Navigating corporate responsibility in global supply chains using codes of conduct

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2 Legal framework of supplier codes of conduct

2.1 Introduction

At the outset of this research, an important terminology disclaimer must be made. It is essential to differentiate *supplier* codes of conduct from *corporate* codes of conduct, or '*internal*' codes. Internal codes of conduct primarily address the behavior and responsibilities of a company's direct employees within national borders. In contrast, *Supplier Codes of Conduct* (SCCs) as I call them, extend their reach to external parties, managing and regulating the actions of subcontractors and external partners within global supply chains. This distinction highlights the broader implications and challenges in enforcing these codes across diverse and fragmented supply chains. In this chapter and the whole dissertation, I focus exclusively on supplier codes of conduct, which can take various forms and terminologies, such as "purchasing policies" or "human rights statements." These codes are typically unilaterally drafted by companies, setting out expectations and standards for suppliers.

2.1.1 Defining supplier codes of conduct as soft law

In 2001, the OECD defined codes of conduct as "*commitments voluntarily made by companies, associations or other entities, which put forward standards and principles for the conduct of business activities in the market place*".[1] Supplier codes of conduct, as a form of corporate self-regulation, are viewed as soft law, given that they are policies voluntarily drafted by private entities. Given Abbott and Snidal's definition of hard and soft law instruments (2000), which considers central the component of 'obligation' of the norm central to its definition, codes of conduct traditionally belong to the category of soft instruments of transnational regulation. Codes of conduct are also qualified as instruments of the 'transnational new governance' (Abbott and Snidal, 2010),[2] which is characterized by a modification of the traditional role of the state. In transnational new governance, the public

1 OECD (2001), "Codes of Corporate Conduct: Expanded Review of their Contents", OECD Working Papers on International Investment, 2001/06, OECD Publishing. http://dx.doi.org/10.1787/206157234626

2 Abbott and Snidal (2010) consider that there is a development of the 'Transnational New Governance', which they define as a new kind of international regulatory system spontaneously arising out of the failure of international "Old Governance" (i.e., treaties and intergovernmental organizations) to adequately regulate international business.

actor relies more heavily on decentralized actors for self-regulation, notably corporations, and utilizes soft law to complement or substitute for mandatory hard law.

Following this basic definition of codes of conduct, it appears unconventional to assess the legal implications – or draft a 'legal framework' – of an instrument that is, by nature, not legally binding. Following a legal positivist approach such as Hart's '*Concept of Law*' (1961) or Raz's '*Practical Reason and Norms*' (1975), a legal instrument is a formal document or tool that establishes rights, duties or other legal effects within a legal system, and are strictly created by a legitimate institution giving them authoritative validity. Codes of conduct, as a private policy drafted '*by and for*' a corporation, usually do not fit within this definition.[3] Yet, in a context of a governance gap in globalisation, codes of conduct come to fill a void of the regulation of transnational actors and global supply chains.[4] Therefore, some lawyers focussing on globalisation and the rise of transnational corporations,[5] have been eager to study the legality of these private policies to interpret them as having a legal impact. This line of thought reflects the gradual blurring of public and private law, contributing to a 'hybrid' governance system blending private authority with public regulatory goals,[6] shifting from a centralized state-centered regulation to a mix forms of regulation.[7]

2.1.2 The choice of soft law in transnational governance

In the realm of global supply chain governance, soft law orchestrated by private entities has been chosen for several reasons throughout the years. Firstly, it provides a flexible framework that can be easily adapted to the diverse and dynamic nature of global supply chains. Secondly, it rose from regulatory gaps, where existing national and international laws did not adequately address the complex issues arising in global supply chains (Prakash & Potoski, 2006). The difficult inter-States negotiation and geopolitical tensions challenged the adoption of binding international regulation on corporate accountability, thus leaving soft law as the most efficient governance model. Thirdly, soft law promotes voluntary compliance and encourages companies to 'self-responsibilize' and demonstrate their commitments to ethical practices. Fourthly, companies themselves have shown goodwill in developing self-regulation, insisting on their capacity to self-regulate. Vogel (2005) argues that this strategy allowed them to preempt

3 The exception arises where codes of conduct are drafted as a contract between the buyer and the supplier. This is studied in section 2.2.1. of this Chapter.

4 See Chapter 1 of this dissertation, section 1.2

5 Anna Beckers is probably the front-runner of this movement in Europe, with her book: Beckers, A. (2015). *Enforcing Corporate Social Responsibility Codes: On Global Self-Regulation and National Private Law*. Hart Publishing. '

6 Backer, L. C. (2011). *Private Actors and Public Governance Beyond the State: The Multinational Corporation, the Financial Stability Board, and the Global Governance Order*.

7 Cafaggi, F., & Renda, A. (2012). *Public and Private Regulation*.

or avoid more stringent mandatory regulation. Consequently, non-binding agreements have been seen as holding potential for an effective arrangement of international relations and global exchanges.

The use of self-regulation to govern supply chains was consecrated by John Ruggie in 2011, with the adoption of the non-binding United Nations Guiding Principles (UNGPs). These UN-adopted non-binding principles emphasized the importance of corporate responsibility in supply chains, and developed the concept of *due diligence*. With due diligence, the UN incentivizes companies to identify, assess, mitigate, and monitor risks associated with their suppliers and third-party partners, and do each of these steps in autonomy, hence self-regulate applicable norms and self-monitor their compliance. The public incentivization of soft law and self-regulation exemplifies Abbott and Snidal's (2010) analysis of transnational new governance: by developing due diligence, the international public actor relies here mostly on businesses to act diligently.

