998 regulates subcontracting and places subcontractors as the ‘weak’ party under the notion of abuse of economic dependence, characterizing “excessive imbalance of rights and obligations<sup>265</sup>”.

With regards the implication of a CoC, unilaterally integrated into the supply agreement, under Italian Contract Law, we can refer to article 1989 of Italian civil code. Accordingly, a promise is binding when publicly made in favor of determined persons. We can imagine that in case of established human rights violations, an Italian consumer could file a “collective civil action<sup>266</sup>” under the notion of misleading advertising<sup>267</sup> against a company’s CoC. Nevertheless, the issue at stake remains the possibility to obtain enforcement of the promise by the actual victim of such breach.

The legislative decree 231/2001 (Law 231)<sup>268</sup> bears a chance to shape the ‘human rights responsibility’ of companies.

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256 R. LEOPIZZI, A. IAZZI, *Ibidem*.

257 F. CAPUTO, R. LEOPIZZI, S. PIZZI, V. MILONE, *The Non-Financial Reporting Harmonization in Europe: Evolutionary Pathways Related to the Transposition of the Directive 95/2014/EU within the Italian Context*, in *Sustainability*, 2019, p.11.

258 *Piano di Azione Nazionale sulla Responsabilità Sociale d’Impresa 2012-2014*, p.7 and COM(2001)366, *Ibidem*.

259 A. BONFANTI, *Private international aspects of Corporate social responsibility*, *Ibidem*. p.438.

260 *Piano di Azione Nazionale Impresa e Diritti Umani 2016-2021* of December 1, 2016.

261 M. FASCIGLIONE, *Il Piano d’azione nazionale italiano su impresa e diritti umani e l’attuazione dei Principi guida ONU del 2011 in Diritti umani e diritto internazionale*, 2017, p.284.

262 Article 1559 of the Italian Civil Code defines the supply agreement (*‘contratto di somministrazione’*).

263 263H. KARAOSMAN, *Behind the runway: extending sustainability in luxury fashion supply chains* in *Journal of Business Research*, 2020, p.660

264 *Ibidem*.

265 *Ibidem*.

266 A. BONFANTI, *Ibidem*, p.453.

267 *Autorità garante della concorrenza e del mercato* available at: <https://en.agcm.it/en/about-us/>

268 *Decreto Legislativo no. 231 of June 8, 2001, Disciplina della responsabilità amministrativa delle persone giuridiche, delle società e delle associazioni anche prive di personalità giuridica, a norma dell’articolo 11 della legge 29 settembre 2000, n. 300*.



## 2. Due diligence and Model 231/2001

Law 231 provides for criminal and administrative liability against any entity with or without legal personality, in Italy or abroad<sup>269</sup> as so far as the offence is committed:

- in the interest of the company;
- for the benefit of the company;

By:

- directors and employees with representation, administration and management responsibilities; or
- directors and employees subject to the direction and supervision of the previously mentioned individuals

Alongside administrative liability, Law 231 includes criminal ‘predicated offenses’ regarding human rights: “*slavery, human trafficking, forced labor (...) serious bodily harm (...) as a result of the breach of health and safety standards and employment thirdcountry national\’s (...) illegally in the country*”<sup>270</sup>.

The sanctions foreseen are:

- monetary penalties (up to 1.5 million €);
- publication of the sentence;
- confiscation of the proceeds/profits from the crime;
- interdictory sanctions (e.g. disqualification, suspension, revocation).

However, all the system relies on a deterrent approach, accepting exemptions of liability on the following conditions:

- a ‘Compliance program’ was adopted and implemented before the commission of the crime by the board of directors;
- a supervisory body was entrusted to oversee the operations and the ‘Compliance program’;
- the ‘Compliance program’ was fraudulently eluded when committing the crime;
- the Supervisory Body performed its surveillance duties with a sufficient level of surveillance.

Thus, companies are invited to design their own effective and adequate<sup>271</sup> ‘Compliance program’ on the basis of due diligence: risk identification and management, periodic evaluation and effective disciplinary system<sup>272</sup>.

Furthermore, article 6 of the decree invites companies to adopt their own CoC reflecting a policy commitment “*on ethical principles relevant to the prevention of 231 offences, that is in line with the features described by UN Guiding Principles (Principle No. 16)*”<sup>273</sup>. However, these guidelines are neither mandatory, nor exempt from liability.

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269 Corte di Cassazione, Sezione VI, decision no. 11626 of April 7, 2020: “*l’ente rispond[e], al pari di ‘chiunque’ (...), degli effetti della propria ‘condotta’, a prescindere dalla sua nazionalità o dal luogo ove si trova la sua sede principale o esplica in via preminente la propria operatività, qualora il reato-presupposto sia stato commesso sul territorio nazionale (...) anche in caso di reato commesso all’estero*”, p.15.

270 FIDH, *Italian legislative decree n° 231/2001: a model for mandatory human rights due diligence legislation?* Paris, 2019, pp.9-10.

271 Article 6 d.lgs. 231/2001.

272 Article 7 para.4 d.lgs. 231/2001.

273 FIDH, *Ibidem*, p.12.

Interestingly, although not explicitly referring to corporate groups, the Italian Supreme Court concluded that the parent company can be held liable under the Law 231 for a “*crime committed within another company of the group*”<sup>274</sup>, as long as an individual acted in the interest or for the benefit of the holding company. This position is in line with article 2487 of the Italian civil code referring to the parent’s company duty of diligence over its subsidiaries “*to perform the correct corporate and business management*”<sup>275</sup>.

Finally, law 231 provides for a concrete organizational model aimed at preventing administrative, criminal and, to a certain extent, civil liability of companies. However, the law does not set a mandatory obligation to adopt a HRDD model, but “*creates a strong incentive*”<sup>276</sup>. Still, Law 231 neither provides for an overall coverage for corporate groups and the entire supply chain, nor addresses HRDD obligation to share with stakeholders the content on adverse human rights impacts<sup>277</sup>. Therefore, difficulties and uncertainties exist to obtain compensation for actual victims.

### 3. Grievance mechanisms

Just like France, Italy set up its NCP, as part of the international OECD network<sup>278</sup>. So far, few claims were submitted by stakeholders, with a case opened against Rina, the Italian audit firm involved in the Ali’s fire in Pakistan<sup>279</sup>.

So, where is the place of the actual victim of corporate violation of human rights?

Following the adoption of the NPA 2016, the Italian government missed the opportunity to address the UNGP’s third pillar by limiting “*its intervention to the identification of gaps in Italian law*”<sup>280</sup>. Currently, if the relationship between buyer and supplier is a contractual one, victims of corporate adverse human rights impact can obtain remedy through tortious law.

Article 2043 of the Italian Civil Code provides for compensation from the author of intentional or negligent act causing an unfair damage to another. Following the civil liability demonstration of causality, victims can seek compensation for any violations attributed to a company. Recently, the Tribunal of Milan received a tort action files by local communities, for environmental and human rights damages, against ENI and its Nigerian subsidiaries<sup>281</sup>. The plaintiffs opposed the lack of effective remedy under Nigerian law and sought compensation by the Italian parent company (statutory seat) on the basis of the Brussels I regulation<sup>282</sup>.

Equally important is the question of civil action for the actual victims of a corporate crime under Law 231. Although foreseeing administrative liability, in practice criminal procedure applies. The ambiguous position of the law led to a mixed case law. First, the Italian Supreme Court<sup>283</sup> denied civil actions against legal entities on the basis of

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274 D. lgs. 231/2001, *Ibidem* and Cassazione Penale Sezione V no. 24583 of January 18, 2011, (*Tosinvest* case).

275 A. BONFANTI, *Ibidem*, p.444.

276 FIDH, *Ibidem*, p.5.

277 *Ivi*, p.20.

278 Article 39 of the Law 273/2002 of December 12, 2002.

279 PCN-Ali Enterprises Factory Fire Affectedes Association (AEFFAA) et al. / RINA Services S.p.A. - Submitted on the September 11, 2018. <sup>280</sup> A. BONFANTI, *Ibidem*, p.443.

