ASTRA anti trafficking action

SUPPLY CHAIN DUE DILIGENCE AND LIABILITY IN THE CONTEXT OF TRAFFICKING IN HUMAN BEINGS

COMPARATIVE LEGAL ANALYSIS AND ANALYSIS OF DOMESTIC REGULATIONS WITH A PROPOSAL FOR IMPROVING THE NATIONAL LEGISLATIVE FRAMEWORK

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COMPARATIVE LEGAL ANALYSIS AND ANALYSIS OF DOMESTIC REGULATIONS WITH A PROPOSAL FOR IMPROVING THE NATIONAL LEGISLATIVE FRAMEWORK

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Foreword

Ten years ago, ASTRA organised its first conference on labour exploitation as a form of human trafficking[1]. *The Conference on Human Trafficking for the Purpose of Labour Exploitation* gathered participants from Serbia, Europe and Euro-Asia, who exchanged information pertaining to different problems in relation to exploitation of workers and trafficking in human beings, with the aim to formulate recommendations for the improvement of public policies in the field.

One of the topics at the conference was at the time the largest case of mass labour exploitation of workers from a number of different states, at a construction site in Azerbaijan (the SerbAz case). The activities undertaken by ASTRA in supporting the workers from Serbia who had been exploited in this case, collecting information and compiling a comprehensive report on the circumstances, participants, treatment of the workers on the construction site and their accommodation, contributed to the adoption of an extremely significant judgement by the European Court of Human Rights (ECHR) in Strasbourg, in the case of *Zoletic and Others v. Azerbaijan*[2] which dealt with the Bosnian workers who, after years of unsuccessful attempts to realise their rights before domestic courts, had finally sought justice from the ECHR.

The judgment is bound to be of major importance for all similar cases in the future, while also bearing additional significance for ASTRA, as all the efforts invested in collecting huge amounts of data and reporting in the case were acknowledged by the ECHR and recognised as valuable evidentiary material concerning the events that had taken place on the construction site. The ECHR established a breach of article 4, paragraph 2 of the European Convention on Human Rights, which refers to the prohibition of forced labour and exploitation. The ECHR determined that the state of Azerbaijan had failed to protect the workers, without dealing with the issue of responsibility for the position of workers (outside this court's competence). The ECHR therefore considered and determined that the state had failed to either prevent said events, or to punish the perpetrators. The judgement is therefore even more valuable to all those combating trafficking in human beings, especially for the purpose of labour exploitation, as the European Convention on Human Rights is not an instrument which prohibits human trafficking, yet in this case, the court established trafficking in human beings as a breach of article 4.

Unlike ten and more years ago, when ASTRA provided support mainly to the Serbian nationals who experienced exploitation in some other state, in the last three years, there have been more and more foreign workers that experience labour exploitation on the territory of Serbia. These are citizens from Middle or Far East countries, who arrive to Serbia lured by the promises of salaries many times greater than what they could earn in their countries of origin. However, hundreds of them have experienced mild or severe labour exploitation, limitation of movement, physical and psychological threats of their employers, inhumane accommodation arrangements, inadequate protection at work, denial of earnings, and working under contracts that are not in line with either Serbian legislation, or international standards.

[1] March 2012, https://astra.rs/konferenciju-o-trgovini-ljudima-u-cilju-radne-eksploatacije/
[2] https://www.stradalex.com/en/sl_src_publ_jur_int/document/echr_20116-12

The following section will contain a short overview of the worrying similarities between the two mass cases of human trafficking for the purpose of labour exploitation on the territory of Serbia, when it comes to the circumstances of the cases and reactions by the Serbian state authorities with the competence to act and implement applicable legislation, as well as to secure observance of the numerous ratified international standards and conventions which pertain to the protection and rights of exploited workers. These are the cases of the Indian workers exploited in the construction of the Corridor 10 and at a construction site in Kraljevo (2019-20), and of the Vietnamese workers exploited at the construction site of a tyre factory of the Chinese company of Linglong in Zrenjanin.

1. Complex language and cultural barriers and differences

The Indian and Vietnamese workers came to Serbia for work, without much information about the country that they were coming to, lured by the promises of earnings considerably higher than what they could earn for similar jobs in their own countries. In addition to not being familiar with the climate (neither of them were prepared for different weather, low temperature, rain and snow on the sites), both groups of works, due to their distinct languages and a small number of people in Serbia with whom they could communicate without difficulties, were practically deprived of the opportunity to communicate with anyone outside their construction sites and accommodation facilities, and thereby could not seek any kind of help or support. Their lack of knowledge of the local language and circumstances led to only pieces of information reaching the workers being those originating from the very persons who exploited them or supported their exploitation. The quality of the information was highly questionable, so, for example, the workers from Vietnam, in one of the contracts they had signed, were informed that Serbia was a state with strict sharia law, where the punishment for stealing was cutting off one's hand. Members of the ASTRA victim support team communicated with the workers who had smartphones and access to the internet, via an online translation service, the fact which represents an additional aggravating circumstance, since the quality of such services is questionable and one cannot rely on the accuracy of the translation.

2. Huge number of presumed victims, exploited workers

In the case of Indian workers, assessments range from 90 to almost two hundred workers, while in the case of Vietnamese workers assessed numbers ranged from 600 to more than a thousand workers. Such a huge number of the workers hindered communication (it was mostly realised through one or more workers who had certain knowledge of English and they conveyed the messages received from the outside world to others), while it also made it harder for help and support efforts to be realised, since the capacities of the organisations involved in the provision of such support have been limited.

3. Limited access to the workers

Both these groups of workers were pretty much isolated in their accommodation

facilities, outside populated areas, and accordingly less accessible to the organisations that provided help and support. Furthermore, due to such isolation, the workers were also unable to leave construction sites and accommodation facilities, due to remoteness of any other buildings and dwellings, but also because of the threats and punishments that they were exposed to, should they attempt to leave the premises. Not even in the cases when workers needed medical help, it was easy to reach them, or to organise help by the competent local services and institutions.

4. Contracts, work permits, the right to unionize

In both these cases, the Labour Inspectorate of the Republic of Serbia established that there were workers on the construction sites that did not possess valid work permits, so proceedings were initiated before the competent misdemeanour courts. Not one of the contracts available to ASTRA and other organisations was translated into Serbian, so the question is who exactly assessed harmonisation of the contracts with applicable national and international labour rights standards. Additionally, the workers themselves signed (sometimes even by leaving their fingerprints) contracts that were in English, while the experience in the field showed that a majority of them did not speak this language, which left room for major abuses. Furthermore, by inspecting the contracts and comparing them to applicable legislation, it has been established that all these contracts were in breach of domestic laws and international standards, as they, inter alia, stipulated inadequate working hours, disproportionate punishment of workers for various "offences", suspended the workers freedom of association and unionization, etc.

Due to all aforementioned facts and the gravity of the circumstances that the workers endured, it is understandable that a majority of them had difficulties in recognising that they were victims of labour exploitation. Workers from both groups mentioned experiences of working in different countries, and the unexpected complexity of the circumstances that they encountered in Serbia, yet after periods of dire circumstances, threats, unpaid salaries, confiscation of passports, limited movement, not having adequate work equipment, sickness, hunger and cold, a majority of the workers finally said that they just wished to return home (or continue their travel towards some EU country), even without their earnings being paid. This indeed happened, eventually. Except for a couple of Indian workers who are currently attempting, supported by ASTRA and the legal representatives engaged in this case, to realise their right to be paid before court, hundreds of workers from India and Vietnam returned to their countries of origin without adequate remuneration, often with but scanty pocket money which was probably insufficient to cover for the costs of their return to the place of residence.

6. Role of the Serbian state, failure to react, political relations with the workers' states of origin and untouchability of capital investments in Serbia

What is particularly troublesome when it comes to this trend is the fact that in both these cases (Indian and Vietnamese workers) the Republic of Serbia had its active role. In the case of the Indian workers working on the Corridor 10, this was a **state**

capital investment, while when it comes to the Linglong factory in Zrenjanin, this is a production facility for which Serbia has provided to the company **financial and non-financial state incentives** in the amounts which have not been recorded thus far (some specialised organisations assessed these incentives to have been illegal even). The reactions by Serbian state authorities to numerous reports and complaints received pertaining to these cases from ASTRA, as well as from other actors, had some common characteristics, as they all involved **ignoring, downplaying the importance and gravity of workers' claims and finally, denying the state's competence and authority to deal with the reported issues**.

7. Opening a window for further abuses

In addition to the fact that none of the cases got its epilogue (nor any of them would, as it seems), Serbia has been expanding the list of the states with whom it would establish the regimes that facilitate migration of workforce from their territory to Serbia. Due to the previously described cases, as well as the ever present trend of Serbian citizens leaving abroad for work and the increased risk of human trafficking for the purpose of labour exploitation, ASTRA will, in the following period, continue to monitor the relevant strategic and legislative frameworks, report on the cases in practice, create and participate in the initiatives to improve the existing framework, and provide direct support to victims of labour exploitation, either Serbian nationals, or foreigners.

"States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence.

States individually are the primary duty-bearers under international human rights law, and collectively they are the trustees of the international human rights regime. Where a business enterprise is controlled by the State or where its acts can be attributed otherwise to the State, an abuse of human rights by the business enterprise may entail a violation of the State's own international law obligations. Moreover, the closer a business enterprise is to the State, or the more it relies on statutory authority or taxpayer support, the stronger the State's policy rationale becomes for ensuring that the enterprise respects human rights."