While codes of conduct are seen as a potential catalyst in guiding corporate behavior, and a solution to international gaps, some scholars argue that the full potential of private regulation can only be achieved by bringing the State back into transnational regulation (Abbott and Snidal, 2010). For instance, Deva (2012) argued that the UNGPs should eventually be translated into binding international legal standards to ensure stronger accountability and enforcement mechanisms. Nolan (2018) considers that an emerging legal framework provides opportunities to entrench codes of conduct within standards and ensure compliance from a legal perspective. This would mean that the *mandatory* and *binding* elements of soft law instruments are expected to harden over time, slowly moving the cursor of CSR and self-regulation towards the harder end of the spectrum. Indeed, theorists of international law consider that 'soft' and 'hard' policies cannot be classified in two independent boxes, but instead form a *continuum* from soft to hard law. Over time, policies can 'harden' as they become institutionalized (Abbott and Snidal, 2000). This 'hardening' of SCC is already debated amongst legal scholars, as Sobczak's famous article of 2015 raises the question: "*Are Codes of Conduct in Global Supply Chains Really Voluntary?*".

2.1.3 Objective of the chapter and research question

This chapter aims to determine where SCCs currently fall within the soft-to-hard law continuum. Specifically, it seeks to provide an overview of the legal framework governing SCCs and to clarify the obligations multinational corporations face concerning these codes. A critical distinction is made here between the concepts of "mandatory" and "binding" as they pertain to SCCs, given their differing legal implications.

- Mandatory SCCs: This term would imply that companies are legally required to adopt these codes, meaning they are no longer voluntary.
- Binding SCCs: This term would indicate that companies are legally obligated to enforce these codes and may face consequences for violations.

These two elements—mandatory and binding—are not inherently linked, which necessitates separate discussions of their implications.

The central research question addressed in this chapter is: *What are the legal obligations associated with SCCs, and what are their legal effects for multinational corporations?* The approach taken in this chapter may seem unconventional for lawyers, as it does not follow a traditional doctrinal approach. Instead of subsequently or comparatively analyzing national and regional legal frameworks, this chapter examines multiple legal fields to explore the mandatory and binding dimensions of SCCs. To answer the research question, I first explore the legal landscape that governs the adoption of SCCs. The primary sub question is: Are these codes mandatory? This section outlines the varying requirements across different jurisdictions and highlights the pressures—both market-driven and regulatory—that compel companies to adopt SCCs. Next, I assess the potential for legal enforcement of these codes. I raise the second sub question: Are codes of conduct binding? While SCCs are typically viewed as non-binding commitments, this chapter investigates the conditions under which they may become binding. I limit myself to the study of contract law, consumer law, and mandatory human rights due diligence, without covering them exhaustively. Setting this legal framework serves as a backbone of the pursuant empirical reflections on SCCs developed in following chapters.

2.1 Adopting codes of conduct: An evolving legal framework

First, let's see how they are defined and whether they are fully voluntary. Second, I show how the recent legal framework makes a shift in this element of 'voluntary', rendering the adoption of codes mandatory.

2.1.1 Questioning the voluntariness of SCCs

Traditionally, SCCs are viewed as voluntary ethical commitments made by companies, which may encompass areas such as the environment, human rights, labor standards, consumer protection, and taxation. Authors Kaptein and Schwartz (2007) describe codes as formal document containing a set of prescriptions developed by and for a company to guide present and future behavior.[8] From their definition, corporate codes of conduct are typically seen as voluntary ethical commitments. The OECD indeed qualifies codes as voluntary policies,[9] and Vytopil (2015) pursues that the primary characteristic of codes of conduct is their "voluntariness".

8 In the exact words « *A business code is a distinct and formal document containing a set of prescriptions developed by and for a company to guide present and future behavior on multiple issues of at least its managers and employees toward one another, the company, external stakeholders and/or society in general.* » Kaptein and Schwartz, 2007.

9 OECD (2001), "Codes of Corporate Conduct: Expanded Review of their Contents", OECD Working Papers on International Investment, 2001/06, OECD Publishing. http://dx.doi.org/10.1787/206157234626

While SCCs are originally characterized by their voluntary nature, this element of 'voluntariness' is increasingly nuanced by public incentives and evolving regulations. According to Sobczak (2006), codes are not purely voluntary: market and societal pressures compel companies to draft codes of conduct. This trend can be identified at national, regional, and international levels. For example, in the United States, both the New York Stock Exchange and Nasdaq have required listed companies to adopt and disclose a code of conduct since 2004. Additionally, federal guidelines recommend judges to consider whether a company convicted of a crime had an effective ethics and compliance program, including a code of conduct, when determining fines. Various other entities, such as Hong Kong's Independent Commission Against Corruption, South Africa's King Committee on Corporate Governance, the Brazilian Institute of Corporate Governance, and Japan's Prime Minister's 2002 advisory panel on the quality of life, have also advised companies to develop codes. The European Union has recently made steps to integrate SCCs into European legislation. In the field of data protection for instance, the General Data Protection Regulation[10] strongly recommends drawing up codes of conduct, with Article 40 specifying that public entities should "*encourage the drawing up of codes of conduct intended to contribute to the proper application of this Regulation*."

Principle 15 of the UNGPs constitutes the most overarching global encouragement for businesses to adopt codes of conduct. The UNGPs do not explicitly refer to 'codes of conduct', but more generally to a 'policy commitment' that businesses should have in place to 'meet their responsibility to respect human rights'. While non-binding, the UNGPs have gained significant global acceptance and have influenced binding legislation, leading some countries to integrate due diligence requirements. This was the case particularly in Europe, with the adoption of a due diligence law in France,[11] in Germany,[12] and in Norway[13]. In an effort to harmonize these frameworks and adopt their own definition of due diligence, the EU legislator has since adopted the Corporate Sustainability Due Diligence Directive (CSDDD), currently being transposed. Until the adoption of the CSDDD, it is safe to say that codes of conduct were largely voluntary, albeit strongly encouraged by international norms and, in some cases, regional or local policies.

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10 Article 40 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32016R0679

11 *Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*[Law No. 2017-399 of March 27, 2017, on the Duty of Vigilance of Parent Companies and Ordering Companies], Journal Officiel de la République Française [Official Gazette of France], Mar. 28, 2017.