280 A. BONFANTI, *Ibidem*, p.443.

281 EUROPEAN PARLIAMENT, *Study no. PE603.475, Ibidem*, pp.57-60.

282 Regulation (EU) no. 1215/2012 of the European Parliament and of the Council of December 12, 2012, On jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. <sup>283</sup> Corte di Cassazione, Sezione VI, n. 2251 of October 5, 2010 and European Court of Justice, *Maurizio Giovanardi and Others*, case C-79/11, of 12 July 2012 in A. BONFANTI, *ibidem*, p. 452.

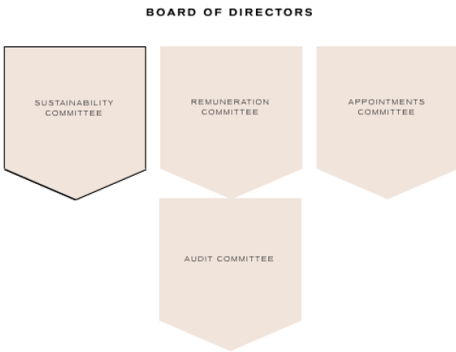
283 Corte di Cassazione, Sezione VI, n. 2251 of October 5, 2010 and European Court of Justice, *Maurizio Giovanardi and Others*, case C-79/11, of 12 July

Law 231. Then, courts recognized such rights to the victims “for damages directly caused by the corporation<sup>284</sup>”. In this context, what is the CSR strategy developed by Kering?

### C. General Kering’s CSR vision

Since its creation in 1963, Kering (ex-PPR<sup>285</sup>) constantly pushed forward its visionary approach to sustainability, making the group, a leader in the luxury industry. This leadership is turned toward a long-term sustainability strategy integrated in all segments of activities. Indeed, Kering’s strategy is designed to “guarantee the survival of the business<sup>286</sup>” through environmental and social initiatives and concrete achievements. As a matter of fact, the group is regularly listed among the most sustainable companies in “Textile, Apparel & Luxury Goods<sup>287</sup>”. Driven by his “long held conviction that Luxury and sustainability are one and the same<sup>288</sup>”, Kering’s Chairman and CEO, François Henri-Pinault, established a road map for the Group, the *maisons* and stakeholders.

The very first step undertaken regards the governance. In fact, “the higher performing companies in the sustainability aspect are those able to integrate them in the processes of governance<sup>289</sup>”. Therefore, CSR is integrated at every level of governance, starting from the Board of Directors relying on a Sustainability Committee in charge of designing, implementing and monitoring the sustainable directives.



Then, the Executive Committee and its sustainability teams (composed of 20 people) provide expertise and technical solutions along the Group Ethics Committee in charge of monitoring the implementation of the CoE among suppliers. Every brand will then rely on an *ad-hoc* sustainable team<sup>290</sup>.

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2012 in A. BONFANTI, *ibidem*, p. 45  
284 A. BONFANTI, *ibidem*, p.452.  
285 [Pinault Printemps Redoute].  
286 E. PAVIONE, *Ibidem*, p.254.  
287 2nd place at Global 100: <https://www.corporateknights.com/reports/2019-global-100/2019-global-100- results-15481153/> and more <https://www.kering.com/en/sustainability/reporting-and-ranking/ranking/>.  
288 KERING, Sustainability Progress, *Ibidem*, p. 2.  
289 E. PAVIONE, *Ibidem*, p. 247.  
290 *Ivi*, p. 254-255.

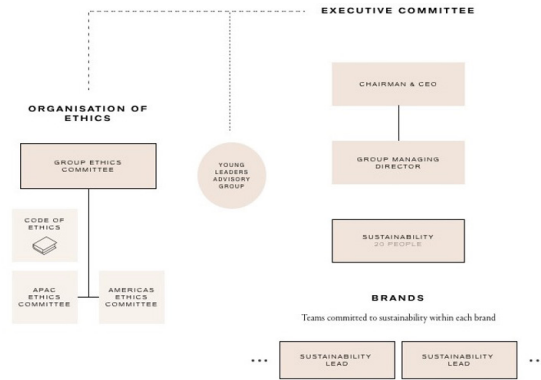


Figure 3 - Governance at Kering available at: <https://www.kering.com/en/sustainability/uor-approach/governance/>

Then, relying on a strong and diverse supply chain, Kering started to re-think its targets in order to address promptly and better mitigate “over 90%<sup>291</sup>” of its impacts. To do so, the group implemented a road map for the period 2012-2016, which has been notably achieved by the release of a new Code of Ethics (CoE). In 2017, the group went further and communicated its three sustainable pillars targets for 2025:

- care for the planet;
- collaborate with people;
- create new business models and innovation.<sup>292</sup>

The second pillar, on “social welfare inside and outside the Group<sup>293</sup>”, delivered concrete achievements: “Kering [is] one of the CAC 40 companies with the highest proportion of women in senior management positions”; the implementation of a progressive global parental leave policy; the adoption of a Charter for the well-being of models.<sup>294</sup> Although the group already achieved great results, integrating an *ad hoc* HRDD strategy can be challenging.

## II. HRDD within Kering

Kering’s approach to human rights is less visible than its environmental one. Still, the Group relies on an internal and international framework (A), basis for identifying and assessing its human rights impact (B), integrating and tracking the findings (C) addressing the violations (D) and reporting on it (E).

### A. HRDD: Internal and International commitments

Following the four HRDD steps: identify human rights impacts, integrate and track the finding into internal processes and account through reporting on how risks are addressed, Kering developed its own prevention system.

First of all, Kering’s operational activities are driven by its Code of Ethics (CoE). Modified many times since its

291 KERING, Sustainability Progress, Ibidem, p. 3.

292 KERING, Sustainability Progress, Ibidem, p.3.

293 *Ibidem*.

294 *Ivi*, p.5.

first version in 1996, the CoE “*powerfully reaffirms [its] commitment to respect for human rights*<sup>295</sup>”. Designed as a guide for daily activities, the CoE is also aimed at “*protect(ing) Kering, its success and longevity*<sup>296</sup>”. By adhering to the main international human rights conventions and international initiatives on business and human rights (UNGP, OECD guidelines), the group reaffirms the necessity to constantly communicate and train its employees on its ethical principles. At the employees’ level, Kering promotes respect for human rights and laws, a workplace free from harassment and non-discrimination, diversity and equality of opportunities.

## B. Identification and Assessment

Risk management is undertaken through a three-step process: “*identifying, analyzing and dealing with risks*<sup>297</sup>”. Kering based its human rights analysis on the UNGP and identified some gaps regarding: “*public commitment and policy, scope of internal control procedures, grievance and remediation mechanisms, and external communications*<sup>298</sup>”.

In order to ensure compliance of its suppliers and to prevent violations of human rights and health and safety at work, Kering created HERCULES, its own risk management system, based on six pillars

- sustainability and mandatory standards;
- centralized management;
- uniform procedure;
- risk-based procedure;
- standardized audits;
- actions against non-compliant suppliers<sup>299</sup>.

Aware of the group’s impact on its supply chain, Kering carried out 13,033 social audits between 2015 and 2019 in order to ensure compliance with its standards. Furthermore, an online “*supplier engagement platform*<sup>300</sup>” was implemented, as well as a supplier sustainability ranking.

Ensuring compliance with the group standards became more than ever essential to avoid bad publicity, such as being accused of human rights violations in countries of operations. In fact, a sweatshop factory, employing immigrant workers, was disclosed in Naples, while producing pieces for brands including Saint Laurent, *maison* of Kering<sup>301</sup>. The Group did not validate the sub-supplier<sup>302</sup>. In practice, the group deploys efforts to achieve transparency within its supply chain and was commended for “*disclosing a handful of raw material suppliers*<sup>303</sup>”.

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295 KERING, *Code of Ethics*, 2018, p.4.

296 *Ibidem*.

297 KERING, *Integrated Report*, 2020, p.14, available at <https://keringcorporate.dam.kering.com/m/13b3a6889900d100/original/INTEGRATED-REPORT2019.pdf>.

298 *Modern Slavery Statement*, 2019, p.5.

299 *Ivi*, p.6.

300 *Ivi*, p.36.

301 REUTERS, *Italian police uncover Naples sweatshop linked to luxury groups*, 2019, available at <https://news.trust.org/item/20191119091035-cbk9a/>.