UN Guiding Principles on Business and Human Rights,
Framework on Business and Human Rights[3]

We should also mention the findings of the latest research of public perceptions in different target groups in Serbia when it comes to trafficking in human beings[4] which indicate that, in the general population, sexual exploitation is still one of the forms of human trafficking that are the easiest to recognise. Labour exploitation is, for now, the least recognisable form of human trafficking among the citizens. When we combine this "invisibility" of the problem in the general population, with the thus far recorded reactions by state authorities, a room is left for numerous abuses and

[3] GuidingPrinciplesBusinessHR_EN.pdf (ohchr.org)
[4] https://drive.google.com/file/d/14rdXnjJbZmI-GOGsygJ4X1P9YIT_RfE9/view

undisturbed continuation of trafficking in human beings for the purpose of labour exploitation of either our citizens abroad, or of the ever growing numbers of migrant workers on the territory of Serbia.

Therefore, in addition to meticulous collection and systematisation of the current cases involving domestic and foreign workers, ASTRA also works on reporting all the cases to state authorities, in line with the purview of their authority and competence. Furthermore, ASTRA has assumed an active role in proposing concrete solutions that could contribute to diminishing the risk of human trafficking for the purpose of labour exploitation, as well as to improving reactions by state authorities in protecting thus exploited workers.

This analysis and proposal for the improvement of public policies are the results of analysing high quality solutions from other states, as well as of the existing Serbian framework, in an attempt to provide concrete proposals for the improvement of the policies and legislation in the Republic of Serbia, in order to strengthen the overall framework for combating trafficking in human beings for the purpose of labour exploitation.

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I INTRODUCTION

The globalisation of the world economy has made the world highly integrated and interconnected. And while such interconnection has both its positive and negative aspects, one of the aspects that requires special attention is related to supply chains.

Supply chain is the entire process of making and selling commercial goods, including every stage from the supply of materials and the manufacture of the goods through to their distribution and sale.[5] It is a complex relationship between a company and its suppliers, which implies a series of steps that need to be taken in order to turn the raw material into a product, and finally to get the product or service to market. Supply chains bring great benefit to a company through integrated and diversified resources, reduced logistics costs, improved logistics efficiency, and high quality of the overall product or service.[6]

Although the terms "supply chain" and "value chain" are often used interchangeably, there is some distinction between them.

In fact, a value chain adds value to a product at every step of the process, including planning, design, development and delivery. While the supply chain starts with the supply of raw materials and ends with the delivery of the finished product, the value chain begins with searching for high-quality raw materials and ends with adding value to the product. Moreover, while the supply chain includes a series of entities and activities that start from the supplier and end with the customer, the value chain entirely focuses on activities, such as innovation, development, and marketing, thus adding value to a product before delivery.[7]

By its legal nature, the essence of a supply chain is a subcontracting chain. Subcontracting occurs when a contractor engaged by an investor or the investor itself entrusts another entity with the performance of part of the works or services that are the subject matter of that contract. The second entity, entrusted with the performance of part of the works or services, is referred to as "subcontractor". Subcontractors may also subcontract some elements of the works or services that they are required to deliver in accordance with the subcontracting arrangements with the contractor ("further subcontracting").[8]

Further subcontracting creates a kind of "chain of subcontracting" in which each link has a contractual obligation to another link, but the principal contractor always has full control over all subcontractors involved in the process.[9]

However, the greatest risk of violation of human rights and workers' rights is hidden precisely in the described functioning of supply chains, especially at the international

[5] Lee Williams, Defining the responsible supply chain, 16.1.2019, https://www.minespider.com/blog/defining-the-responsible-supply-chain#:~:text="Responsible%20sourcing%2C%20also%20referred%20to,4)

[6] What's the difference between a supply chain and a value chain?, 21.10.2021. https://grantedltd.co.uk/funding-blog/whats-the-difference-between-a-supply-chain-and-a-value-chain/#:~:text=To%20recap%3A%20the%20supply%20chain,which%20maximises%20the%20competitive%20advantage.

[7] Supply Chain Vs Value Chain, 22.8.2022, https://www.wallstreetmojo.com/supply-chain-vs-value-chain/

[8] SIGMA Public Procurement Brief 37, September 2016, https://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-37-200117.pdf p. 1.

[9] Liability in Subcontracting Chains: National Rules and the Need for a European Framework, 22.8.2022, https://www.europarl.europa.eu/RegData/etudes/STUD/2017/596798/IPOL_STU(2017)596798_EN.pdf p. 23.

level. As regards human rights violations, they can be very diverse and severe, such as modern slavery, trafficking in human beings, forced labour, debt bondage, sale and exploitation of children.

The term "modern slavery" is usually used as an umbrella term for human trafficking, forced labour and debt bondage. All of these crimes have a common feature – they involve one person depriving another person of their liberty in order to exploit them for personal or commercial gain. According to the Global Slavery Index, an estimated 30 million people in the world today live in some form of modern slavery. Nowadays, modern slavery sometimes still takes the form of buying and selling people, where people are physically held in chains. However, victims of modern forms of slavery are usually controlled through far more subtle mechanisms. In the international economy, there are many examples of migrant workers who are forced to work against their will. For example, in 2012, 30 migrant workers from Lithuania were freed from exploitative working conditions on a farm in Kent, UK. The workers were sent from the country of origin to work on a free-range chicken farm, supplying Freedom Food and Happy Eggs. Once in the UK, they were immediately put into debt bondage and forced to work 17 hours a day, and kept under control by violence and verbal abuse.

Article 4 of the Council of Europe Convention on Action against Trafficking in Human Beings[10] defines trafficking in human beings as "recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs."

Forced labour is work or service that is taken from a person under the menace of a penalty and for which the person has not offered themself voluntarily.

Debt bondage, in the context of modern slavery, is a worker pledging their labour or the labour of others under their control as security for a debt, or when either the real value of the work undertaken is never applied to repayment of the debt, or the length and nature of the work that has to be undertaken is never fully defined or limited.

The sale and exploitation of children involves situations where children are transferred by one person to another for remuneration or other consideration, or situations where children are used in sexual activities for remuneration.[11]

In addition to such drastic violations of human rights, there are also various, no less significant, forms of violation of the rights of employees. There is evidence, especially in cases of posted employees, that they have been exploited and left without wages or part of the wages to which they are entitled. In accordance with the Law on the Conditions for Posting Employees to Temporary Work Abroad and Their Protection,

[10] Council of Europe Convention on Action against Trafficking in Human Beings, adopted on 16 May 2005; Law on Ratification of the Council of Europe Convention on Action against Trafficking in Human Beings ("Official Gazette RS – International Treaties", no. 19/2009).

[11] Tackling modern slavery in supply chains - a guide 1.0, 22.8.2022, https://respect.international/wp-content/uploads/2017/11/Tackling-Modern-Slavery-in-Supply-Chains.pdf p. 6

the term "posted employee" is defined as "an employee who is employed by an employer who sends him to work abroad for a limited period of time after which he/she is returning to work with the employer."[12] There were also situations where posted employees were not able to collect their receivables from the employer, because the company/employer disappeared or never existed.[13] Therefore, it is necessary to establish clear liability in the subcontracting chain in order to protect workers.

The liability of subcontractors can influence the increased attention of the principal contractor, that is, it can give a strong incentive to contractors to choose subcontractors more carefully and to check whether subcontractors fully fulfil their obligations according to the rules of the host country. In principle, we can distinguish between joint and several liability and chain liability.

In the case of joint and several liability, if a subcontractor fails to fulfil its obligations with respect to employees, i.e. it fails to pay wages, taxes and contributions, its contractor may be liable for its entire debt. In this regard, employees and the Tax Administration have one more guarantor.[14]

Chain liability extends joint and several liability through the entire chain or a large part of it. As a result, liability also extends to the principal contractor. However, it should be kept in mind that the principal contractor is not necessarily the investor or client (contracting entity). If the national legal system does apply liability to an investor/client (ordering party) as well, we can use the term "full chain liability", which means that all links of the subcontracting chain can be held liable.

The work of temporary employment agencies deserves special attention. According to the Law on Agency Employment, they are defined as a company or entrepreneur registered with the competent authority in the territory of the Republic of Serbia, which establishes a working relationship with an employee for the purpose of temporarily assigning him or her to an employer in the territory of the Republic of Serbia to work under its supervision and management. Assigned employee is a natural person who is employed by the Agency in accordance with this law and the law regulating labour, and who is assigned to the user employer for the purpose of temporarily performing tasks under its supervision and management, in accordance with this law. The user employer is a legal entity, entrepreneur or a representative office or branch of a foreign legal entity that is registered in accordance with the law in the territory of the Republic of Serbia, a state authority, an authority of autonomous province and local self-government, unless otherwise specified by this law, where, under their supervision and management, the assigned employee temporarily performs tasks, in accordance with this law.[15]

This type of employment carries risks both for the user employer and for the assigned employee. Employment conditions for assigned employees often differ from the conditions for those who are permanently employed by the user employer. Moreover, assigned employees are often paid less and do not have the same benefits as permanent employees, and the user employer often tries to keep the smallest

[12] Law on the Conditions for Posting Employees to Temporary Work Abroad and Their Protection, Article 2, paragraph 1, item 3 (Official Gazette of the RS, nos. 91/2015 and 50/2018 art. 2, para. 1, item 3)
[13] Tackling modern slavery in supply chains - a guide 1.0, 22.8.2022, https://respect.international/wp-content/uploads/2017/11/Tackling-Modern-Slavery-in-Supply-Chains.pdf p. 23.
[14] Ibid, p. 21.
[15] Law on Agency Employment (Official Gazette of the RS, no. 86/2019), Article 2, paragraphs 1, 2 and 3

possible number of permanent employees in order to minimise expenses, while using assigned employees to compensate for the lack of labour.[16]

In addition to initiatives to prevent the violation of human rights and the rights of workers in the supply chain, there is a noticeable trend, both at level of the European Union and in the legislation of its Member States, to impose the obligation of environmental due diligence as a form of due diligence in the supply chain. For example, Article 15 of the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 requires the Member States to ensure that certain companies adopt a plan to ensure that the business model and strategy of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C in line with the Paris Agreement. This plan shall identify, on the basis of information reasonably available to the company, the extent to which climate change is a risk for, or an impact of, the company's operations.[17]

[16] Liability in Subcontracting Chains: National Rules and the Need for a European Framework, 22.8.2022, https://www.europarl.europa.eu/RegData/etudes/STUD/2017/596798/IPOL_STU(2017)596798_EN.pdf , p. 25.