12 *Lieferkettensorgfaltspflichtengesetz [Supply Chain Due Diligence Act]*, Bundesgesetzblatt [Federal Law Gazette], Teil I [Part I], July 22, 2021, at 2959.

13 *Lov om virksomheters åpenhet og arbeid med grunnleggende menneskerettigheter og anstendige arbeidsforhold* [Transparency Act], LOV-2021-06-18-99, Lovdata [Norwegian Law Data], June 18, 2021.

2.1.2 The shift towards mandated codes in the EU with the due diligence framework

In April 2024, the EU officialized the shift towards the mandatory adoption of SCCs, with the adoption of the CSDDD. This Directive includes an obligation for multinationals to adopt codes of conduct, and to take measures to verify compliance with the code of conduct.[14] The EU Commission submitted the proposal in February 2022, and after extensive negotiations, the EU Council reached a final compromise text on the CSDDD on March 14th, 2024. After the publication in the Official Journal of the European Union planned for June 2024, Member States will have two years to transpose CSDDD's requirements into national law. The companies entering the scope of the CSDDD[15] will be subjected to due diligence obligations – including the mandatory adoption of codes – within the prescribed three years of the Directive entering into force.

By transforming the voluntary business practice of adopting codes of conduct into a mandatory requirement, the EU legislator recognizes the private actor as a regulator of global corporate governance and gives companies a responsibility in regulating their supply chains. This role is granted with a large autonomy, as the CSDDD does not include specific requirements on the content of codes of conduct, merely mentioning that the code of conduct must describe 'rules and principles to be followed throughout the company and its subsidiaries, and the company's direct or indirect business partners'.[16] Despite the absence of authoritative obligations on what codes of conduct should contain, companies can turn to the UNGPs, the UN Global Compact, the OECD Guidelines for Multinational Enterprises, and the ILO Conventions for guidance, as these internationally-recognized text provide a solid legal background for the content of codes. The working documents of the European Commission on the Directive considers that companies should adhere at least to the Fundamental ILO Conventions and the OECD Guidelines,[17] but this reference never integrated the text of the CSDDD. However, the Directive includes a public supervision, by establishing national supervisory authorities[18] in charge of supervising companies' compliance with the CSDDD's requirements, including the examination of the content of codes of conduct. In practice, the definition of standards

14 Article 7 CSDDD

15 Pursuant to Article 2 CSDDD, targeted companies are EU multinationals with at least 1,000 employees and an annual turnover over €450 million ; or non-EU multinationals generating at least €450 million net turnover within the Union.

16 Article 7(b) CSDDD

17 E.g. COMMISSION STAFF WORKING DOCUMENT Corporate Social Responsibility, Responsible Business Conduct, and Business & Human Rights: Overview of Progress, SWD(2019) 143 final of March 2019

18 Pursuant to Article 24 of the CSDDD, Member States must set supervisory authorities to supervise compliance with the obligations laid down in Articles 7 to 16.

applying throughout the supply chain are thus left at the discretion of companies, with some public supervision.

With this formulation, the CSDDD assigns companies a significant role in shaping global corporate governance by effectively entrusting them with policy-making functions. Some scholars see this as inviting multinationals to act as 'quasi-legislators'[19] because the legislator not only shifts responsibility to private actors, but also elevates them to a position of influence traditionally reserved for public authorities. In this setting, supply chains are viewed as a hierarchical model, where market power is concentrated exclusively or primarily at the level of the company. The company is, in essence, the chain leader, and retains a significant discretion in defining the standards that apply to their operations and those of their suppliers. This hierarchy might be problematic as the reality of global supply chain networks may also be quite different.[20] Yet, this move of the EU legislator reflects a broader trend in global governance, where non-state actors are increasingly recognized as key players in regulating transnational economic activities – characterizing the 'blur' between the public and the private actors.[21]

2.2 Enforcing codes of conduct: The legal implications of SCCs

After examining the legal framework surrounding the adoption of SCCs, it is essential to explore their enforceability and the extent to which they are binding once adopted by multinationals. According to the OECD, "*voluntary codes do not have the status of law or regulation*"[22], indicating that the provisions of codes do not inherently constitute legal obligations, thus are not binding.

As a result, reputational retaliation and threats constituted, for a long time, the primary pathway to ensure that companies act upon their SCCs and enforce them, as a strong non-legal motivation. King and Toffel (2007) notably highlight the importance of reputational concerns as a key driver for companies to adopt and comply with these standards. While public exposure of non-compliance, often by NGOs or the media, is a powerful motivator, it has its limitations. Companies may engage in "window dressing," where they superficially adopt codes of conduct without genuinely implementing or enforcing them. For instance, Wells (2007) underline NGOs' compliance

19 Alex Geert Castermans & Cornelis J. W. Baaij, *The Potential of Contractual Assurances to Advance Supply Chain Due Diligence*, EUI, RSC, Working Paper, 2023/28, (2023)

20 Ibid.

21 On how serious structural issues provided the conditions for the emergence of Regulatory Standard-schemes, out of the traditional State-approach to address the adverse consequences of production: Kenneth W. Abbott & Duncan Snidal, *The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State*, in *The Politics of Global Regulation* 44, 44-88 (Walter Mattli & Ngaire Woods eds., 2009).

22 OECD (2015), G20/OECD Principles of Corporate Governance, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264236882-en

monitoring deficiencies, due to organizational weaknesses of NGOS, their dependence on multinationals for whom they monitor, the limits imposed on NGO effectiveness by corporate restructuring and market competitiveness, and the inadequate pressures from anti-sweatshop movements. These constraints suggest that the NGO-centered soft law policies are 'too weak for the job' (Wells, 2007), undermining the credibility of SCCs.