302 Interview with Rémi LEONFORTE, General Counsel, Kering Group Operations and Kering Italia, July 27, 2020.

303 FASHION REVOLUTION, *Fashion transparency Index*, 2020, p. 22.

## C. Findings and internal processes

The majority of Kering's sourcing is localized in Italy. However, a recent case concerning home-workers under irregular contract was brought to the public attention. The risk is to commission a supplier, who, in turn will sub-contract "*the production to smaller factories under the pressure of reduced lead time and squeezed prices*<sup>304</sup>". Aware of this, Kering took concrete actions regarding the living wage within its Italian supply chain, constantly encouraging collective bargaining agreements to ensure social welfare<sup>305</sup>.

For the 12,2% of its other suppliers, the group joined various international initiatives aiming to ensure a fair and transparent living wage. In particular, Kering relied for many years on the expertise of Indian embroiderers in Mumbai while being accused of "*offering little in the way of employment protection*<sup>306</sup>". In response, the group adhered to the

Utthan Pact "*to secure a sustainable supply chain which all partners can be proud of*<sup>307</sup>" while preserving an historical craftsmanship. As an ongoing process, the Group supports exporters' transparency, certification, compliance with the labor law and monitoring processes. Besides, as a strong advocate of women's empowerment, Kering implemented skills trainings, education and micro-loans in the regions where its supply chains are located<sup>308</sup>.

Kering invests also a lot on internal and on-line training as a way to communicate internally its values and to ensure compliance with its standards. In that sense, the CoE is communicated to all employees through compulsory annual training sessions. Training sessions are also held for suppliers of "*the Leather Goods, Fashion and Watches activities*<sup>309</sup>" focusing on human rights and fundamental freedoms.

## D. Operational-level grievance mechanisms

Since 2005, a whistleblowing system has been in place at Kering. The alert system is accessible to the company's employees and has been extended to the Group's partners. Thus, suppliers have access to it and can submit grievances. The system can be "*used to report any suspicion related to Modern Slavery – among other offenses or violations*<sup>310</sup>" while protecting from reprisals.

In 2019, the Ethics Committee received 55 claims, 22 *via* the hotline. Overall, 32 led to deeper investigations while only 5 were judged in breach of the CoE, associated with corrective measures<sup>311</sup>. In 2018, 4 violations identified led to disciplinary measures. Still, the group used the alerts "*for improvement and recommendations*<sup>312</sup>".

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304 E. PATON, M. LAZZAZZERA *Inside Italy's shadow economy* in *The New-York Times*, 2018.

305 KERING, *Sustainability Progress*, *ibidem*, p.37.

306 K. SHULTZ, E. PATON, P. JAY, *Luxury's hidden Indian Supply Chain* in *The New-York Times*, 2020.

307 UTTHAN Framework, *Transforming the embroidery in Mumbai*, 2016, p.2.

308 KERING, *Sustainability Progress*, *ibidem*, p.37.

309 KERING, *Modern Slavery Statement*, *ibidem*, p.9.

310 *Ibidem*.

311 KERING, *Plan de vigilance, Le document d'enregistrement universel*, 2020., p. 86.

312 KERING, *Additional information to ESG reporting*, 2019, p.1.

## E. Accountability: reporting

Following the implementation of mandatory HRDD in the UK and in France, Kering released its 2019 Statement on Modern Slavery<sup>313</sup> and its *Plan de Vigilance*<sup>314</sup>. The latter is sub-divided in financial and extra-financial information with regards to the risk management and a focus on human rights protection within the Group, identified as one of the six strategic issues for the 2025 horizon<sup>315</sup>.

On the international stage, Kering adhered to the UN Global Compact in 2008 and commits to integrate the ten principles including human and labor rights in its operations. Invited to report annually on the group's achievements to the UN Secretary General, Kering announced in 2017 a new metric system able to measure “*achievement of the SDGs, (...) relative to culture, community, opportunity, equity and empowerment*”<sup>316</sup>.

Betting on total transparency, the group was the first to publicly release its sustainable standards in 2018<sup>317</sup>.

Finally, in the midst of the Covid-19 pandemic, Kering has published its digital integrated report focusing a part on the risk management, directly inspired by the guidelines of the international integrated reporting council<sup>318</sup>.

## III. HRDD within Kering's supply chain

Kering relies on a strong methodological due diligence system based on contract standard (A), collaborative approach (B) monitoring (C) and escalation responses to noncompliance (D).

### A. Contract framework

Alongside recognized international conventions promoting human rights, the Group designed its own CoE stating its uncompromised commitments to social welfare. In addition to that, a Charter of Suppliers was attached to the CoE to reaffirm the approach to social standards. Associated with the Kering Sustainability Standards “*which are systematically communicated to every supplier with which the Group has a contractual relationship*”<sup>319</sup>, the Charter became an integral and mandatory part of every supply agreement. With a special emphasis on workers' rights, child labor, slavery, discrimination, health and safety at work, the suppliers are expected to communicate the Charter to their employees<sup>320</sup>. Besides, Kering Sustainability Principles established tools aiming at ensuring compliance with legislation and at “*driving the luxury industry toward higher (...) social standards*”<sup>321</sup>.

Consequently, requirements are divided into minimum, to be met immediately, and additional ones, to reach higher

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313 KERING, *Modern Slavery Statement*, *Ibidem*.

314 KERING, *Plan de vigilance*, *Ibidem*.

315 *Ivi*, p.93 and p.419.

316 KERING, *Communication On Progress: Letter to the UN Secretary General* of February 28, 2017, available at: [https://keringcorporate.dam.kering.com/m/374cf47759e491ee/original/Communication-onprogress-2016\\_EN.pdf](https://keringcorporate.dam.kering.com/m/374cf47759e491ee/original/Communication-onprogress-2016_EN.pdf)

317 KERING, *Sustainability Principles*, available at: [https://keringcorporate.dam.kering.com/m/0cb4a4b5740cf783/original/Sustainability-Principles\\_EN.pdf](https://keringcorporate.dam.kering.com/m/0cb4a4b5740cf783/original/Sustainability-Principles_EN.pdf)

318 KERING, *Integrated Report*, *Ibidem*, p.14.

319 *Ivi*, p.16.

320 KERING, *Suppliers' Charter in Code of Ethics*, *Ibidem*, p. 17-18.

321 KERING, *Sustainability Principles*, *Ibidem*, p.3.

standards. Those documents compose the contract framework for Kering and its houses, before and after entering a new supply agreement and both for raw materials and manufacturing.

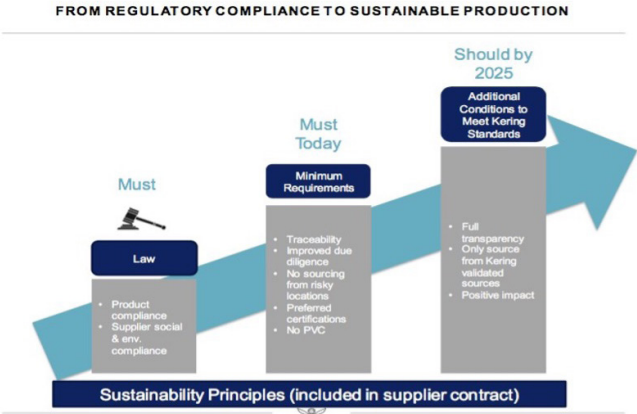


Figure 4 - KERING, Standards for Raw Materials and Manufacturing Processes, Paris, 2019 (update), p. 9.

The CoE, Charter and Sustainability principles are not negotiated with suppliers but rather imposed on them. Thus, the contract does not foresee any personalization regarding human rights standards. Therefore, before contracting, Kering ensures that the supplier immediately meets the minimum standards through an ‘activation audit’ selection. As a group, Kering, enjoys a position of economic strength and has the possibility to impose its vision over its suppliers. Consequently, if negotiations are possible regarding commercial terms, social commitments are not debatable<sup>322</sup>. Where additional costs should result from the implementation of Kering standards, the latter expect from its suppliers to make it present during the commercial discussion and to prepare a plan “to address these requirements in a long-term, economically viable manner<sup>323</sup>”.