[17] Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, 22.8.2022, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071

II OVERVIEW OF COMPARATIVE LEGAL SOLUTIONS

1. EUROPEAN UNION

The Treaty on the Functioning of the European Union (EU)) contains several fundamental freedoms, which represent the basic and founding principles of the EU. Freedom of movement of workers, freedom to provide services, and freedom of establishment are guaranteed to every citizen or company in a member state. In order to protect workers, the EU has adopted several regulations and directives; however, except for the Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ("the IMI regulation")[18], (hereinafter: Enforcement Directive), all directives and regulations arising from the European labour legislation do not directly impose rules on liability in subcontracting chains. Except for the Enforcement Directive, those legal acts do not aim to specifically protect workers included in the subcontracting chain, but generally protect all posted workers.[19]

This Directive prevents fraudulent and abusive subcontracting practices by establishing a liability mechanism, but also recognises other problems, such as a "letter-box-company". It is a company whose purpose is not to actually perform any real economic activities, but it has rather been established with fraudulent intentions – to circumvent the obligations such as the payment of tax, social security contributions, etc. Therefore, a posting company must develop substantial activities, other than purely internal management and/or administrative activities.[20]

The subcontracting liability is limited to the construction sector. This Directive covers also posting by temporary work agencies provided that it is aimed at activities in the construction sector. Other economic sectors are not covered by the Directive and remain under control of national legislations.[21]

When it comes to liability of subcontractors, article 12 of the Directive stipulates that member states remain are free, having consulted with relevant social partners, and in line with the national law or practice, to undertake additional measures, on a non-discriminatory and proportionate basis so as to secure a production chain subcontractor "could be held liable by the posted worker with respect to any outstanding net remuneration corresponding to the minimum rates of pay and/or contributions due to common funds or institutions of social partners".

However, Article 12 of the Directive enables member states on voluntary basis to provide for so-called "escape clause", according to which a contractor that has undertaken due diligence obligations as defined by national law shall not be held liable. In summary, the liability of Article 12 of the Enforcement Directive resembles a very "soft touch"

[18] Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation')

[19] Liability in Subcontracting Chains: National Rules and the Need for a European Framework, 22.8.2022, https://www.europarl.europa.eu/RegData/etudes/STUD/2017/596798/IPOL_STU(2017)596798_EN.pdf, p. 28.

[20] Ibid, p. 44

[21] Ibid, p. 47

approach on liability in subcontracting chains. In comparison to other concepts of liability, it only provides for liability one up in the chain and contains a voluntary escape clause, whose requirements are not defined. Member states reluctant to the concept of subcontracting liability might use that in order to undermine liability by defining only little requirements for a proper due diligence, for instance by simply providing a written statement of respecting the minimum rates of pay.[22]

Finally, it must be taken into consideration that the concept of liability in subcontracting chains is a highly controversial matter within the EU. The concept of more stringent liability up to a full chain liability has proven to be too ambitious as some member states were reluctant to implement a liability scheme into their national legal systems.[23]

Regarding due diligence, the European Parliament and the Council on 23 February 2022 adopted the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (hereinafter referred to as "Directive Proposal").[24] The Directive Proposal aims to encourage sustainable and responsible corporate behaviour across global value chains.

The new due diligence rules will apply to the following companies and sectors in the EU as follows: (1) Group 1: all EU limited liability companies of substantial size and economic power (with 500+ employees and EUR 150 million+ in net turnover worldwide). (2) Group 2: Other limited liability companies operating in defined high impact sectors, which do not meet both Group 1 thresholds, but have more than 250 employees and a net turnover of EUR 40 million worldwide and more. For these companies, the rules will start to apply 2 years later than for Group 1. This will apply also to non-EU companies active in the EU with turnover threshold aligned with Group 1 and 2, generated in the EU.[25]

Article 3 of the Directive Proposal defines value chain as "activities related to the production of goods or the provision of services by a company, including the development of the product or the service and the use and disposal of the product as well as the related activities of upstream and downstream established business relationships of the company."[26]

Member States shall ensure that companies conduct human rights and environmental due diligence by carrying out the following actions: (a) integrating due diligence into corporate strategies; (b) identifying actual or potential adverse impacts; (c) preventing and mitigating potential adverse impacts, and bringing actual adverse impacts to an end and minimising their extent; (d) establishing and maintaining a complaints procedure; (e) monitoring the effectiveness of their due diligence policy and measures; and (f) publicly communicating on due diligence.[27]

[22] Liability in Subcontracting Chains: National Rules and the Need for a European Framework, 22.8.2022, https://www.europarl.europa.eu/RegData/etudes/STUD/2017/596798/IPOL_STU(2017)596798_EN.pdf , p. 48.
[23] Ibid, p. 51
[24] Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, 22.8.2022, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071
[25] Just and sustainable economy: Commission lays down rules for companies to respect human rights and environment in global value chains, European Commission - Press release, 22.8.2022, https://single-market-economy.ec.europa.eu/news/just-and-sustainable-economy-commission-lays-down-rules-companies-respect-human-rights-and-2022-02-23_en
[26] Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, Article 3, 22.8.2022, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071
[27] Ibid, Article 4

Member States shall ensure that companies integrate due diligence into all their corporate policies. The due diligence policy shall contain the following: (a) a description of the company's approach, including in the long term, to due diligence; (b) a code of conduct describing rules and principles to be followed by the company's employees and subsidiaries; (c) a description of the processes put in place to implement due diligence, including the measures taken to verify compliance with the code of conduct and to extend its application to established business relationships.[28]

Although the Directive Proposal could be a significant step forward in reducing the companies' adverse impact on workers, local communities and the environment around the world, it seems that it is already causing controversy. In fact, a group of civil society organisations criticised the Directive Proposal and gave a series of recommendations on how the text should be changed and what should be implemented.

Inter alia, legislators were urged to introduce an effective and robust obligation to prevent adverse human rights and environmental impacts across the entire value chain, in a proportionate and risk-based manner. Regrettably, the proposed Directive limits the due diligence obligation to "established business relationships", which falls behind international standards and risks generating perverse incentives for companies to restructure their value chains in order to avoid their due diligence obligation.[29]

Furthermore, the definitions of adverse human rights and environmental impacts must be broadened. In any event, the corresponding annex would need to be more inclusive in order to integrate all the relevant international instruments, which should be updated on a regular basis in order to allow for their further development.

One of the main objections refers to civil liability and access to justice. In fact, legislators must strengthen provisions on civil liability and access to justice. In court, the burden of proof must be on the company, to prove whether it acted appropriately or not. This burden must not be on the claimant who has limited resources and little access to evidence. Companies must also remain liable even when they have sought to verify compliance through industry schemes and third-party audits. Other well-known barriers to justice typical of transnational cases must also be lifted, including the lack of claimants' access to key information, unreasonable time limitations, and obstacles to collective redress. Independent non-profit organisations with a legitimate interest in representing victims must also be granted the right to act on their behalf.[30]

Finally, the Directive Proposal will certainly be discussed now and, in light of its ambitious and controversial proposals, will be subject to amendment in the process of adoption by the European Parliament and the Council. Pressure for early agreement and adoption of the Due Diligence Directive Proposal is expected to be intense, since the aim is to harmonise requirements in the EU in the wake of a number of national laws, such as limiting other national laws imposing due diligence requirements leading to a patchwork of inconsistent obligations. Once adopted, Member States must transpose the measure into their national laws.[31]

[28] Ibid, Article 5

[29] Civil society statement on the proposed EU Corporate Sustainability Due Diligence Directive, 11.5.2022. https://www.amnesty.org/en/documents/ior60/5588/2022/en/

[30] Ibid.

[31] European Commission issues major proposal on due diligence obligations to protect human rights and the environment across supply chains, 22.8.2022, https://www.whitecase.com/insight-alert/european-commission-issues-major-proposal-due-diligence-obligations-protect-human#:~:text=The%20Proposed%20Directive%20introduces%20a,or%20end%20actual%20adverse%20impacts.

In the meantime, in the course of preparing the present report, more precisely on 10 November 2022, the EU Parliament adopted the Corporate Sustainability Reporting Directive[32]. The EU Council is expected to adopt it by the end of November 2022, after which it will be published in the Official Journal and will enter into force 20 days after publication.