Beyond reputational threats, efforts are made by different actors to enhance the enforceability of these codes by using the existing legal framework. In this section, three legal pathways are investigated, to provide a comprehensive understanding of the potential legal enforceability of SCCs as well as the existing gaps, ultimately addressing the question: are codes binding? Firstly, the legal framework on contractual private law may apply when SCCs are incorporated into contractual agreements between the supplier and the buyer. In this case, they gain legal significance by becoming enforceable terms within those contracts. This contractual integration transforms voluntary commitments into binding obligations, providing a legal basis for accountability (section 2.2.1). Secondly, various consumer protection law may apply. Under specific circumstances, consumers may invoke corporate responsibility if violations of SCCs are perceived as misleading practices. This enforcement avenue is grounded in consumer protection laws, which can give SCCs a binding effect by holding companies accountable for deceptive or unfair practices (section 2.2.2). Finally, the mandatory human rights due diligence legal framework may also provide a legal basis to enhance corporate accountability in case of SCC violation (section 2.2.3).

2.2.1 Supplier Codes of Conduct enforceability with contract law

When entering the contractual relationship with their suppliers, the two parties decide on a number of terms and conditions forming the contractual obligations. Within those, it is possible to include non-financial requirements, such as the conditions under which the goods and services should be performed. The integration of SCCs into contractual agreements is a critical mechanism for enforcing codes, and ensuring that suppliers adhere to the labor standards that the buying company mandates. However, the corporate practices vary widely, each company deciding on different ways forward, raising different challenges. Several examples of key practices can be underlined here, substantiated by extracts of SCCs part of the Database of Business Ethics.[23] These practices underline the different levels to which SCCs may be integrated within contractual obligations.

A first corporate practice consists of explicitly incorporating SCCs

23 To access the full text of the codes of conduct referenced in this Chapter, I include in footnote a link to the website from archive.org. This version of the code corresponds to the version collected between June 2020 and January 2021, and included in the analysis of subsequent chapters. It is worth nothing that most of the companies of the Database of Business Ethics have altered their supplier codes of conduct by the end of my research (June 2024). Yet, for consistency, I used the same codes of conduct throughout the research.

within contracts with suppliers (or 'purchasing contracts') by including specific clauses that reference the SCC. These clauses stipulate that compliance with the SCC is a condition of the contract, thereby making the obligations outlined in the SCC legally binding for the supplier. For instance, the companies Orkla and British American Tabacco are both adopting this approach. Within their SCCs, they specify that the provisions and standards consist of contractual agreements to be respected by the supplier.

> *"When this CoC has been communicated to a specific supplier, it shall be regarded as a contract document and as an integral part of any contract entered into between the Orkla company and the supplier in question."*
>
> Orkla Supplier Code of Conduct, May 2018[24]

> *"This requirement is incorporated into our contractual arrangements with suppliers."*
>
> British American Tabacco, Group Supplier Code of Conduct, 2018.[25]

In some cases, such as in Amphenol's code, the provisions even specifies that labor standards are above the purchasing contract itself:

> *"Supplier agreements are governed by contractual terms and conditions, however in the event of conflict between this SCOC and the terms and conditions of any contract, the obligations set forth in the SCOC will govern unless explicitly stated otherwise in the contract."*
>
> Amphenol Supplier Code of Conduct, October 2019.[26]

A second practice lies in ensuring that suppliers acknowledge and certify their compliance with the SCC, even though it is not explicitly part of the contract. This acknowledgment can take the form of a signed document or a formal certification process that the supplier must complete and update regularly. This practice raises questions as to whether it constitutes a binding agreement, as it is not part of the purchasing contract.

> *"The Code of Ethics/Business Partner Commitment is a separate commitment that all Business Partners have to sign and commit to comply with."*
>
> Hennes & Mauritz code of Ethics for Business Partners, January 2016.[27]

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24 Access Orkla's SCC version of May 2018 at: https://web.archive.org/web/20200923124133/https://www.orkla.com/sustainability/procedures-and-policies/supplier-code-conduct/

25 Access British American Tabacco's SCC, version of 2018, at: https://web.archive.org/web/20200228081521/https://www.bat.com/group/sites/uk__9d9kcy.nsf/vwPagesWebLive/DO9EAMHQ/$FILE/medMDB4GDSF.pdf?openelement

26 Access Amphenol's SCC, version of October 2019, at: https://web.archive.org/web/20211129090155/https://amphenol.com/docs/supplier-code-of-conduct-en

27 Access H&M's code of Ethics for Business Partners, version of January 2016, at: https://web.archive.org/web/20211006083445/https://hmgroup.com/wp-content/uploads/2020/10/Business-Partner-Sustainability-Commitment_en.pdf

Finally, some companies may choose the 'silent' approach, by not mentioning the SCC in the contract itself, but merely publish their codes on webpages dedicated to their supplier relationships, thus not integrating it in the contract *per se*. [28] This can also be the case when companies are drafting public statements addressed to their suppliers.[29] Here, scholars have questioned whether public statements could constitute a proof that the SCC holds value in the contractual relationship (Beckers, 2015). Going one step further in this direction, many companies decide to explicitly reject the contractual force of SCCs, by including a disclaimer. Below are a few examples of such disclaimers.

> *"This Supplier Code of Conduct is in no way intended to conflict with or modify the terms and conditions of any existing contract. Unless otherwise stated in such contract, in the event of a conflict, suppliers shall adhere to the contract terms."*
>
> Airbus' General Disclaimer within their Supplier Code of Conduct, June 2018.[30]

> *"This Code is not a contract, is not intended to be all inclusive, and does not supersede any contractual rights or obligations of you or Progressive."*
>
> Progressive Supplier Code of Conduct, January 2021.[31]

This diversity of practices related to the integration of codes within purchasing contracts is possible due to the large margin of discretion of companies to draft their SCCs. While this is inherent to the definition of a *voluntary* self-regulatory policy, it brings a number of legal challenges that have yet to be addressed.