As an integral part of the contract, Kering expects a total compliance also from the sub-suppliers. In fact, suppliers are requested to disclose their sub-suppliers and to adopt a comparable due diligence system in order to ensure compliance with the standards<sup>324</sup>.

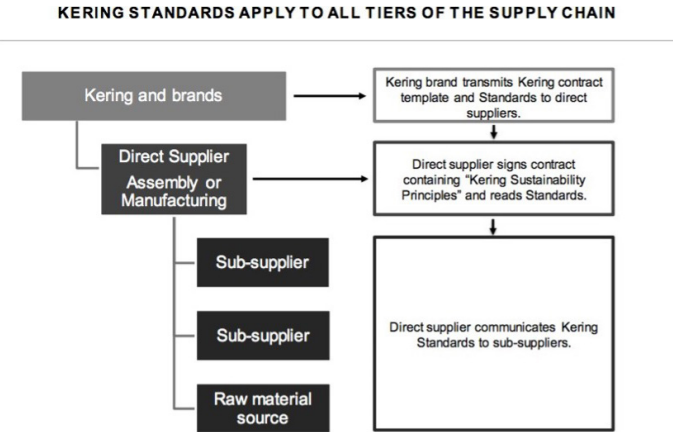


Figure 5 - KERING, Standards for Raw Materials, Ibidem, (2019), p. 8.

322 Interview R. LEONFORTE, Ibidem.  
 323 KERING, Standards for Raw Materials and Manufacturing Processes, Paris, 2017 p.112. 324 Ibidem.  
 324 Ibidem



Moreover, when entering a contract with the Group, the supplier must disclose information relative to its employees (e.g., numbers, contractual terms, nationalities, homeworkers)<sup>325</sup>.

Despite the lack of negotiation on those specific matters, Kering promotes a collaborative approach with its commercial partners.

## B. Collaborative approach

Aware of the necessity to support the whole supply chain, Kering established collaborative tools “*to achiev(e) the long-term value and mutual benefits that sustainability can provide [its] businesses*<sup>326</sup>”. In that sense, the ‘Kering Standards for Raw Materials and Manufacturing Processes’ was designed as a non-binding guidance for suppliers. In practice, the document provides best practices to support their journey from low to higher standards. Interestingly, the group promotes a step-by-step approach, based on realistic achievements and improvements, through trainings and a supplier’s platform<sup>327</sup>. This is particularly relevant for helping suppliers to achieve the additional standards, aimed to be mandatory by 2025.

Furthermore, suppliers are invited to alert Kering of “*any serious difficulty in applying [this] Charter or any infringement of it*<sup>328</sup>”. A technical support is offered to prevent and remediate to any difficulties affecting the standards’ fulfillment. Suppliers have also access to the Group’s hotline. However, its access still needs to be improved through widespread communication tools<sup>329</sup>.

In any case, collaboration goes side by side with an efficient monitoring system.

## C. Monitoring and rating

An important part of the Group’s effort to promote and ensure the respect of human rights within its activities is dedicated to monitoring its suppliers. The adherence to the CoE is continuously assessed, either by the Kering Supply Chain Audit (KSCA) under the abovementioned Hercules System “*at Kering brands’ suppliers and sub-suppliers*<sup>330</sup>” or by external auditors.

The audits are divided into:

- standardized audits: comprehensive audit composed of pre-determined questions relying on 13 categories (including child labor, workers’ rights, discrimination, sub-contracting, etc.)<sup>331</sup>; and
- risk-based auditing<sup>332</sup>: classifying suppliers according to high, medium and low compliance levels and adapted to the needs of each house.

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325 KERING, Standards for Raw materials (2019), *Ibidem*, p. 154.

326 KERING, Standards for Raw materials (2017), *Ibidem*, p.4.

327 *Ibidem*.

328 KERING, *Suppliers’ Charter*, *Ibidem*, p.18.

329 Interview R. LEONFORTE, *Ibidem*.

330 KERING, *Modern Slavery Statement*, *Ibidem*, p. 11.

331 *Ivi*, p.7.

332 *Ibidem*.

In particular, the KSCA undertakes informal interviews with workers alone, selected “to offer a representation of the workforce<sup>333</sup>”, while ensuring their confidentiality. As regard the frequency of audits, the group relies on announced and unannounced audits, depending on the previous findings, every two or four years. As such, in 2019, the Group ordered 3,441 audits, with “1,840 comprehensive audits and 1,601 follow-up audits” meaning that “56% of suppliers were audited in 2019<sup>334</sup>”.

Appendices – Social Compliance and Enforcement of Kering Code of Ethics in Supply Chain

Type of activity	Type of supplier	Type of audit	Timing	Frequency
GLOBAL AUDIT SUPPLIER ACTIVATION	Direct supplier and Sub-supplier	Announced	Notification normally one week in advance	Only for new supplier activation
GLOBAL AUDIT SUPPLIER MONITORING		Announced	Notification normally one week in advance	At least every 2 years
FOLLOW-UP SUPPLIER MONITORING		Unannounced	Anomalies deadline or depending on needs	Depending from anomalies correction deadline
SUSPICION OF SOCIAL VIOLATION OR ANY OTHER SPECIFIC VIOLATION		Mostly unannounced based on situation in coordination with the BU	ASAP	Depending on alert

Figure 6 - KERING, Standards for Raw materials (2017), Ibidem, p.105.

When auditing provides a way to ensure compliance with the standards set by the group, rating can also have a positive impact. In fact, Kering developed a “detailed vendor rating system<sup>335</sup>” expected to be extended to all suppliers by 2020. Consequently, not complying with the standards will affect the supplier rating “which is visible to all Kering brands and plays a part in supplier selection<sup>336</sup>”.

Finally, audit provides concrete information regarding compliance of suppliers.

**D. Responses to non-compliance**

Under Hercules system, audits result in suppliers’ classification in categories: compliant, partially, progress expected and zero tolerance<sup>337</sup>. When non-compliance breaches are identified, related breached are classified in four categories<sup>338</sup>:

- zero tolerance: standards for which the group do not compromise (including child and forced labor) and resulting in an immediate termination of the contract;
- serious: the supplier has one month to remediate, a follow-up audit is activated;
- moderate: the supplier has three months to remediate, follow up audit is activated;
- observation: a corrective plan is established within six months, to be checked during the next audit

333 Ivi, p.8  
 334 Ivi, p.11.  
 335 KERING, Sustainability Progress Report, Ibidem, p.36.  
 336 KERING, Standards for Raw materials (2017), Ibidem, p.112.  
 337 KERING, Modern Slavery Statement, Ibidem, p.8.  
 338 Ibidem.

In 2019, 0,7% of zero tolerance breaches were identified and 68 supply agreements were ended for “*unsatisfactory audit results*”<sup>339</sup>.

Through this escalation system, the Group affirms its strong commitment towards human rights while allowing room for improvement, always in a collaborative way. Furthermore, an internal response to a human right breach will better protect the Group’s reputation<sup>340</sup>.

However, access to remedy can be questioned under such system. The group has a jointliability towards the sub-supplier under Italian law<sup>341</sup> but will be reluctant to compensate supplier’s employees in case of human rights violation, making it a ‘supplier’s problem’. Actually, through its technical and legal support, Kering expects its suppliers to prevent any breach before terminating the contract<sup>342</sup>.

Interestingly, the supplier agreement does not foresee determined obligation to purchase, as the orders should vary according to the collection’s needs<sup>343</sup>. However, by signing the French Charter for responsible supplier relations,<sup>344</sup> Kering is committed to respect good CSR practices in its purchasing activities. As a matter of fact, the ongoing pandemic puts under pressure the whole economic system, including Kering’s orders. The Group and its *maisons* decided to support their suppliers, notably through credit facilities<sup>345</sup> when honoring the orders was not possible.

Finally, Kering prioritizes long-term and collaborative relationship. Still, due to its economic strength, the contract translates a certain imbalance of powers. Aware of this, the Group itself promotes a “*shift to equal partnerships*”<sup>346</sup>, opening new perspectives when advocating social welfare and human rights: is internalizing all the manufacturing process the best solution?