This Directive will impose detailed sustainability reporting requirements and will significantly expand the number of EU and non-EU companies subject to the EU sustainability reporting framework. The required disclosures will go beyond environmental and climate change reporting to include social and governance matters (for example, respect for employee and human rights, anti-corruption and bribery, corporate governance and diversity and inclusion). In addition, companies will have to report on the due diligence processes they implement in relation to sustainability matters and the actual and potential adverse sustainability impacts of company's operations and value chain. In accordance with this Directive, companies will be required to disclose a wide range of sustainability-related information including: (1) a brief description of the company's business model, strategy and sustainability risks and opportunities. The focus on sustainability is no longer optional or voluntary, but mandatory, and must be embedded in the company's long-term vision and strategy, and must also be applied to its policies; (2) implementation plans in relation to the transition to a sustainable economy, measures taken to limit global warming in line with the Paris Agreement and to achieve climate neutrality by 2050 and exposure to coal, oil and gas-related activities; (3) greenhouse gas emission targets; and (4) due diligence processes implemented by the company in relation to sustainability matters and the actual and potential adverse impacts of the company's operations and value chain. It is expected that the reporting required under this Directive will have indirect implications for supply chain and other outsourcing partners.[33]

As regards the relationship between the Due Diligence Directive Proposal and the Corporate Sustainability Reporting Directive, they are meant to be applied in tandem by corporate entities. While the Due Diligence Directive Proposal outlines mandatory due diligence companies must implement regarding human rights and environmental impacts along their supply chains, the Corporate Sustainability Reporting Directive serves as the major reporting vehicle by which companies will report their relevant sustainability activities. Both proposals reference the UN Guiding Principles on Business and Human Rights (UNGPs) and the OECD Guidelines for Multinational Enterprises (OECD Guidelines) as foundational international due diligence frameworks.[34]

[32] European Parliament legislative resolution of 10 November 2022 on the Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting (COM(2021)0189 – C9-0147/2021 – 2021/0104(COD))

[33] EU Corporate Sustainability Reporting Directive – new sustainability disclosure obligations for EU and non-EU companies, 25.11.2022, https://www.mayerbrown.com/en/perspectives-events/publications/2022/11/eu-corporate-sustainability-reporting-directive-new-sustainability-disclosure-obligations-for-eu-and-non-eu-companies

[34] Everything you need to know about the EU CSDD & EU CSRD, Ashley Smith-Roberts, 25.11.2022, https://www.levinsources.com/knowledge-centre/insights/eu-csdd-eu-csrd-mining

2. GERMANY

In June 2021, Germany adopted the Law on Due Diligence Corporate Obligations in Supply Chain[35], which should come into force in 2023. This law carries new rules to ensure that companies doing business in Germany meet the standards set out in United Nations Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises[36], but also in the National Plan on Business and Human Rights[37].

The law imposes due diligence obligations on companies that have an administrative headquarters, statutory seat, or branch office in Germany to comply with human rights and environmental standards. It also exposes them to serious liabilities upon violations.[38]

This is the first time the responsibility of German companies to respect human rights in global supply chains has been put on a legal footing. The law applies to the following companies: (1) From 2023: Companies based in Germany with more than 3,000 employees, or German-registered branches of foreign companies with more than 3,000 employees. (2) From 2024: Companies based in Germany with more than 1,000 employees, or German-registered branches of foreign companies with more than 1,000 employees.[39]

The law contains an exhaustive list of internationally recognised human rights conventions. The legal interests protected in those conventions are used to prohibit corporate action that may violate protected legal positions. These include, in particular, the prohibition of child labour, slavery and forced labour, the disregard of occupational safety and health obligations, withholding an adequate wage, the disregard of the right to form trade unions or employee representation bodies, the denial of access to food and water as well as the unlawful taking of land and livelihoods.[40]

Under the German Law, companies must monitor and act upon violations in their own operations, as well as operations of their direct suppliers worldwide starting from the extraction of the raw materials to the delivery to the end customer. In addition, if companies obtain substantiated knowledge of a possible violation of human rights or environmental standards by one of their indirect suppliers, they must immediately conduct a risk analysis for these violations.[41]

In accordance with Article 3, Section 2 of the Act, enterprises are under an obligation to exercise due regard for the human rights and environment-related due diligence obligations, with the aim of preventing or minimising any risks to human rights or environment-related risks. The due diligence obligations include: (1) establishing a

[35] Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten, (Lieferkettensorgfaltspflichtengesetz, LkSG), https://wirtschaft-entwicklung.de/fileadmin/user_upload/5_Wirtschaft_und_Menschenrechte/Downloads/Lieferkettensorgfaltspflichteng-esetz.pdf
[36] UN Guiding Principles on Business and Human Rights (UNGP)
[37] Nationaler Aktionsplan, Wirtschaft und Menschenrechte (NAP)
[38] Igor Konstantinov, German Supply Chain Act (LkSG): Due Diligence Obligations Explained, 19.4.2022. https://www.circularise.com/blog/german-supply-chain-act-due-diligence-obligations-explained#:~:text=The%20German%20Supply%20Chain%20Act%20(LkSG)%20is%20the%20first%20legislative,the%20German%20Supply%20Chain%20Act.
[39] Ibid.
[40] Act on Corporate Due Diligence Obligations in Supply Chains, 22.8.2022, https://www.csr-in-deutschland.de/EN/Business-Human-Rights/Supply-Chain-Act/supply-chain-act.html
[41] Igor Konstantinov, Ibid.

risk management system; (2) designating a responsible person within the enterprise; (3) performing regular risk analyses; (4) issuing a policy statement; (5) laying down preventive measures in its own area of business and with respect to direct suppliers; (6) taking remedial action; (7) establishing a complaints procedure; (8) implementing due diligence obligations with regard to risks at indirect suppliers; and and (9) documenting and reporting.[42]

The Federal Office for Economy and Export Control (Bundesamt für Wirtschaft und Ausfuhrkontrolle, BAFA) controls the fulfilment of due diligence obligations under German legislation. If companies fail to comply with their due diligence obligations, the German Law imposes the following sanctions: (1) Fines: Periodic penalty payments of up to EUR 50,000 in administrative enforcement proceedings. (The fines can exceed this amount when imposed for the infringement of these obligations in the past), for administrative offences[43]. In case an average annual turnover of a company is more than 400 million euros, the fine can go up to 2% of the average annual turnover.

(2) Exclusion from public tenders: Upon violation, companies can be excluded from winning public contracts (contracts on public tenders) in Germany for up to three years. and (3) Civil liability: Claims under section 823 of the German Civil Code[44] (Bürgerliches Gesetzbuch or BGB) on the grounds of a breach of a duty of care and claims under foreign law are a realistic threat to German companies violating human rights.[45]

While liability may not have been extended in substantive legal terms, it has been in procedural terms. Thus the Law does not envisage independent legal basis for complaints concerning civil law liability. This thereby leads to a situation, when a company breaches the due diligence obligation, with consequences for the health of the employees, according to the Law, the injured party cannot seek compensation for the damage from the company (arising from Article 3, Paragraph 3.[46])[47] However, the German Law on Supply Chain now extends the rights of domestic trade unions and non-governmental organisations regarding the assertion of third party rights violations before German courts,[48] that is, their capacity to initiate proceedings for the protection of rights ("special representative complaint"). Thus under Article 11, Paragraph 1 of the Law, any person claiming that their rights of paramount importance ("especially important legal right") have been violated may authorise a domestic trade union or non-governmental organisation[49] to initiate proceedings (in its own

[42] Act on Corporate Due Diligence Obligations for the Prevention of Human Rights Violations in Supply Chains (Lieferkettensorgfaltspflichtengesetz – LkSG), section 3, https://www.bmas.de/SharedDocs/Downloads/DE/Internationales/act-corporate-due-diligence-obligations-supply-chains.pdf?__blob=publicationFile&v=3

[43] According to Article 24 of the Law, in case company breaches its stipulated obligations, this constitutes an administrative offence, whereby criminal liability does not exist (since, unlike other legal systems in Europe, in Germany companies are not subject to criminal liability). Često postavljena pitanja o nemačkom Zakonu o dužnoj pažnji u lancu snabdevanja (Frequently asked questions concerning the German Due Diligence in Supply Chains Act - ZDPLS), Centar za politike emancipacije, p. 13.

[44] Bürgerliches Gesetzbuch (BGB), Gesetze im Internet, https://www.gesetze-im-internet.de/bgb/BJNR001950896.html

[45] Igor Konstantinov, ibid. Up. Five myths about the German Supply Chain Act, CMS LAW-NOW, 20 Jan 2022, https://www.cms-lawnow.com/ealerts/2022/01/five-myths-about-the-german-supply-chain-act; Up. Često postavljena pitanja o nemačkom Zakonu o dužnoj pažnji u lancu snabdevanja (Frequently asked questions concerning the German Due Diligence in Supply Chains Act - ZDPLS), pp. 11-14. http://www.industrijskisindikat.org/userfiles/file/Cesto_postavljenja_pitanja_o_nemackom_zakonu_o_duznoj_paznji_u_lancima_snabdevanja.pdf, str. 11.

[46] According to Art. 3, Para. 3 of the Law: Infringement of the obligations in this Law does not imply any liability concerning civil legislation. Any civil legislation liability existing independently of this Law remains unchanged.

[47] Često postavljena pitanja o nemačkom Zakonu o dužnoj pažnji u lancu snabdevanja (Frequently asked questions concerning the German Due Diligence in Supply Chains Act - ZDPLS), p. 13.

[48] Igor Konstantinov, Ibid.

[49] When the conditions are fulfilled that the union or NGO are regularly present in sad state and that, according to their statutes, they do not operate commercially or temporarily for the purpose of realisation of human or other recognised rights in the national context, according to Article 11, Paragraph 2 of the Law.

name and for the benefit of the injured party) in order to enable realisation of his/her rights before court,[50]

The Due Diligence in Supply Chains Act requires companies to integrate into their daily operations the basic principles set in their human rights strategies. All business processes must be reviewed on the basis of the human rights strategy and, in this context, codes of conduct or guidelines must be established. Furthermore, the human rights strategy must become a binding component of business relationships.[51]

3. FRANCE

France adopted the Law on Due Diligence of Parent Companies and Contractors[52] (*Loi de Vigilance*) or Corporate Duty of Vigilance Law[53] (hereinafter: French Law) back in 2017. The French Law requires all large French companies (with over 5,000 employees in France or over 10,000 worldwide) to undertake due diligence with regard to the companies they control and all their contractors and suppliers. The French Law is structured around two mechanisms. The first concerns due diligence and is aimed at preventing risks and serious abuses of fundamental rights, health, personal safety and the environment in connection with business activities. The second is a *redress and liability mechanism* for breaches of these obligations by companies.[54]

Article 1 of the French Law establishes new due diligence obligations. As of the entry into force of the Law, interested companies must establish, publish and effectively implement a vigilance plan, which will contain "measures to identify risks and prevent serious violations of human rights and fundamental freedoms, health and safety of individuals and the environment" in their entire sphere of influence.