One issue arises because the formulation of codes is often unilaterally drafted by corporations, while the contractual relationship is undertaken between two parties. This creates a unilateral duty within this contractual relationship for the supplier to make efforts towards compliance labor standards, while the company does not bear part of the weight. For instance, in Henkel's code below, it is explicitly formulated that the code is not a basis for contractual rights against their own companies.

> *"This "Responsible Sourcing Policy" represents fundamental principles to which Henkel is committed. However, this document should not be misinterpreted as providing an independent basis for assertion of contractual rights against Henkel."*
>
> Henkel Responsible Sourcing Policy, October 2018.[32]

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28 Vytopil 2015, p. 123, 124, 129 and 135-138.

29 Beckers 2015, p. 50-71.

30 Access Airbus's SCC, version of June 2018, at: https://web.archive.org/web/20200306140847/https://www.airbus.com/be-an-airbus-supplier.html

31 Access Progressive SCC, version of January 2021, at: https://web.archive.org/web/20170706094821/http://investors.progressive.com/phoenix.zhtml?c=81824&p=irol-govConduct

32 Access Henkel's Responsible Sourcing Policy, version of October 2018, at: https://web.archive.org/web/20211102070357/https://www.henkel.com/resource/blob/638576/0cd55ea135913dbe1e5a7f5d58b8081f/data/responsible-sourcing-policy.pdf

As a result of this disbalanced bearing of duty of implementing the code, the multinationals' legal accountability can hardly be found. The contract law pathway also raises another crucial issue: the absence of supply chain workers of a right to compensation in case of violation of the contract. The supply chain workers, in this buyer-supplier contractual relationship, are third party to the contract. The principle of relativity of contracts posits that contracts are only binding and enforceable between the parties who have entered into the agreement (van der Heijden, 2011). It means that the rights and obligations arising from a contract do not extend to third parties who are not signatories to the contract. Exceptions to this principle exist, and have been developed differently by national courts, who generally consider that third parties may acquire rights or obligations under a contract if they are 'beneficiary' to this contract. In contract law, a third-party beneficiary is someone who benefits from a contract between two other parties but is not a party to the contract itself. The rights of third-party beneficiaries to claim their rights based on the violation of the contract depend on various factors, including the intention of the contracting parties and the specific terms of the contract. If the contracting parties clearly intend for the contract to confer benefits on a third party, that third party may have enforceable rights under the contract.

Considering that SCCs explicitly refer to fundamental labor standards of supply chain workers, it could be interpreted that they have legal standing in case of SCC violation. However, this has not been the jurisprudential interpretation, until now. In the case Doe v. Wal-Mart Stores of 2009,[33] Wal-Mart is sued by workers from its suppliers' factories in China, Bangladesh, Indonesia, Swaziland and Nicaragua. These workers claimed that the code of conduct set forth in Wal-Mart's contracts with its foreign suppliers was violated, and that Wal-Mart should be held accountable for a breach of a contractual duty to inspect its suppliers' foreign factories. As a result of the breach of this contractual duty, it was claimed that the employees (acting as third-party beneficiaries) were harmed. To some extent, it was recognized that multinationals have a "*duty of care*" towards their suppliers as well as monitoring of the codes of conduct provisions. However, the court considered that supplier workers did not have sufficient legal standing, as the relationship between Walmart and the plaintiffs was too remote to support a claim for breach of contract.[34] This case underscores the legal challenges faced by third-party beneficiaries seeking to enforce the terms of supplier codes of conduct against multinational corporations like Walmart. According to the argumentation of Beckers however, the debate on third party beneficiary to the code of conduct provisions is still ongoing and will widely depend on national interpretation. Until now, no supply chain worker has been granted a right of action as a third-party beneficiary to a contract including a supplier code of conduct. Considering the legal uncertainty and the open-ended debate, some companies have specified

33 Jane Doe I, et al v. Wal-Mart Stores, Inc, No. 08-55706 (9th Cir. 2009)

34 Opinion by Judge Gould in Jane Doe I, et al v. Wal-Mart Stores

within codes the absence of third-party beneficiary to these contracts. Two examples are noteworthy:

> *"The Third Party places reliance on Novartis Guidance at its own risk and any consequences of decisions relating to, or the implementation of, such Guidance are the sole responsibility of the Third Party. Novartis does not warrant and makes no representations as to the accuracy or completeness of such Guidance and will not be held responsible by any person, including the Third Party, in any manner whatsoever, for any consequences of the Third Party's reliance on or implementation of such Guidance."*
>
> Novartis, Third Party Code of November 2020.[35]

> *"This Code is not intended to create new or additional rights for any third party."*
>
> Apple, Supplier code of conduct of January 2020.[36]

From this non-exhaustive list of examples regarding SCC formulation on the contractual arrangements, I describe the diversity of the practices across companies. This joins the analysis of Beckers (2015), that codes' legal dimension significantly relies on corporate willingness to make their code binding. Ultimately, private law respects the expressed intention of the speaker, who has the freedom to determine whether or not to create a legal obligation. In the end, "*Contract law is, from an orthodox understanding, primarily concerned with the enforcement of the promises that parties make" (*Beckers, 2015, p.266). The judge, in the few existing cases on SCCs, have also shown reluctance to accept third parties to the contract to claim rights upon it, until now. Therefore, it is completely up to the company to decide on the binding effect of codes. In the following two sections, I investigate whether consumer protection laws and the due diligence legal framework give SCCs a legal value to activate corporate accountability.

2.2.2 Supplier codes of conduct enforceability with consumer protection laws

Consumer protection laws present an alternative route to seek accountability for violations of labor standards in global supply chains. Here, I explore how consumer protection laws can be leveraged to ensure that companies adhere to their SCCs, and highlights the remaining gaps.