## IV. Insights from Kering’s Sustainability team

A theoretical approach can rapidly be challenged by the harsh reality of doing business while respecting human rights. I drew four lessons from my discussion with Kering’s subject matter experts<sup>347</sup>:

First of all, it is true that soft law is as important as hard law. OECD guidelines are a useful tool to conduct responsible business to complement the French Law of vigilance. The Group already adopted integrated report and focuses more heavily on the industry best practices in addition to this ‘new’ legal tool, as it is too nascent to be in full force in France. For a group like Kering, ESG for investors or a ranking within Fashion Transparency Index are important drivers beyond mere legal compliance. The pressure from investors is more important than the one of mandatory regulations to engage due diligence.

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339 *Ivi*, p. 11.

340 Interview R. LEONFORTE, *Ibidem*.

341 *Ibidem*.

342 *Ibidem*.

343 *Ibidem*.

344 *Le Médiateur des Entreprises et le Conseil National des Achats*, Charter for responsible supplier relations, 2010.

345 S. PIERACCINI, *Gucci, Intesa San Paolo accordo di filiera per sostenere la ripresa in Il Sole* 24, 2020.

346 GLOBAL FASHION AGENDA, *CEO Agenda*, *Ibidem* p.6

347 In order to reinforce the relevance of my work, I interviewed two members of the Kering’s Sustainability Team on July 21, 2020. A summary of my discussions with them constitute the core of this final section.

Second, human rights are certainly at the heart of Kering's vision, however it is obvious that the focus is less visible than the one on environmental issues, because environmental targets are easier to measure. On the contrary, measuring human rights achievements without comprehensive tools is rather difficult. Things might change with the pandemic, as social indicators gained more importance for investors. As such, Kering's *Plan de Vigilance* relies on a few human rights indicators with:

- formation rate on Ethics and Compliance and number of claims received within the Group's operations;
- audit rate and follow-up on suppliers' within the Group's supply chain<sup>348</sup>.

Third, when dealing with risks management, the sustainability team focus on a step by step process. HRDD is an ongoing process and making substantial changes on working conditions, for instance in India, requires time. Above all, when increasing salary is related to more working hours, discussing best labor practices with workers can lead to nothing. So, being locally oriented and flexible when talking working conditions is crucial. However, at the Group level, all the risks are mainly concentrated in Europe, especially in western Europe. Relying on a strong rule of law, like in France and Italy, allows the Group to manage its human rights due diligence, although regional-oriented, like in Southern Italy, characterized by a strong system of trade unions.

Finally, ensuring a full monitoring along the raw materials journey remains the main challenge. Here again, social audit is only one risk management tool but certainly not the only one. In practice, although audit can deliver concrete analyses, programming only one visit holds a relative chance to prevent risks. Conversely, sustainability teams encourage training as it has concrete impact and results. Communicating with and understanding the suppliers can be more powerful. In other words, engaging in a HRDD means taking a 360° view of a company's activities.

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348 KERING, Plan de vigilance, Ibidem, p.91.

## Conclusion

To conclude, this work has analysed various options available to brands to enhance their responsibility to respect human rights inside and outside their activities.

First, moving from the general framework surrounding business and human rights, I showed how soft law has powerfully shaped the business and human rights strategy. That said, I pointed out the limits of business self-regulation through CoC, social audit, reporting or certification when designed in a vacuum. On the contrary, HRDD can serve to fill this gap by restoring the rights of victims of human rights abuses. Nevertheless, companies are still 'shy' at integrating an efficient due diligence process within their daily activities, bringing up the need of an international mandatory HRDD.

Secondly, I have imagined a 'fictitious' supply agreement in light of the HRDD. Because the contract is one of the companies' tools used to foster human rights, I covered the negotiation phase with notably the insertion of human rights clauses and the *ex-post* phase, i.e. in case of a contractual breach. Personalised and inclusive dialogue can lead to positive change, especially when the buyer re-thinks his 'indirect' role in originating human rights abuses through the purchasing activities. In case of breach, an escalation system should be considered, envisaging contractual termination as the ultimate solution. While discussing human rights clauses, a clear identification of Third-Party-Beneficiary must be promoted to facilitate their access to remedy, either at the company level or through other non-State based mechanisms.

Thirdly, I moved from theory to practice with the Kering Group case study. Examining CSR, in France and in Italy, allowed me to show the playing field of the Group's activities and how due diligence is undertaken in these countries. While both countries provide strong incentive to incorporate HRDD, Kering did not wait for mandatory rules to selfregulate its business. As a leading company committed towards sustainability, Kering developed sophisticated supply agreements leaving little space for non-compliant suppliers. Aware of its powerful position, the Group promotes a collaborative approach with its suppliers, which needs to be asserted.

HRDD is an ongoing process and as such can take infinite forms within business' activities. Still, access to remedy for the victims seems to be the weak link of the whole UNGP framework. Taking into account the transnational effect of today's business, a comprehensive and international mandatory framework, offering coherence, visibility and stability in favour of human rights must be encouraged.

Finally, engaging in HRDD process for a luxury brand will certainly have a cost (time, energy and money), but let's "[try] to change the world, one sequin at a time<sup>349</sup>".

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349 Lady Gaga and the sociology of fame: college course in *The Independent*, 2010.

# Table of Figures

Figure 1 - Examples of human costs in the fashion industry .....5

Figure 2 - Example of contract social responsibility .....19

Figure 3 - Governance at Kering available at: <https://www.kering.com/en/sustainability/our-approach/governance/>.....41

Figure 4 - KERING, Standards for Raw Materials and Manufacturing Processes, Paris, 2019 (update), p. 9.....42

Figure 5 - KERING, Standards for Raw Materials, Ibidem, (2019), p.8.....46

Figure 6 - KERING, Standards for Raw materials (2017), Ibidem, p.105. ....48

## Bibliography

### International provisions

UN General Assembly, Resolution 217 A (III) of 10 December 1948.

UN General Assembly, Resolution 2200 A (XXI) of 16 December 1966.

UN General Assembly, Resolution 41/128 *on the Right to Development* of 4 December 1986

U.S., Public Law 111–203, Dodd-Frank Wall Street Reform and Consumer Protection Act, 2010.

UN General Assembly, Resolution 26/9, Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, 14 July 2014.

UN General Assembly, Resolution A/RES/70/1, Transforming our world: the 2030 Agenda for Sustainable Development, 25 September 2015.

### EU and European legislative provisions

European Union, The European Principles of Contract Law, 2002.

Regulation (EC) no. 864/2007 of the European Parliament and The Council of July 11, 2007, On the law applicable to non-contractual obligations (Rome II).

Regulation (EU) no. 593/2008 of The European Parliament and of the Council of June 17, 2008, On the law applicable to contractual obligations (Rome I).

Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions of October 25, 2011, *A renewed EU strategy 2011-14 for Corporate Social Responsibility*, Brussels, COM(2011)366.

Charter of Fundamental Rights of The European Union of 26 October 2012, C 326/02.

Regulation (EU) no. 1215/2012 of the European Parliament and of the Council of December 12, 2012, On jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Directive (EU) no. 2014/95 of the European Parliament and of the Council of 22 October 2014 amending Directive (EU) no. 2013/34 as regards disclosure of non-financial and diversity information by certain large undertakings and groups Text with EEA relevance.

UK, Public General Acts, Modern Slavery Act, C30 of 26 March 2015.

Regulation (EU) no. 2017/821 of the European Parliament and of the Council of 17 May 2017, laying down supply

chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and highrisk areas.

Dutch Senate, Child Labour Due Diligence Act, 14 May 2019.

## French legislative provisions

French Civil Code of March 21, 1804.

French Commercial Code of September 15, 1807.

French Constitution of October 4, 1958.

*Loi organique n° 2011-333 of March 29, 2011, relative au Défenseur des droits.*

French *Assemblée Nationale*, draft law no. 2578 of February 11, 2015.

Law no. 2017-399 of March 27, 2017, *Relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre.*

*Ordonnance* no. 2017-1180 of July 19, 2017, *Relative à la publication d'informations non financières par certaines grandes entreprises et certains groupes d'entreprises*

Law no. 2019-486 of May 22, 2019, *Relative à la croissance et la transformation des entreprises.*

## Italian legislative provisions

Italian Civil Code, *Regio decreto* no. 262, of March 16, 1942.