The vigilance plan must contain, among other things, risk mapping, processes for the regular assessment of the situation of subsidiaries, subcontractors, and suppliers, tailored actions to reduce risks of severe impacts, an alert mechanism on the existence or the materialisation of risks, a system of monitoring implementation measures and evaluating their effectiveness.

Regarding the conditions for liability for due diligence violation, it should be noted that the initially proposed legal solution concerning civil law sanctions was rejected by the Constitutional Court. As a result, the corporate civil liability can only exist in accordance with Articles 1240 and 1241 of the French Civil Code, that is, three elements are required to establish such liability: harmful act, harmful consequence and causal link between the two[55]

[50] Act on Corporate Due Diligence Obligations for the Prevention of Human Rights Violations in Supply Chains (Lieferkettensorgfaltspflichtengesetz – LkSG), section 11, https://www.bmas.de/SharedDocs/Downloads/DE/Internationales/act-corporate-due-diligence-obligations-supply-chains.pdf?__blob=publicationFile&v=3

[51] The German Supply Chain Act – a focus on the new due diligence obligations, 29.6.2022, https://www.roedl.com/insights/supply-chain-act-due-diligence-obligations

[52] Translation according to the Serbian version contained in: Model smernica o vladinim merama za sprecavanje trgovine ljudima u svrhu radne eksploatacije u lancima snabdevanja (Model of Guidelines on Governmental Measures for the Prevention of Human Trafficking for the Purpose of Labour Exploitation in Supply Chains), OSCE, https://www.osce.org/files/f/documents/3/3/475511.pdf, p. 23.

[53] Ibid., LOI no 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (1); French Corporate Duty of Vigilance Law (English Translation).

[54] Dr Daniel Sharma LL.M., Human Rights Due Diligence Legislation in Europe – Implications for Supply Chains to India and South Asia, 26.3.2021, https://www.dlapiper.com/en/middleeast/insights/publications/2021/03/human-rights-due-diligence-legislation-in-europe/#:~:text=The%20Duty%20of%20Vigilance%20Act,is%20structured%20around%20two%20mechanisms

[55] Louise Nhieu, Overview of the French law regarding corporate responsibility, Ambassade de France en Serbie, Liaison Magistrate Office Belgrade- July 2022, p. 10

Regarding a harmful act, not every breach of due diligence duty leads to liability. In fact, the Law establishes only the obligation to create and implement a vigilance plan, as strictly defined by the legislator. In other words, the law establishes the obligation of means, not the obligation of result. Further, as regards harmful consequences, in terms of damage compensation, not all damages can be compensated because the law only takes into account: "severe violations of human rights and fundamental freedoms, health and safety of people and the environment". This is a noticeable difference compared to regular law, which allows reparation for any form of damage. However, the text allows for proven risks of future harm to be taken into account, since the absence of measures in the plan or its ineffective implementation can lead to corporate liability.

In terms of causal link, liability can only be established if it is proven that the company's failure to comply with the obligation of due diligence caused damage. The law does not presume a causal link, which implies that the victim must prove causation between the harmful act and the harmful consequence.[56]

The main consequence of a breach of due diligence is damage compensation. Under French law, two types of compensation are possible: (1) in-kind compensation, which essentially consists of *restitutio in integrum* (reparation), and (2) proportionate compensation, through the award of monetary compensation according to the type of injury and the damage sustained. In addition to the above, the law stipulates that the court may order the publication of its decision, in whole or in part, which may seriously affect the company's reputation.

One of the main criticisms of this law concerns the sanctions, though, they are in truth rarely applied for several reasons. First of all, the law does not provide for any body that would control compliance with the obligations established by the law, and therefore there is no *a priori* control. In other words, in order for a breach to be discovered, it must be reported.

Finally, the law foresees only the broadest measures, and companies are left room to insist on their proposals to a lesser or greater extent, so it has been noticed that since the law came into force, companies do not take any risk by setting excessive and overambitious goals.[57]

4. AUSTRALIA

The Australian Modern Slavery Act entered into force on 1 January 2019. It requires companies carrying out at least part of their business in Australia (regardless of where they are domiciled), with a consolidated revenue of at least AUD 100 million to report on the steps they have taken to identify and reduce risks of modern slavery, as well as how they assess the effectiveness of their actions.[58]

The Act defines 'modern slavery' with reference to the Commonwealth Criminal Code and international law. The definition includes conduct that would constitute slavery and slavery-like offences, whether or not the conduct took place in Australia; human

[56] Ibid, p. 11
[57] Ibid, p. 12
[58] Study on due diligence requirements through the supply chain, Publications Office of the European Union, 2020, p. 196, https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en

trafficking; and the worst forms of child labour. Slavery and slavery-like conduct would include forced labour, deceptive recruitment and debt bondage.[59]

In fact, modern slavery affects millions of people worldwide and unfortunately, is a multi-billion-dollar industry. Many Australian companies may be unaware that modern slavery practices are occurring in their supply chains (the number of victims is roughly estimated to up to 15,000). By managing and reporting on the risks of modern slavery, Australian entities join the international effort to eliminate modern slavery. They also help to protect themselves from serious legal, reputational, operational and financial risks of being connected with modern slavery.

Each year, reporting entities must submit a 'modern slavery statement' to the Minister for Home Affairs. The modern slavery statement must describe the risks of modern slavery in the operations and supply chain of the reporting entity. The statement must also include the information about the actions taken to address those risks; identification of the reporting entity; description of structure, operations and supply chains of the reporting entity; description of the risks of modern slavery practices in its supply chains; description of the process of consultation with any entities the reporting entity owns or controls or with which it is issuing a joint modern slavery statement.

The statement must also be in a form approved by the Ministry, must be approved by the governing body of the entity, must be signed by a responsible member of the entity and submitted within 6 months of the end of the reporting period.

In order to produce a modern slavery statement, a reporting entity will need to engage various functions within the entity. The first step may be to build awareness of what modern slavery is in practice and how it may be relevant to the organisation. The sectors that procure finished goods, provide food and supplies to the business, etc. must all examine their activities and supply chains to evaluate risk. Further, entities within the corporate group, and outside organisations such as suppliers, trade unions, subcontractors, etc. should also be consulted.[60]

Therefore, conducting due diligence on modern slavery risks may include: mapping key parts of the organisation's operations and supply chain and assessing the risk of modern slavery occurring within them. Risk assessment may include developing human rights guidelines, adopting terms of business with suppliers, adopting a process to help monitor the effectiveness of measures taken to prevent cases of modern slavery in supply chains, as well as assessing the effectiveness of response where modern slavery is identified.

The Act does not include penalties if the entities who have that obligation do not submit the modern slavery statement. However, a lack of penalties does not necessarily mean a lack of consequences.

The Minister can publish information on the register about a reporting entity's failure to submit a statement, provided the Minister first makes a request to the entity for explanation or remedial action and the entity fails to comply. Entities' statements will

[59] Modern Slavery Act, Factsheet, July 2020, https://www.lawcouncil.asn.au/publicassets/535b277c-f3d5-ea11-9434-005056be13b5/Modern%20Slavery%20Factsheet%20Final%20-%20July%202020.pdf

[60] Ibid., p. 2

also be the subject of public scrutiny by interested stakeholders including consumer and investor groups, non-governmental organisations, and the media.[61]

Finally, the Act does not require reporting entities to certify that they are slavery free, but it does require entities to show concrete steps towards understanding and managing their modern slavery risks in both their operations and supply chains and provides a clear framework for doing so.[62]

5. THE UNITED STATES OF AMERICA

Before starting a more detailed analysis of the relevant legislation in the United States (US), we will present one illustrative case, which, among a number of other similar cases, prompted the California legislator to take action. This is the case of Florencia Molina.

Florencia Molina, a mother of three children, sewed clothes for a well-known department store in Mexico. In Mexico, Molina had two jobs, but still could not make ends meet – particularly after her ex-husband kicked her and her children out of the house. Since she was in a very difficult situation, her sewing instructor connected her with an American woman who promised her a good job as a seamstress with a decent salary and housing. After she accepted the offer, Molina made her way to the U.S., planning on staying no more than six months — just long enough to earn enough money to return to her children in Mexico and open a sewing shop.

However, immediately upon arrival in Southern California, Molina found herself in trouble. Molina's boss confiscated all of her identification documents and threatened her with a possible action of law enforcement. In addition, the factory entrances were locked during the day and the watchmen guarded the doors at night, prohibiting anyone from escaping.

Molina's wages were withheld under the guise of repaying the debt she had incurred during the trip from Mexico to California. Molina's boss threatened to harm her if she tried to contact the authorities and forbade her to communicate with her family back home. In an interview with Ms. Magazine, Molina recounted her trafficker's words, "she told me she could kill me and no one would ask her for me. She told me dogs have more rights than I have in this country."

Day after day Molina and her peers were abused and traffickers even used threats to the lives of their loved ones back home. One Sunday morning, forty days into the abuse, Molina was permitted to attend a church service and as soon as she had an opportunity, she escaped. Molina reported the traffickers to the FBI, who connected her with the Coalition to Abolish Slavery & Trafficking (CAST). However, Molina's trafficker got off easy with a labour abuse type charge and a light sentence of six months' house arrest[63]. Using Molina and countless other cases of forced labour as motivation, the California Transparency in Supply Chains Act exemplifies a ground-breaking shift in State leadership and California's relationship to corporate sourcing practices[64].