Consumer protection laws are designed to prevent businesses from engaging in unfair or deceptive practices that could harm consumers and limit the practices of window dressing or greenwashing. When a company

35 Access Novartis's Third Party Code of Conduct, version of November 2020, at: https://web.archive.org/web/20241009010024/https://www.novartis.com/sites/novartis_com/files/novartis-third-party-code-v-2.pdf

36 Access Apple's SCC, version of January 2020, at: https://web.archive.org/web/20200831040318/https://www.apple.com/au/supplier-responsibility/pdf/Apple-Supplier-Code-of-Conduct-January.pdf

promotes its commitment to ethical, environmental, and social standards through its SCCs, it creates certain expectations among consumers. If the company fails to uphold these standards, it could be seen as engaging in misleading or deceptive practices. This is where consumer protection laws can come into play, as they can be used to address discrepancies between a company's public commitments and its actual practices.

The legal framework around deceptive advertising has, to some extent, been used to ensure that companies do not make false promises in their codes. The *Kasky v. Nike*[37] case is a good example of judges' interpretation of codes – or generally public statements on supply chain labor practices – in light of consumer protection. In 1998, Nike faced widespread criticism for the labor practices in its overseas factories. In response, Nike engaged in a public relations campaign, issuing press releases, writing letters to newspaper editors, and sending direct mail to customers defending its labor practices. Nike asserted that it was providing fair wages and good working conditions. Mark Kasky, a US citizen, filed a lawsuit against Nike under California's unfair competition and false advertising laws. He argued that Nike's statements were false and misleading, constituting deceptive advertising intended to promote sales of Nike products. Among the contested statements was Nike's code of conduct, which Kasky alleged did not align with the actual labor practices in its subcontracting factories. The case was settled in 2003, with Nike agreeing to adopt a more transparent approach to its workers and subcontractors — and making a payment of $1.5 million to the Fair Labor Association. The California Supreme Court held that Nike's statements were indeed commercial speech, intended to promote the sale of its product, and subject to false advertising. While no clear jurisprudential outcome was given regarding consumer rights as per codes of conduct, the judges' interpretation of codes of conduct as a commercial speech underscored the legal risks associated with making public statements on ethical practices in codes of conduct without substantiating them by action.[38]

The French Samsung case deals with similar facts. On 26 February 2013, three claimants submitted a complaint against Samsung France and X. The organizations allege misleading advertising practices, based on the incompatibility between Samsung's public ethical commitment to being a "socially responsible" company and a report from China Labor Watch which alleges frequent unpaid overtime, the absence of adequate safety measures, and compulsory work practices in Samsung's subcontractors' factories in China. However, the complaint was dismissed, as investigations did not find sufficient proof for workplace malpractices in Samsung supplier factories. Although the lawsuit was dismissed, Samsung suffered from bad publicity and consumer retaliation.

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37 Kasky v. Nike, Inc., 27 Cal. 4th 939, 45 P.3d 243 (2002).

38 For lengthy development on Kasky V. Nike case, see : Mayer, Kasky V. Nike case and the Quarrelsome Question of Corporate Free Speech, Business Ethics Quarterly , Jan., 2007, Vol. 17, No. 1 (Jan., 2007), pp. 65-96

Another example here could be the German Volkswagen Emissions Scandal,[39] while not directly related to SCCs. In this case, Volkswagen falsely advertised its vehicles as environmentally friendly, violating consumer protection laws. The company faced substantial fines and legal actions for misleading consumers. This case underscores the potential for consumer protection laws to address discrepancies between corporate claims and actual practices and set a precedent for holding corporations accountable for environmental fraud and consumer deception.

Outside of these cases, the EU has been particularly active in protecting consumers from unfair commercial practices, notably with the adoption of Directive 2005/29/EC on unfair commercial practices (UCP Directive). The Directive foresees that, in case of a dispute, a judge can take a code of conduct into account when assessing business practices (Article 10). The noncompliance with a code of conduct and the absence of verifiable commitment from the company is considered as one of the misleading actions under Article 6 of the Directive. As a result, it is now easier for consumers to seek redress to expose a trader that is allegedly contravening the claims in its code of conduct. It can also be noted that falsely claiming to be a signatory to a code of conduct is also a misleading practice, as highlighted in Annex I (1) UCP Directive.[40]

It is also the consumer protection pathway that the due diligence obligation appears to take in Norway. In June 2021, Norway adopted the Business Transparency and Fundamental Rights Act (*Åpenhetsloven*)[41], according to which Norwegian consumers can request, at any time, information on the company's management of its due diligence.[42] Companies are required to report on their due diligence policy and provide information in the following three weeks. The execution of the law is placed under the control of the Norwegian Consumer Authority, which can impose financial penalties in the event of non-compliance but which mainly plays an advisory and recommendation role on the obligation of due diligence. Arguably, this law will put societal pressure on companies' corporate social policies by putting the responsibility to ask questions in the hands of the consumers.

The legal avenue of using consumer protection laws to enhance corporate responsibility is promising and offers a possibility for SCCs' enforceability even when these codes are not integrated into supplier contracts. Holding companies accountable through consumer protection laws can significantly influence corporate behavior, compelling companies to adhere to their

39 United States v. Volkswagen AG, Case No. 2:16-cr-20394 (E.D. Mich. 2017).

40 Willem H. van Boom, Unfair Commercial Practices, in: Christian Twigg-Flesner (ed.), Research Handbook on EU Consumer and Contract Law (Research Handbooks in European Law series), Cheltenham: Edward Elgar 2016, p. 388-405

41 *Åpenhetsloven* of 14 June 2021 establishing a transparency obligation for companies on fundamental human rights and decent working conditions (Transparency Act).