Law no.287 of October 10, 1990, *Norme per la tutela della concorrenza e del mercato.*

Law no. 143 of June 22, 1998, *Disciplina della subfornitura nelle attività produttive.*

Legislative Decree no. 231 of June 8, 2001, *Disciplina della responsabilità amministrativa delle persone giuridiche, delle società e delle associazioni anche prive di personalità giuridica, a norma dell'articolo 11 della legge 29 settembre 2000, n. 300.*

Law 273/2002 of December 12,2002, *Misure per favorire l'iniziativa private e lo sviluppo della concorrenza.*

Legislative Decree no. 254 of December 30, 2016, *Attuazione della direttiva 2014/95/UE del Parlamento europeo e del Consiglio del 22 ottobre 2014, recante modifica alla direttiva 2013/34/UE per quanto riguarda la comunicazione di informazioni di carattere non finanziario e di informazioni sulla diversità da parte di talune imprese e di taluni gruppi di grandi dimensioni.*



Law no. 145 of December 30, 2018, *Bilancio di previsione dello Stato per l'anno finanziario 2019 e bilancio pluriennale per il triennio 2019-2021*.

## Case law

European Court of Justice (ECJ)

ECJ, *Maurizio Giovanardi and Others*, case C-79/11, of 12 July 2012.

### **France**

*Cour de Cassation, Chambre Sociale* no. 01-17501 of November 25, 2003.

*Cour de cassation, Chambre Commerciale* no.08-19200 of September 15, 2009.

*Cour de Cassation, Chambre criminelle* no.10-82.938 of September 25, 2012.

*Cour d'Appel de Versailles, 3ème chambre, Association France-Palestine Solidarité 'AFPS' v. Société Alstom Transport*, R.G. no. 11/05331 of March 22, 2013.

*Conseil Constitutionnel*, Decision no. 2017-750 DC of March 23, 2017.

### **Italy**

*Corte di Cassazione Penale Sezione V* no. 24583 of January 18, 2011, (*Tosinvest* case).

*Corte di Cassazione, Sezione VI* no. 2251 of October 5, 2010.

*Corte di Cassazione, Sezione VI*, no. 11626 of April 7, 2020.

### **U.S.A**

U.S Court of Appeal, Ninth Circuit, *Doe v. Walmart stores*, (*Walmart case*), no. 0855706 of July 10, 2009.

## Books and academic articles

### **1964- 2000**

W. FRIEDMANN, *The changing structure of International Law*, California, 1964.

E. FREEMAN, *Strategic Management, A Stakeholder Approach*, Cambridge University Press 1984.

A. CASSESE, *International law in a divided world*, New-York, 1986.

M. A. EMMELHAINZ, R. J. ADAMS, *The Apparel Industry Response to 'Sweatshop' Concerns: A Review and Analysis of Codes of Conduct* in *The Journal of Supply Chain Management*, 1999.

K. BRUNO, J. KARLINER, *Tangled Up In Blue* in *CorpWatch*, 2000, available at <https://corpwatch.org/article/tangled-blue>.

## 2001-2009

S. J. FRENKEL, D. SCOTT, *Compliance, collaboration and codes of labor practice: the Adidas connection* in *California Management Review*, 2002.

G. CHANDLER, *The evolution of the business and human rights debate* in *Business and Human Rights: Dilemmas and Solutions*, 2003.

M. T. KAMMINGA, *Corporate obligations under International Law*, paper presented at the 71st Conference of the International Law Association plenary session on Corporate Social Responsibility and International Law, Berlin, 2004.

S. BARRIENTOS, S. SMITH, *Do workers benefit from ethical trade? Assessing codes of labour practice in global production systems* in *Third World Quarterly*, 2007.

D. E. BOYD, R. E. SPEKMAN, J. W. KAMAUFF, P. WERHANE, *Corporate Social Responsibility in Global Supply Chains: A Procedural Justice Perspective* in *Long Range Planning*, 2007.

R. LOCKE, T. KOCHAN, M. ROMIS, F. QIN, *Beyond corporate codes of conduct: Work organization and labour standards at Nike's suppliers* in *International Labour Review*, 2007.

G. KNIGHT, J. SMITH, *The Global Compact and Its Critics: Activism, Power Relations, and Corporate Social Responsibility* in *Discipline and Punishment in Global Politics*, 2008.

P. LUND-THOMSEN, *The Global Sourcing and Codes of Conduct Debate: Five Myths and Five Recommendations* in *International Institute of Social Studies*, 2008.

R. G. KOCER, L. FRANSEN, *Codes of Conduct and the Promise of a Change of Climate in Worker Organization* in *European Journal of Industrial Relations*, 2009.

R. MCCORQUODALE, *Corporate Social Responsibility and International Human Rights Law* in *Journal of Business Ethics*, 2009.

A. VOGENAUER, *Commentary on the Unidroit Principles of International Commercial Contracts (PICC)* Oxford, 2009.

## 2010- 2015

T. KOIVUROVA, *Due Diligence* in *Max Planck Encyclopedia of Public International Law*, 2010.

T. LAMBOOY, *Corporate Due Diligence as a Tool to Respect Human Rights*, in *Netherlands Quarterly of Human Rights*, 2010.

F. CILIBERTI, J. De HAAN, G. De GROOT, P. PONTRANDOLFO, *CSR codes and the principal-agent problem in supply chains: four case studies*, in *Journal of Cleaner Production*, 2011.

P. M. ERWIN, *Corporate Codes of Conduct: The Effects of Code Content and Quality on Ethical Performance* in *Journal of Business Ethics*, 2011.

J. RUGGIE, UN Special Representative, *Principles for responsible contracts: integrating the management of human rights risks into State-investor contract negotiations: guidance for negotiators*, 2011.

A. PETERKOVA MITKIDIS, *Sustainability Clauses in International Supply Chain Contracts: Regulation, Enforceability and Effects of Ethical Requirements* in *Nordic Journal of Commercial Law*, 2014.

C. CERRUTI, C. MENA, H. SKIPWORTH, E. TAVOLETTI, *Characterizing agile supply partnerships in the fashion industry* in *International Journal of Operations and Production Management*, 2015.

## 2016

H. CULLEN, *The irresistible rise of human rights due diligence: Conflict minerals and beyond* in *George Washington International Law Review*, 2016.

F. DI BENEDETTO, *Corporate social responsibility and antitrust compliance in the fashion industry* in *Papers di diritto europeo*, II ed. The fashion industry in the European Union, 2016.

T. HOSKIN, *The Vile Excess and Inequality of the Global Fashion Industry* in *Huck*, 2016, available at <https://www.huckmag.com/perspectives/reportage-2/vile-excessinequality-global-fashion-industry/>

E. PAVIONE, *Emerging Competitive Strategies in the Global Luxury Industry in the Perspective of Sustainable Development: the Case of Kering Group* in *Management Dynamics in the Knowledge Economy*, 2016.

## 2017

S. BRABANT, E. SAVOUREY, *France's Corporate Duty Of Vigilance Law : A Closer Look at the Penalties Faced by Companies* in *Revue Internationale De La Compliance Et De L'éthique Des Affaires*, 2017.

S. COSSART, J. CHAPLIER, T. BEAU De LOMENIE, *The French Law on Duty of Care: A Historic Step towards Making Globalization Work for All* in *Business and Human Rights Journal*, 2017.

E. DELBUFALO, M. BASTL, *Multi-principal collaboration and supplier's compliance with codes-of-conduct*, in *The International Journal of Logistics Management*, 2017.

M. FASCIGLIONE, *Il Piano d'azione nazionale italiano su impresa e diritti umani e l'attuazione dei Principi guida*

ONU del 2011 in *Diritti umani e diritto internazionale*, 2017.

R. KARMEEL, Understanding and Managing Human Rights Risks is a key elements of integrated thinking, 2017, available at <https://integratedreporting.org/news/understanding-and-managing-human-rights-risks-is-a-key-element-of-integrated-thinking/>

R. MCCQUORDALE, L. SMIT, S. NEELY, R. BROOKS, *Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises*, in *Business and Human Rights Journal*, 2017.