[61] Ibid, p. 3
[62] Ibid, p. 4
[63] Sutapa Basu, Ph.D, Johnna E. White, MPA, Human trafficking and supply chains; Recommendations to Reduce Human Trafficking in Local and Global Supply Chains, University Of Washington Women's Center, 2017, p. 47
[64] Ibid., p. 48

The California Transparency in Supply Chains Act of 2010 (hereinafter: Act) became effective on 1 January 2012 in the State of California. In line with the Act, it is required that certain companies doing business in California disclose their efforts to eliminate slavery and human trafficking from their direct supply chains.[65]

In enacting the Transparency in Supply Chains Act, the California Legislature found that slavery and human trafficking are crimes under state, federal, and international law; that slavery and human trafficking exist in the State of California and in every country, including the United States; and that these crimes are often hidden from view and are difficult to uncover and track. The Legislature also found that consumers and businesses are inadvertently promoting these crimes through the purchase of goods and products that have been tainted in the supply chain, and that, in the absence of publicly available disclosures, consumers are at a disadvantage in being able to distinguish companies on the merits of their efforts to supply products free from the taint of slavery and trafficking. In passing the Act, the Legislature declared the intent of the State of California to ensure that large retailers and manufacturers provide consumers with information regarding their efforts to eradicate slavery and human trafficking from their supply chains, educate consumers on how to purchase goods produced by companies that responsibly manage their supply chains, and, thereby, improve the lives of victims of slavery and human trafficking.

In order to provide consumers with this critical information and to allow consumers to make more educated purchasing decisions, the Legislature mandated the posting of information by certain companies. A company must meet certain criteria to be subject to the law. It must: (a) identify itself as a retail seller or manufacture in its tax returns; (b) satisfy the legal requirements for "doing business" in California; and (c) have annual worldwide gross receipts exceeding $100,000,000. The law requires companies subject to the law to disclose information regarding their efforts to eradicate human trafficking and slavery within their supply chains on their website or, if a company does not have a website, through written disclosures.[66]

Companies subject to the Transparency in Supply Chains Act must disclose the extent of their efforts in five areas: verification, audits, certification, internal accountability, and training. Specifically, in its supply chains disclosure, a company must disclose to what extent, if any, it: (1) engages in verification of product supply chains to evaluate and address risks of human trafficking and slavery. The disclosure shall specify if the verification was not conducted by a third party; (2) conducts audits of suppliers to evaluate supplier compliance with company standards for trafficking and slavery in supply chains. The disclosure shall specify if the verification was not an independent, unannounced audit; (3) requires direct suppliers to certify that materials incorporated into the product comply with the laws regarding slavery and human trafficking of the country or countries in which they are doing business; (4) maintains internal accountability standards and procedures for employees or contractors failing to meet company standards regarding slavery and trafficking; (5) provides company employees and management, who have direct responsibility for supply chain management, training on human trafficking and slavery, particularly with respect to mitigating risks within supply chains.[67]

[65] California Transparency in Supply Chains Act Declaration, 22.8.2022, https://www.kpperformance.com/california-supply-chains-act?gclid=CjwKCAjw-L-ZBhB4EiwA76YzOUC8JkHIAs3ZedcHYnvbE2r1hRcX160QNR2MmwLRca_4SGc3ExQE4xoC8hQQAvD_BwE
[66] The California Transparency in Supply Chains Act, 22.8.2022, https://oag.ca.gov/SB657
[67] Ibid.

Since California has been the first state in the nation to pass such a measure, its law offers other states a wealth of lessons and perspectives. However, one significant limitation of the Act is that it requires companies to disclose their efforts but does not require companies to actually investigate their supply chain and make modifications and corrections as necessary. Rather, a company can disclose that it is not taking any action to prevent human trafficking and still be in compliance with the law. Advocates for greater impact encourage strengthening the Act and similar legislation to require companies to go a step beyond disclosure and diligently and comprehensively evaluate their supply chain as well as resolve areas of risk and abuse where present.

Enforcement mechanisms represent a significant limitation of the law. The Attorney General has exclusive authority to enforce the law through an order to take action.[68] In principle, there were ideas that citizens could file private lawsuits, which would greatly facilitate the work of the Attorney General, but in the end, this solution was excluded from the final text.

California's Supply Chain Transparency Act is an important first step towards a higher standard of corporate transparency and draws attention to supply chain practices, which has led to drafting Federal legislation. Furthermore, the Act could hold companies responsible for false statements in their disclosures, although there has not been a successful case to date.[69]

[68] Sutapa Basu, Ph.D, Johnna E. White, MPA, Human trafficking and supply chains; Recommendations to Reduce Human Trafficking in Local and Global Supply Chains, University Of Washington Women's Center, 2017, p. 48.
[69] Ibid, p. 49.

III ANALYSIS OF THE NATIONAL LEGAL FRAMEWORK

1. INTRODUCTION

In the previous part of the report, we gave an overview of the problem, pointed out the major violations of rights, and provided a short comparative legal analysis, looking at how the issue of due diligence in supply chains is regulated in the analysed legislations. In this part, we will present the national legislative framework and the provisions of the relevant laws related to our topic, and propose the ways of improving the existing legislative framework.

2. CRIMINAL LAW FRAMEWORK

The legislation of the Republic of Serbia includes the criminal offences that are the most serious violations of human rights in the supply chain: trafficking in human beings and holding in slavery and transportation of enslaved persons. These criminal offences belong to the group of crimes against humanity and other goods protected by international law. Common to all criminal offences in this chapter is that they represent serious violations of the norms of international humanitarian law. Those violations are also included in the relevant international conventions, and therefore these offences are criminalised in line with the obligation from the conventions according to which the criminal offences should be included in the national legislation and perpetrators should be punished.[70] In addition to the Criminal Code of the Republic of Serbia[71] which regulates the aforementioned offences, the Law on Criminal Liability of Legal Persons[72] is also relevant for the subject that we deal with here.

Moreover, the prohibition of slavery, servitude and forced labour are constitutional categories, since Article 26 of the Constitution of the Republic of Serbia stipulates that no person may be kept in slavery or servitude, as well as that all forms of human trafficking are prohibited. Forced labour is also prohibited, while sexual or financial exploitation of person in unfavourable position shall be deemed forced labour.

Labour or service of persons serving sentence of imprisonment, if their labour is voluntary, with financial compensation, labour or service of military persons, or labour or services during war or state of emergency in accordance with measures prescribed on the declaration of war or state of emergency, shall not be considered forced labour.[73]

2.1 Trafficking in Human Beings

This criminal offence is stipulated under Article 388 of the Criminal Code of the Republic of Serbia as follows:

[70] Prof. dr Zoran Stojanović, Komentar Krivičnog zakonika, Peto izmenjeno i dopunjeno izdanje, JP Službeni glasnik, Beograd, 2016, p. 1021

[71] Criminal Code of the Republic of Serbia (*Official Gazette RS*, no. 85/2005, 88/2005 - corr., 107/2005 - corr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019)

[72] Law on Liability of Legal Entities for Criminal Offences (Official Gazette RS, no. 97/2008)

[73] Constitution of the Republic of Serbia (*Official Gazette of the RS*, nos. 98/2006 and 115/2021), Article 26

(1) "Whoever by force or threat, deception or maintaining deception, abuse of authority, trust, dependency relationship, difficult circumstances of another, retaining identity papers or by giving or accepting money or other benefit, recruits, transports, transfers, sells, buys, acts as intermediary in sale, hides or holds another person with the intent of exploiting such person's labour, forced labour, commission of offences, prostitution, mendacity, pornography, placing in slavery or servitude, for the removal of organs or body parts or service in armed conflicts, shall be punished with imprisonment of three to twelve years.

(2) When the offence referred to in paragraph 1 of this Article is committed against a juvenile, the offender shall be punished by the penalty prescribed for that offence even if there was no use of force, threat or any of the other mentioned methods of perpetration.

(3) If the offence referred to in paragraph 1 of this Article is committed against a juvenile, the offender shall be punished by imprisonment of a minimum of five years.

(4) If the offence referred to in paragraphs 1 and 2 of this Article resulted in serious bodily injury of a person, the offender shall be punished by imprisonment of five to fifteen years, and if the offence referred to in paragraph 3 of this Article resulted in serious bodily injury of a juvenile, the offender shall be punished by imprisonment of a minimum five years.

(5) If the offence referred to in paragraphs 1 and 3 of this Article resulted in the death of one or more persons, the offender shall be punished by imprisonment of a minimum of ten years.

(6) Whoever habitually engages in offences referred to in paragraphs 1 to 3 of this Article or if the offence is committed by a group shall be punished by imprisonment of a minimum of five years.

(7) If the offence referred to in paragraphs 1 to 3 of this Article is committed by an organised criminal group, the offender shall be punished by imprisonment of a minimum of ten years.

(8) Whoever knows or should know that a person is a victim of trafficking, and abuses his/her position or allows another to abuse his/her position for the exploitation referred to in paragraph 1 this Article, shall be punished by imprisonment of six months to five years.

(9) If the offence referred to in paragraph 8 of this Article is committed against a juvenile and the offender knew or could know it, the offender shall be punished by imprisonment of one to eight years.