42 Ibid Section 6 of the Act

commitments out of fear of consumer backlash and reputational damage. However, this approach has a critical shortcoming: it does not allow victims of corporate misconduct in supply chains to seek damages. The focus on consumer entitlements overlooks the intended beneficiaries of these codes—the workers and communities affected by corporate practices. Estlund (2012) offers a more nuanced view, suggesting that remedies obtained through consumer protection laws would benefit workers as well, reflecting the price premium paid for ethically produced goods, rather than directly addressing or prohibiting the wrongful practices. In the Western context, it is understandable that litigation would focus on CSR strategies driven by consumer demand. In fact, scholars show that, historically, CSR obligations have been integrated into commercial law rather than labor law. As Sobczak (2006) argues, multinational obligations to uphold minimum labor standards are rarely addressed within labor law but are part of commercial codes. For example, non-financial reporting obligations are incorporated into the commercial code (Code du commerce) in French law. In a global context of inequalities and injustices of wealth distribution and labor exploitation, this approach shows its limits. While consumer protection laws offer a potential pathway for enforcing SCCs, they are limited in addressing the broader issues of corporate accountability and justice for affected workers.

2.2.3 Supplier codes of conduct enforceability with the CSDDD

As described in section 2.1. above, the adoption of the CSDDD operates a shift from a voluntary to a mandatory adoption of SCCs. The follow-up question thus entails: how will companies have to enforce their SCCs pursuant to the Directive? To ensure compliance with their codes of conduct, companies must obtain contractual assurances from business partners,[43] and take measures to verify their compliance.[44] Later, the text explains that "*For the purposes of verifying compliance, the company may refer to independent third-party verification*". This appears to call for third party external auditing as sufficient and legitimate tool to verify compliance with codes. In theory, this could mean that companies are exempt from further actions once they have adopted a SCC and conducted audits. The clear priority on contractual codes of conduct and third-party verification, in misalignment to the UNGPs is, to some, a matter of concern (Patz, 2022). Several risks can be underlined here.

One primary risk emerges from the potential interpretation of codes as self-sufficient, implying that mere adoption serves as evidence of diligent behavior. On top of the SCC adoption and compliance verification, Article 10(2)(a) of the Directive mandates companies to formulate an "*action plan*" only "*where necessary due to the nature or complexity of the measures required for prevention*." This allows for companies to select themselves the risks to

43 Article 10.2.(b) CSDDD
44 Article 7(c) CSDDD

tackle in supply chains, potentially diminishing the effectiveness of due diligence efforts outside of these formalities that might entail window dressing and not drive further efforts.

Another critical concern lies in the Directive's top-down approach, as it does not include the necessity for companies to consult with stakeholders on the development of their codes, and generally on their due diligence plans. This is even more transparent from the new Directive text adopted by the Council on March 15th. Previously, the proposal stipulated that "*Companies shall, where relevant, carry out consultations with potentially affected groups including workers*" (Article 6 Commission proposal 2022), thus explicitly referring to workers as a group of interest. The new text of the Directive changes this formulation, reinforcing the interpretation of a top-down governance lacking collaboration: "*Where information necessary for the assessment (…) can be obtained from business partners (…), the company shall prioritize requesting such information, where reasonable, directly from business partners*". This shows a major shift in stakeholder consultation, away from a collaborative engagement and exacerbating misalignment with the UNGPs, which prioritize horizontal human rights policy integration and stakeholder engagement as opposed to verification and compliance needs.

Moreover, the legislative emphasis on 'contractual assurances' from suppliers underscores the perception that many responsibilities outlined in the CSDDD are not primarily on the multinational itself but rather on imposing obligations for suppliers to comply with the code, while positioning the company as the quasi-regulator in this dynamic. Article 10 mandates companies to obtain "*contractual assurances from a business partner (…) that it will ensure compliance with the company's code of conduct*," effectively making the code a legally binding obligation for both parties of the contract. In this contractual relationship, one party sets the standards unilaterally, and the other oversees compliance. This comes to reinforce the pre-existing power disbalance in many buyer-supplier relationship. Alternatively, other due diligence laws focus on emphasizing the role of companies to integrate human rights within their own corporate practices. For example, the German due diligence law mandates companies to establish a human rights committee internally. This internal shift would ultimately lead to putting importance on human rights concerns in their supplier relationships, and that would likely trickle down the supply chain, if that is a priority for the buyer. A promising aspect of the Directive in this direction is found in Article 10(2)(d), which mandates companies to "*make necessary modifications or improvements to the company's own business plan, overall strategies, and operations, including purchasing practices, design, and distribution practices*." This provision demonstrates a focus on internal company actions. However, the whole Directive does not go in this direction. Indeed, the European Parliament initially proposed an obligation for companies to avoid contributing to harm through their purchasing practices, but this provision was later

abandoned.[45] Finally, Article 12 of the Directive addresses the "*Remediation of actual adverse impacts*," but does not include a direct obligations pending on companies, but an indirect one, passing by the Member States: "*Member States shall ensure that, where a company has caused or jointly caused an actual adverse impact, the company provides remediation*."

From this interpretation of the Directive's text, the major risks concern the shift of the compliance burden onto suppliers, while allowing multinationals to unilaterally set standards and monitor compliance. This apparent top-down governance model prioritizes economic interests over human rights considerations and fails to promote innovative solutions towards a multi-stakeholder governance of global supply chains. To mitigate these risks, it will be essential for the legislator to emphasize stakeholder consultation, internal implementation costs within companies, and the horizontal and vertical integration of human rights policies. Pursuant to the risks highlighted, it is still unclear what the effect of the Directive will be, and whether the CSDDD will effectively provide for a legal pathway imposing a shift of responsibility onto the multinational.

2.3 Conclusion

This Chapter had the intention on setting the legal framework surrounding SCCs, notably addressing whether codes are mandatory, and whether they are binding. The answer is not straightforward, as the legal landscape around SCCs is evolving, changing across country, and there is no universal jurisprudence determining the legal value of corporate self-regulation (Van der Heijden, 2011; Beckers, 2015). I observe that, while codes are not mandatory yet, public and private actors are increasingly incentivizing companies to adopt them. The EU will soon shift the voluntary adoption of codes to a legal obligation, with the entry in force of the CSDDD in 2026. The Directive will mandate in-scope multinationals and operating in the EU to adopt codes, yet leaving them in charge of choosing their content.