J. M. SMITS, *Enforcing Corporate Social Responsibility Codes under Private Law: On the Disciplining Power of Legal Doctrine* in *Indiana Journal of Global Legal Studies*, 2017.

B. STAUFFER, *Follow the thread: the need for supply chain transparency in the garment and footwear industry*, in *Human Rights Watch*, 2017.

## 2018

R. C. BROWN, *Due Diligence Hard Law Remedies for MNC Labor Chain Workers* in *UCLA Journal of International Law and Foreign Affairs*, 2018.

I. DESBARATS, *La RSE « à la française » : où en est-on ?* in *Droit social*, 2018.

C. LEVESQUE, M. HENNEBERT, G. MURRAY, R. BOURQUE, *Corporate Social Responsibility and Worker Rights: Institutionalizing Social Dialogue Through International Framework Agreements* in *Journal of Business Ethics*, 2018.

F. MANES-ROSSI, A. TIRON-TUDOR, G. NICOLO, G. ZANELLATO, *Ensuring More Sustainable Reporting in Europe Using Non-Financial Disclosure: De Facto and De Jure Evidence* in *Sustainability*, 2018.

E. SAFFOURI VELASCO, *Corporate Social Responsibility and supply contracts: from soft law to hard law: A global perspective* in *International Commercial Law Research Paper*, 2018.

S. ZAGELMEYER, *Non-State based non-judicial grievance mechanisms (NSBGM): An exploratory analysis, A report prepared for the Office of the UN High Commissioner for Human Rights, Manchester*, 2018.

## 2019

J. BUTLER, *The corporate keepers of international law* in *The American Journal of International Law*, 2019.

F. CAPUTO, R. LEOPIZZI, S. PIZZI, V. MILONE, *The Non-Financial Reporting Harmonization in Europe: Evolutionary Pathways Related to the Transposition of the Directive 95/2014/EU within the Italian Context*, in *Sustainability*, 2019.

S. DADUSH, *Contracting for Human Rights, looking to version 2.0 of the ABA Model Contract Clauses* in *American University Law Review*, 2019.

R. LEOPIZZI, A. IAZZI, A. VENTURELLU, S. PRINCIPALE, *Nonfinancial risk disclosure: The “state of the art” of Italian companies*, in *Corporate Social Responsibility and Environment Management*, 2019.

J. C. LIPSON, *Promising Justice: Contract (as) Social Responsibility in Wisconsin Law review*, 2019.

J.S. MARTIN, *Private Law Remedies, Human Rights, and Supply Contracts in American University Law Review*, 2019.

L. MAVOUNGOU, *Les Pouvoirs Privés Économiques à L'épreuve De La Loi Française Sur Le Devoir De Vigilance in Revue internationale de droit économique*, 2019.

G. NOTO LA DIEGA, *Can the law fix the problems of fashion? An empirical study on social norms and power imbalance in the fashion industry in Journal of Intellectual Property Law & Practice*, 2019.

J.S. MARTIN, *Private Law Remedies, Human Rights, and Supply Contracts in American University Law Review*, 2019.

S. TOMASEKOVA, *Exploring the Barriers to Employee Engagement with Corporate Social Responsibility in the Fashion Industry*, Master's Thesis, Utrecht University, September 2019.

J. YANG, *Contract Law Aspects of Sustainable Companies' Certification in the global value chain*, in *European Review of Contract Law*, 2019.

## 2020

WILKS, J. BLANKENBACH, *Will Germany become a leader in the drive for corporate due diligence on human rights in Business and Human Rights Centre*, 2020.

S. BRABANT and E. SAVOUREY, *All eyes on France:- French vigilance Law first enforcement cases, current cases and trends in Cambridge Core Blog*, 2020.

C. BRIGHT, *Creating a Legislative Level Playing Field in Business and Human Rights at the European Level: is the French Duty of Vigilance Law the Way Forward?* In *EUI Working Paper*, 2020.

M. CURLEY, *Human Rights Due Diligence: Making it mandatory – and effective*, in *EUIdeas*, 2020.

A. CROCKETT, E. SAVOUREY, O. ELGIE, J. TEMME, *Switzerland to hold referendum on proposed human rights due diligence in Business and Human Rights Centre*, 2020.

A. BONFANTI, *Private international aspects of Corporate social responsibility in Ius Comparatum – Global Studies in Comparative Law*, Volume XXXXII, Switzerland, 2020, p. 437-468.

A. DANIS-FATOME, K. DECKERT, M. NIBOYET, L. SINOPOLI, *Private international aspects of Corporate social responsibility in Ius Comparatum – Global Studies in Comparative Law*, Volume XXXXII, Switzerland, 2020, p.353-400.

A. DUTHILLEUL, M. De JOUVENEL, *Evaluation de la mise en œuvre de la loi n° 2017399 du 27 mars 2017 relative*

*au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*, Paris, 2020.

S. EASTWOOD, J. FORD, L. REYNOLDS, *Business and Human Rights: Mandatory Human Rights due diligence: European Commission to introduce a legislative initiative by 2021* in *Mayer-Brown*, 2020.

Y. FARAH, V. OLUSOLA KUNUJI, *Contractualisation of Human Rights, and public participation- Challenges and prospects* in *Public Participation and Foreign Investment Law: From the Creation of Rights and Obligations to the Settlement of Disputes*, Brill, 2020.

H. KARAOSMAN, *Behind the runway: extending sustainability in luxury fashion supply chains* in *Journal of Business Research*, 2020.

R. LEOPIZZI, A. IAZZI, A. VENTURELLI, S. PRINCIPALE, *Non-Financial risk disclosure: the “state of the art” of Italian companies* in *Corporate Social Responsibility Environmental Management*, 2020.

A. MICHOD, *Can Soft Words Lead to Strong Deeds? A Comparative Analysis of Corporate Human Rights Commitments’ Enforcement* in *Seattle Journal For Social Justice*, 2020.

J. F. SHERMANN III, *The Contractual Balance between can I and Should I?* in *Corporate Social Responsibility Initiative of Harvard Kennedy School*, 2020.

F. SHERMANN III, *The General Counsel as Partner in Shaping a Corporate Culture That Respects Human Rights* in *Corporate Responsibility Initiative, Harvard Kennedy School*, 2020.

## Soft Law - International and Governmental Organizations

### **European Union (EU)**

European COMMISSION, MEMO/11/730 of October 25, 2011, Brussels.

FRA, COUNCIL OF EUROPE, *Handbook on European Law relating to access to justice*, Luxembourg, 2016.

FRA, Opinion no. 1/2017, *Improving access to remedy in the area of business and human rights at the EU level*, Vienna, of April 10, 2017.

EUROPEAN COMMISSION, *The regulation explained* available at: <https://ec.europa.eu/trade/policy/in-focus/conflict-minerals-regulation/regulationexplained/>

EUROPEAN COMMISSION, *Focus on Combatting conflict materials* available at <https://ec.europa.eu/trade/policy/in-focus/conflict-minerals-regulation/>

EUROPEAN PARLIAMENT, Study no. PE603.475, *Access to legal remedies for victims of corporate human rights abuses in third countries*, Brussels, 2019.

EUROPEAN COMMISSION, *Study on due diligence requirements through the supply chain*, Final Report, Brussels, 2020.

EU Parliament's Responsible Business Conduct Working Group, *European Commission promises mandatory due diligence legislation in 2021* in *Business and Human Rights Resource Centre*, 2020.

### **Organisation for economic co-operation and development (OECD)**

OECD, *Guidelines for Multinational Enterprises*, Paris, 2011.

OECD, *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, Paris, 2016.

OECD, *Due Diligence Guidance for Responsible Business Conduct*, 2018.

OECD, *Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector*, Paris, 2018.

OECD, *COVID-19 and Responsible Business Conduct*, 2020.

### **United Nations (UN)**

UN Human Rights Council, endorsement of the United Guiding Principles for Business and Human Rights (UNGPs), New-York and Geneva, of June 16, 2011, HR/PUB/11/04.

ILO-IOE, *Child Labour Guidance Tool for Business*, 2015.