(10) The agreement of persons to be exploited or placed in slavery or servitude referred to in paragraph 1 of this Article shall not affect the existence of the criminal offence referred to in paragraphs 1, 2 and 6 of this Article."[74]

[74] Criminal Code of the Republic of Serbia, (Official Gazette of the RS, nos. 85/2005, 88/2005 - corrigendum, 107/2005 - corrigendum, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019), Article 388

Among the international documents that regulate this area, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children,[75] supplementing the United Nations Convention against Transnational Organized Crime,[76] is particularly important.

According to Prof. Zoran Stojanović, PhD,[77] the action of perpetration is recruiting, transporting, transferring, handing over, selling, buying, mediating in selling, hiding or holding another person. The action may be perpetrated in the following ways: by force or threat, deception or maintaining deception, abuse of authority, trust, dependency relationship, difficult circumstances of another, retaining identity papers or by giving or accepting money or other benefit. In order to consider that a criminal offence exists, it is necessary that the perpetrator undertakes the action of perpetration in one of the prescribed ways, so both the action and the manner of its perpetration should be viewed as a whole. In addition, the existence of a criminal offence requires a certain focus, i.e. the achievement of a certain goal with respect to a person/passive subject, who is the object of trade. In other words, the actions must be performed with the aim of exploiting their work, forced labour, committing criminal offences, prostitution or other types of sexual exploitation, begging, use for pornographic purposes, holding another person in slavery or servitude, for the removal of organs or body parts or service in armed conflicts.[78]

According to the relevant judicial practice of the courts in the Republic of Serbia, specifically the Appellate Court in Niš, "for the existence of the criminal offence of human trafficking, it is not enough that the perpetrator has committed one or more of the actions of perpetration specified in Article 388 of the Criminal Code, but it is necessary that those actions be undertaken with the aim that is also precisely described in the provisions of this Article." In the explanatory part of Decision Kž 1008/16 of 29 June 2016, the Appellate Court in Niš states:

"Considering the allegations presented in the appeal, this court had in mind that the provisions of Article 388, paragraph 1 of the Criminal Code stipulates that the criminal offence of trafficking in human beings is committed by anyone who, by force or threat, deception or maintaining deception, abuse of authority, trust, dependency relationship, difficult circumstances of another, retaining identity papers or by giving or accepting money or other benefit, recruits, transports, transfers, sells, buys, acts as intermediary in sale, hides or holds another person with the intent of exploiting such person's labour, forced labour, commission of offences, prostitution, mendacity, pornography, placing in slavery or servitude, for the removal of organs or body parts or service in armed conflicts.

Some of international legal documents that regulate this matter, and therefore the existence of slavery, are the United Nations Convention against Transnational Organized Crime, with the Additional Protocols - the Protocol to Prevent, Suppress and Punish Trafficking in Human Beings, Especially Women and Children and the Protocol against the Smuggling of Migrants by Land, Sea and Air and others.

[75] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children represents an international instrument, universal in character, which came into force on 25 December 2003 and has 152 members (151 states and the EU). The Republic of Serbia ratified the Protocol on 6 December 2001, and it became effective on 25 December 2003.

[76] Law on Ratification of the UN Convention against Transnational Organised Crime and Supplementary Protocols (Official Gazette FRY – International Treaties, no. 6/2001)

[77] Prof. dr Zoran Stojanović, Komentar Krivičnog zakonika, Peto izmenjeno i dopunjeno izdanje, JP Službeni glasnik, Beograd, 2016,

[78] Ibid., p. 1071

In terms of Article 4 of the Convention, the acts of recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, are performed for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

In any case, according to the cited provision of Article 388 of the Criminal Code of the Republic of Serbia, in order for the criminal offence of human trafficking to exist, it is not enough that the perpetrator has committed one or more of the actions of perpetration exhaustively enumerated in Article 388 of the Criminal Code, but it is necessary that those actions be undertaken with the aim that is also precisely described in that article." In the specific case, the charging document of the public prosecutor specified the slavery of the injured party as a goal of taking the actions by the accused.

As regards the action of perpetration, for this criminal offence to exist, it is also necessary for the perpetrator to be aware that the desired goal of the activity is exploitation in one of the ways prescribed by law, so that for this criminal offence to exist, the aforementioned actions of perpetrations must be undertaken with the aim of exploitation. This is because exploitation as the intention and goal of the actions undertaken and the means of perpetration are essential elements of this criminal offence, which distinguish it from some other criminal offences.

Given that the injured party G. G. pointed out that she had been forced to do housework in the house of the accused, this court has also taken into account that labour exploitation implies the existence of circumstances that indicate that it is performed under conditions that are contrary to the principle of respect for human dignity, physical and mental integrity, health, those that are largely disproportionate to the conditions of other persons who perform the same or similar jobs, regarding particularly difficult working conditions, offensive and abusive circumstances that are contrary to human dignity.

Bearing in mind that the accused were charged with having undertaken the aforementioned actions with the aim of enslaving the injured party - minor G. G., in determining whether there was exploitation for the purpose of slavery, the first-instance court had to pay more attention to the testimony of the injured party and the statements of all persons who testified about the circumstances of the injured party's stay in the house of the accused V. V. In determining that decisive fact, according to the provisions of international conventions, it must be taken into account that slavery implies the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, as stated in the 1926 Geneva Slavery Convention, the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery and others, where slavery is also understood as branding or otherwise marking a slave or a person of servile status in order to indicate his status, or the state of dependence of a person who is illegally forced or coerced by another person to provide any services to that person or other persons."

The offence has an intentional nature, and the passive subject - victim of the criminal offence has a special status, which means that in accordance with Article 6 of the Protocol, the victim must be provided with appropriate assistance.

In addition to the basic form, the offence also has a more serious form, if it is committed against a minor, even if the perpetrator did not use force, threat or any other means of perpetration.[79]

There are two forms of criminal offence with serious consequences - the first form is grievous bodily injury (paragraph 4) and the second form is death (paragraph 5). In case of serious consequence, there must be negligence.

A serious criminal offence exists if the perpetrator is habitually engaged in the commission of a criminal offence, as well as if the offence was committed by a group, i.e. by at least three persons who are associated for the purpose of committing criminal offences (paragraph 6), while the most serious form exists if the offence was committed by an organised criminal group (paragraph 7)[80].

In view of Article 16 of the Council of Europe Convention on Action against Trafficking in Human Beings, the 2009 Law on Amendments to the Criminal Code introduced a new form of offence (paragraph 8). It exists if the perpetrator knows or should have known that the person was a victim of human trafficking, and takes advantage of his or her position or allows another to exploit his or her position for the purpose of exploitation included in the basic form of the criminal offence, and the more serious form exists if the offence was committed against a minor (paragraph 9).

In addition, according to Professor Zoran Stojanović, PhD, the purpose of paragraph 10 is to proscribe the possibility of excluding the existence of a criminal offence due to the consent of the injured party - a victim of human trafficking.[81]

Violation of the right to prohibit human trafficking, guaranteed by Article 26 of the Constitution of the Republic of Serbia, was also the subject of protection by the Constitutional Court of the Republic of Serbia. Thus, in its Decision Už-1526/2017 of 4 March 2021,[82] the Constitutional Court established that "*trafficking in human beings cannot be reduced only to the criminal law aspect, but it has its own constitutional character with the central goal of protecting the victims of human trafficking.*" *During its deliberation, the Constitutional Court started from the conclusion that human trafficking is a modern form of slavery and as such contrary to the principle of humanity, that it offends human dignity and the fundamental values on which a civilised democratic society rests. Considering the fact that the principle of deferred criminal prosecution was applied on the basis of the requalification of criminal offence, from the serious offence of trafficking in human beings to the minor offence of helping the perpetrator after the crime has been committed, where the victim is a child, by misapplication of procedural rules, the Constitutional Court concluded that the proceedings for the criminal offence of trafficking in human beings must be conducted with thorough consideration of all constitutive elements and available evidence before adopting a court decision.*

[79] Ibid.
[80] Ibid, p. 1072
[81] Ibid, p. 1073
[82] Decision of the Constitutional Court of the Republic of Serbia no. Už-1526/2017 (*Official Gazette of the RS*, no. 34/2011 of 6 April 2021)

The Constitutional Court considers that in this particular case the competent public authorities - the High Public Prosecutor's Office in Belgrade and the Higher Court in Belgrade did not fulfil their positive obligations in the procedural aspect in relation to the prohibition of all forms of human trafficking guaranteed under Article 26, paragraph 2 of the Constitution, to conduct an effective and fair procedure, which would result in the adoption of a relevant judgment.[83]

2.2 Holding in Slavery and Transportation of Enslaved Persons

This criminal offence is stipulated under Article 390 of the Criminal Code of the Republic of Serbia as follows:

(1) Whoever in violation of international law enslaves another person or places a person in servitude, or holds a person in slavery or servitude, or buys, sells, hands over to another or mediates in buying, selling and handing over of such person or induces another to sell his/her freedom or freedom of persons under his/her support or care, shall be punished with imprisonment of one to ten years.

(2) Whoever transports persons in slavery or servitude from one country to another shall be punished with imprisonment of six months to five years.

(3) Whoever commits the offence referred to in paragraphs 1 and 2 of this Article against a juvenile shall be punished with imprisonment of five to fifteen years[84].

The first treaties against slave trade appeared as early as in the 19th century. Later, international documents appeared, such as the 1926 Slavery Convention, supplemented by the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, concluded in Geneva in 1956 (and ratified by our country). The prohibition of slavery and slave trade is included in the 1948 Universal Declaration of Human Rights.

According to Professor Zoran Stojanović, PhD, a criminal offence consists of more actions of perpetration, as follows: enslaving another person or placing a person in servitude, or holding a person in slavery or servitude, buying, selling or handing over to another or mediating in buying, selling and handing over of such person or inducing another to sell his/her freedom or freedom of persons under his/her support or care.