Concerning the legal enforcement of codes, I investigate three legal pathways giving codes a legal value. First, codes become binding when they are part of the contractual terms and conditions of the buyer-supplier purchasing contract. While this avenue has been explored by legal scholars, it contained a major flaw, as corporate accountability is very limited, and suppliers are the main actors accountable in case of SCC violation. This is due to the formulation of SCC standards, mainly phrasing obligations

45 Article 4 of the European Resolution states: "*Undertakings shall ensure that their purchase polices do not cause or contribute to potential or actual adverse impacts on human rights, the environment or good governance*." European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL). This was abandoned in the European Commission Proposal of 2022. https://www.europarl.europa.eu/doceo/document/TA-92021-0073_EN.html

pending on suppliers. Second, SCCs may activate corporate responsibility towards their consumers, notably using consumer misleading or deceptive legal protection. While this pathway may be a strong incentive for multinationals to act ethically and to conform to their set standards as it affects their reputation, it excludes supply chain workers from claiming their rights, given the absence of grievance mechanism for victims. Finally, I foresee how the upcoming due diligence legal framework could activate corporate accountability in the future, once the CSDDD enters in force. Due diligence legislation is a promising pathway and partially aims to fill the gap of the contract law and consumer protection laws. Yet, it remains uncertain what the effect of the CSDDD will be in practice, and many risks can be highlighted that would limit codes' enforceability. All in all, SCCs were, until recently, in the 'soft law' part of the soft-hard law continuum, as also interpreted by the judges in the few cases ruling on SCCs. However, the evolving legal framework seeking to increase corporate accountability for human rights violations in global supply chain operates a progression towards the harder end of the continuum.

While SCCs are increasingly surrounded by a legal framework, significant gaps remain in their enforceability. The primary outcome of the legal analysis is that companies ultimately retain a large discretion to determine whether their codes become binding instruments and who can claim rights based on them. The diversity in the formulation of SCCs, as demonstrated in Section 2.2.1, indicates that there is no consistent practice in this regard. Consequently, for SCCs to have legal value, multinationals must draft their codes with a clear intent to be binding. Proponents of the view that SCCs are not binding argue that since multinational enterprises often create these codes as aspirational and non-binding guidelines, they do not intend to be legally bound by them. Beckers (2016) considers that traditional contract law puts the notion of *intent* as paramount in determining the legal consequences of an SCC, and to interpret commitments from multinationals. Therefore, the clearer the formulation and the more binding the provisions, the greater the chance it will fulfill its intended purpose, because it shows intentions on the company to act upon the code (Lynn et al., 2005). This conclusion calls for further investigation on companies' *intentions* when drafting supplier codes, more specifically whether companies intend to create obligations or merely recommend vague principles of good labor practices. The next two steps of this research are now clear:

- **Step 1**: Measuring the extent of companies' social commitments and their intentions, by assessing whether they adopt codes and how they formulate the standards and obligations laid in codes. This is the objective of Chapter 4 and 5.
- **Step 2**: Assessing whether actions are practically taken to fulfill these social commitments. This will be investigated in Chapters 3, 5, and 6.

While the analysis of the legal framework surrounding of codes of conduct highlights that MNEs have significant discretion in determining whether

codes create binding obligations, courts may occasionally intervene to establish corporate responsibility for supply chain impacts through alternative legal routes. A landmark example is the 2021 ruling in *Milieudefensie et al. v. Royal Dutch Shell* by the Dutch District Court in The Hague.[46] In this case, the court did not take into account Shell's code of conduct, choosing instead to base its judgment on an unwritten standard of care,[47] which it interpreted as requiring Shell to reduce its CO^2 emissions by 45% by 2030. This decision demonstrates that, in certain cases, courts may impose responsibilities on companies that go beyond the commitments outlined in their codes of conduct. However, this judgement has not been upheld on appeal on 12 November 2024, demonstrating how exceptional this initial ruling was.[48]

Pursuant to the analysis of the legal framework, one observes that the *voluntary* and *non-binding* characteristics that defined SCCs until recently are evolving, especially considering the recent adoption of the European Corporate Sustainability Due Diligence Directive. When reading this dissertation, it is crucial to note that this research was conducted *prior* to the shift towards a mandatory adoption of SCCs. While the Commission's proposal for the Directive was published mid-research (in 2022), the adoption of this text was uncertain until the last month of the doctoral research (June 2024). With this shift, the European legislator's approach positions companies as *quasi-legislators* of supply chains, an arrangement that delegates the responsibility of defining codes' content to multinational corporations. In other words, companies are expected to act as 'chain leaders', seeing supply chains as a hierarchical structure with the buying company at the top. This approach raises concerns about its alignment with the complex realities of supply chains, as noted by Baaij and Castermans (2023), but enhances the relevance of this research. Indeed, the study of SCCs' content will be even more relevant as this self-regulatory policy gains in legal value. Therefore, a comparative study examining the period *before* and *after* the Directive's implementation will be instrumental in understanding corporate responses to the new legal framework within their self-regulatory policies. The data provided in this dissertation may serve as a baseline, or the 'before,' for such future studies, offering a valuable foundation for analyzing the impact of the Directive on corporate behavior and compliance within supply chains.

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46 The Hague District Court, *Milieudefensie and Others v. Royal Dutch Shell PLC and Others*, case number C/09/571932, Judgment of 26 May 2021.

47 Book 6, Section 162 of the Dutch Civil Code proscribes acts that conflict with what is generally accepted according to unwritten law

48 Gerechtshof Den Haag. (2024). *Judgment of 12 November 2024* (Case No. 200.302.332/01). ECLI:NL:GHDHA:2024:2100.