OHCHR, *Corporate Human Rights Due Diligence, identifying and leveraging emerging practices*, available at <https://www.ohchr.org/EN/Issues/Business/Pages/CorporateHRDueDiligence.aspx>

OHCHR, *Human Rights "Issues Paper" on legislative proposals for mandatory human rights due diligence by companies*, 2020.

OHCHR, *Corporate Human Rights Due Diligence, identifying and leveraging emerging practices*, available at <https://www.ohchr.org/EN/Issues/Business/Pages/CorporateHRDueDiligence.aspx>

OHCHR, UN Guiding Principles on Business and Human Rights at 10 "Business and human rights: towards a decade of global implementation" available at <https://www.ohchr.org/EN/Issues/Business/Pages/UNGPsBizHRnext10.aspx>

OHCHR, *Legislative proposals for mandatory human rights due diligence by companies in UN Human Rights Issues Paper*, 2020.

OHCHR, *Mandatory Human Rights Due Diligence Regimes*, 2020.

UN website, *Human Rights* available at <https://www.un.org/en>

## Governmental Initiatives

### France

*Le Médiateur des Entreprises et le Conseil National des Achats*, Charter for responsible supplier relations, 2010.

France, *Ministère de l'économie des finances et de la relance*, *Rapport Du PCN Sur La Mise En Œuvre Des Principes Directeurs De L'OCDE Dans La Filière TextileHabillement* of December 2, 2013.

*Plan National d'Action pour la mise en œuvre des Principes Directeurs des Nations Unies relatifs aux Droits de l'Homme et aux Entreprises*, of April 26, 2017.

### Italy

*Piano di Azione Nazionale sulla Responsabilità Sociale d'Impresa 2012–2014*.

*Piano di Azione Nazionale Impresa e Diritti Umani 2016-2021* of December 1, 2016.

*PCN-Ali Enterprises Factory Fire Affectees Association (AEFFAA) et al. / RINA Services S.p.A.*, 2018.

### Norway

Norwegian Government, Report from the Norwegian Ethics Information Committee, Supply Chain Transparency, 2019, available at <https://www.regjeringen.no/contentassets/6b4a42400f3341958e0b62d40f484371/ethicsinformation-committee---part-i.pdf>

## NGO reports

ISO, *Discovering ISO 26000: Guidance on Social Responsibility*, 2010.

CLEAN CLOTHES CAMPAIGN, *Report Stitched Up: Poverty wages for garment workers in eastern Europe and Turkey*, 2014.

OECD WATCH, *Remedy Remains Rare*, 2015.

ESSEX BUSINESS AND HUMAN RIGHTS, *Improving path to business accountability for human rights abuses in the global supply chains: a legal guide*, 2017, Essex.

GLOBAL FASHION AGENDA and THE BOSTON CONSULTING GROUP, *Pulse of the fashion industry*, 2017.

SHIFT, MAZARS, *The UNGP reporting framework and integrated reporting*, 2017 available at <https://www.ungpreporting.org/resources/the-ungp-reporting-frameworkand-integrated-reporting/>

THE BOSTON CONSULTING GROUP, *Total societal impact: a new lens for strategy*, 2017.



THE JOINT ETHICAL TRADING, *Guide to buying responsibly*, 2017.

ECOVADIS, *Sustainability Clauses in Commercial Contracts: The Key to Corporate Responsibility*, 2018.

CLEAN CLOTHES CAMPAIGN, *Report, Fig Leaf For Fashion: How social auditing protect brands and fails workers*, 2019.

CORPORATE HUMAN RIGHTS BENCHMARK, *Key Findings*, 2019.

DELOITTE, *Global powers of luxury good*, 2019.

FIDH, *Italian legislative decree n° 231/2001: a model for mandatory human rights due diligence legislation?* Paris, 2019.

GLOBAL 100, 2019 results available at <https://www.corporateknights.com/reports/2019-global-100/2019-global-100-results15481153/>

ECCHR, Policy Paper, *Garment supply chain in intensive care? Human rights due diligence in times of (economic) crises*, 2020.

EUROPEAN COALITION FOR CORPORATE JUSTICE, *From impossible to inevitable: Corporate justice in times of Covid-19*, 2020.

DUTY OF VIGILANCE RADAR available at <https://vigilance-plan.org/search/>

FASHION REVOLUTION, *Fashion transparency Index*, 2020.

GLOBAL FASHION AGENDA, *CEO Agenda, Covid-19 edition*, 2020, available at <https://globalfashionagenda.com/publications/#ceoagenda>

## Media articles

*Lady Gaga and the sociology of fame: college course* in *The Independent*, 2010.

T. HOSKIN, *Luxury brands: higher standards or just a higher mark-up?* In *The Guardian*, 2014.

E. PATON, M. LAZAZZERA *Inside Italy's shadow economy* in *The New-York Times*, 2018.

REUTERS, *Italian police uncover naples sweatshop linked to luxury groups*, 2019, available at <https://news.trust.org/item/20191119091035-cbk9a/>

*Europe takes a big step towards companies having 'duty of care' on Human rights*, in *EU Reporter*, 2019, available at <https://www.eureporter.co/economy/2019/06/12/europetakes-a-big-step-towards-companies-having-duty-of-care-on-humanrights/>

A. CLEGG, *How companies can protect their reputation during a pandemic* in *Financial Times*, 2020.

J. GAPPER, *Forced labour is the price of a cheap cotton T-shirt* in *Financial Times*, 2020

B. JOHNS, *Is forced Uighur labour in your supply chain?* In *The Business of Fashion*, 2020, available at [https://www.businessoffashion.com/articles/professional/forceduighur-labour-supply-chain-china-xinjiang-camps?utm\\_source=bof-professionalnewsletter&utm\\_campaign=1673004121985449&utm\\_term=25&utm\\_medium=email](https://www.businessoffashion.com/articles/professional/forceduighur-labour-supply-chain-china-xinjiang-camps?utm_source=bof-professionalnewsletter&utm_campaign=1673004121985449&utm_term=25&utm_medium=email)

S. PIERACCINI, *Gucci, Intesa San Paolo accordo di filiera per sostenere la ripresa* in *Il Sole 24*, 2020.

K. SHULTZ, E. PATON, P. JAY, *Luxury's hidden Indian Supply Chain* in *The New-York Times*, 2020.

M. XIAO, H. WILLIS, C. KOETTL, N. RENEAU, D. JORDAN, *China Is Using Uighur Labor to Produce Face Masks*, in *The New-York-Times*, 2020.

## KERING Group

About KERING GROUP available at <https://www.kering.com/en/>

KERING Sustainability ranking available at <https://www.kering.com/en/sustainability/reporting-and-ranking/ranking/>

KERING, Sustainability Principles, available at: [https://keringcorporate.dam.kering.com/m/0cb4a4b5740cf783/original/SustainabilityPrinciples\\_EN.pdf](https://keringcorporate.dam.kering.com/m/0cb4a4b5740cf783/original/SustainabilityPrinciples_EN.pdf)

UTTHAN Framework, *Transforming the embroidery in Mumbai*, 2016.

KERING, *Communication On Progress: Letter to the UN Secreray General*, 2017, available at: [https://keringcorporate.dam.kering.com/m/374cf47759e491ee/original/Communicationon-progress-2016\\_EN.pdf](https://keringcorporate.dam.kering.com/m/374cf47759e491ee/original/Communicationon-progress-2016_EN.pdf)

KERING, *Standards for raw materials and manufacturing processes*, 2017.

KERING, *Code of Ethics*, 2018.

KERING, *Suppliers' Charter* in *Code of Ethics*, 2018.

KERING, *Additional information to ESG reporting*, 2019.

KERING, *Standards for Raw Materials and Manufacturing Processes*, Paris, 2019 (update).

KERING, *Modern Slavery Statement*, 2019.

KERING, *Integrated Report*, 2020, available at: <https://keringcorporate.dam.kering.com/m/13b3a6889900d100/original/INTEGRATED-REPORT->

KERING, *Plan de vigilance, Le document d'enregistrement universel*, Paris, 2020.

KERING, *Sustainability Progress Report 2017-2020*, Paris, 2020.

## Interviews

Interview with members of KERING's Sustainability Team, on July 21, 2020.

Interview with Rémi LEONFORTE, General Counsel, KERING Group Operations and KERING Italia on July 27, 2020.