Paragraph 2 of this Article stipulates a minor form of criminal offence, and it refers to the transportation of persons in slavery or servitude.

The existence of slavery or servitude is characteristic for the existence of this criminal offence. According to the Convention to Suppress the Slave Trade and Slavery, slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, while the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery also includes institutions such as debt bondage, serfdom, sale of a female person by the family for marriage, etc.[85]

[83] The Constitutional Court of the Republic of Serbia established a violation of the right to prohibit human trafficking, 25.11.2022, https://astra.rs/ustavni-sud-srbije-utvrdio-povredu-prava-na-zabranu-trgovine-ljudima/
[84] Criminal Code of the Republic of Serbia, Article 390
[85] Zoran Stojanović, p. 1076

2.3. Liability of Legal Entities for Criminal Offences

The special Law on the Liability of Legal Entities for Criminal Offences[86] introduced the criminal liability of legal entities in the Republic of Serbia in 2008. This Law regulates the system of liability of legal entities for criminal offences. According to Professor Dragan Jovašević, PhD, in line with the provisions of this Law, "in addition to natural persons, the following entities may be held liable for the criminal offences stipulated in the Criminal Code and secondary, supplementary criminal legislation: 1) national and foreign legal entities that commit a criminal offence in the territory of the Republic of Serbia, 2) foreign legal entities that commit a criminal offence abroad to the detriment of the Republic of Serbia, nationals thereof or national legal entities, and 3) national legal entities that commit a criminal offence abroad".[87]

Under Article 6 of this Law, a legal entity shall be held liable for criminal offences committed with the intent to achieve gain for the legal entity by the responsible person within his or her remit and powers, while the liability of a legal entity also exists where the lack of supervision or control by the responsible person allowed the commission of crime for the benefit of that legal entity by a natural person operating under the supervision and control of the responsible person.[88]In addition, the Law stipulates that liability of legal entities is based upon culpability of the responsible person[89].

In terms of sanctions, in accordance with this law, a fine and dissolution of a legal entity may be imposed on a legal entity. Dissolution of a legal entity is the most severe sanction, and according to Professor Dragan Jovašević, PhD, this sanction can be imposed "if the activity of a legal entity as a whole or to a significant extent was in the function of committing criminal offences. Therefore, the application of this sanction is considered when a legal entity has used its registered activity as a means or manner of committing criminal offences as a whole or on a larger scale, to a significant extent."[90]

3. MISDEMEANOUR LAW FRAMEWORK

In accordance with Article 2 of the Law on Misdemeanours (*Official Gazette of the RS*, nos. 65/2013, 13/2016, 98/2016 - CC Decision, 91/2019 and 91/2019 - as amended), a misdemeanour is defined as an unlawful act stipulated as a misdemeanour by the law or other regulation of the competent authority, and for which a misdemeanour sanction is prescribed.[91]

In other words, a misdemeanour exists if a certain action, which has been undertaken, is prescribed as unlawful by the law or other regulation.[92]

Article 17 of the Law on Misdemeanours regulates the subjects of liability as follows:

"A natural person, entrepreneur, legal entity and the responsible person in a legal

[86] Law on Liability of Legal Entities for Criminal Offences (Official Gazette RS, no. 97/2008)
[87] Dragan Jovašević, Krivična odgovornost pravnih lica u Republici Srbiji https://scindeks-clanci.ceon.rs/data/pdf/0042-8426/2019/0042-84261903112J.pdf, p. 119
[88] Law on the Liability of Legal Entities for Criminal Offences (Official Gazette of the RS, no. 97/2008), Article 6
[89] Ibid, Article 7
[90] Dragan Jovašević, p. 123
[91] Law on Misdemeanours (*Official Gazette of the RS*, nos. 65/2013, 13/2016, 98/2016 - CC Decision, 91/2019 and 91/2019 - as amended), Article 2
[92] Nataša Delić, Vanja Bajović, Priručnik za prekršajno pravo, JP Službeni glasnik, Beograd, 2018, p. 14

entity may be liable for a misdemeanour.
The Republic of Serbia, territorial autonomies and local self-governments and their authorities may not be liable for a misdemeanour, but the law may prescribe that a responsible person in the public authority, authority of territorial autonomy or local self-government is liable for a misdemeanour under conditions referred to in Article 18, paragraph 1 of this Law."

The meaning of this provision is that natural persons can be held liable for a misdemeanour, but what is particularly important for our topic is that legal entities can also be held liable. Regarding the liability of a legal entity, the most accepted position is that this liability is objective by its nature.[93] Thus, Article 27 of the Law on Misdemeanours regulates the liability of a legal entity as follows:

"A legal entity shall be liable for a misdemeanour committed by an action or omission of due supervision of the management body or a responsible person or by an action of another person that, at the time when the misdemeanour was committed, was authorised to act in the name of the legal entity.

A legal entity shall additionally be liable for a misdemeanour if:
1) the management body passes an unlawful decision or an order whereby committing misdemeanour is enabled or when the responsible person orders a person to commit a misdemeanour;
2) a natural person commits a misdemeanour due to an omission by the responsible person to supervise or control him/her.

Under conditions referred to in paragraph 2 of this Article, a legal entity may additionally be liable for a misdemeanour if:
1) the misdemeanour procedure against the responsible person has been discontinued or if such person has been relieved from liability in compliance with the provisions of Article 250 of this Law;
2) there are legal or actual obstacles for determining liability of the responsible person in the legal entity or where it cannot be determined who the responsible person is.

The liability of a natural or responsible person in a legal entity for a misdemeanour committed, for a criminal offence or for an economic offence shall not preclude the liability for misdemeanour of the legal entity."[94]

Since the liability of a legal entity is linked to an action, the responsible person's action or failure to act, the expert community considers that the legislator had an intention to define the liability of legal entities extremely extensively as "derivative objective liability."[95]However, exceptionally, the liability of legal entities also can be "autonomous objective liability".[96] The essence of this liability is that a legal entity is not held liable for the misdemeanour committed by the authority or the responsible person, but is held liable for the misdemeanour committed by any natural person, because it occurred due to an omission in the organisation of the legal entity.[97]

[93] Ibid, p. 36
[94] Law on Misdemeanours (*Official Gazette of the RS*, nos. 65/2013, 13/2016, 98/2016 - CC Decision, 91/2019 and 91/2019 - as amended), Article 27
[95] Prof. dr Nataša Delić, doc. dr Vanja Bajović, Priručnik za prekršajno pravo, JP Službeni glasnik, Beograd, 2018, p. 62
[96] Ibid.
[97] Ibid.

The liability of a legal entity is regulated by Article 30 of the Law on Misdemeanours as follows:

"The responsible person, within the meaning of this Law, shall be considered to be a person in the legal entity entrusted with certain tasks which pertain to management, business or work process, as well as a person that, in a state authority, authority of a territorial autonomy and in a local self-government unit, performs certain duties.

The responsible person, who acted based on orders of another responsible person or a management body and if he/she took all the actions that he/she was obliged to take based on the law, other regulation or act in order to prevent the commission of a misdemeanour, shall not be responsible for the misdemeanour.

Liability of the responsible person shall not cease on account of the termination of his/her employment with the legal entity, public authority or an authority of the local self-government unit, or due to the occurrence of impossibility to declare the legal entity liable due to its dissolution."[98]

This legal provision envisages two categories of responsible persons: 1) persons in the legal entity entrusted with certain tasks which pertain to management, business or work process; 2) persons that, in a public authority, authority of a territorial autonomy and in a local self-government unit, perform certain duties.

According to Professor Nataša Delić, PhD, the legal entity is "cumulative with the responsibility of the responsible person." And yet, the liability of the responsible person is independent of the liability of the legal entity and exists even when it is impossible for the legal entity to be declared liable due to its dissolution. The liability of the legal entity is also independent of the liability of the responsible person, for example in case of the death of the responsible person."[99]

However, the relevant practice of the courts of the Republic of Serbia should also be taken into account; it shows that in certain situations the extract from the Business Registers Agency alone is not sufficient evidence for determining the responsible person in the legal entity, and it is therefore necessary for the court to identify that person. Thus, the Misdemeanour Court of Appeal, in the explanation of its Decision 1 Prž. no. 10766/19 of 13 August 2019 states, among other things, the following:

"A legal entity shall be liable for a misdemeanour committed by an action or omission of due supervision of the management body or a responsible person or by an action of another person that, at the time when the misdemeanour was committed, was authorised to act in the name of the legal entity. A legal entity shall additionally be liable for a misdemeanour if: 1) the management body passes an unlawful decision or an order whereby committing a misdemeanour is enabled or when the responsible person orders a person to commit a misdemeanour; 2) a natural person commits a misdemeanour due to an omission by the responsible person to supervise or control him/her. Under conditions referred to in paragraph 2 of this Article, a legal entity may additionally be liable for a misdemeanour if: 1) the misdemeanour procedure against

[98] Law on Misdemeanours, Article 30
[99] Nataša Delić, Vanja Bajović, p. 66

the responsible person has been discontinued or if such person has been relieved from liability in compliance with the provisions of Article 250 of this Law; 2) there are legal or actual obstacles for determining liability of the responsible person with the legal person or where it cannot be determined who the responsible person is. The liability of a natural or responsible person in a legal entity for a misdemeanour committed, for a criminal offence or for an economic offence shall not preclude the liability for misdemeanour of the legal entity, Article 27 of the Law on Misdemeanours (Official Gazette of the RS, nos. 65/2013, 13/2016, 98/2016 - CC Decision, 91/2019 - as amended, 91/2019).

The responsible person, within the meaning of this Law, shall be considered to be the person in the legal entity entrusted with certain tasks which pertain to management, business or work process, as well as the person who, in a state authority, authority of a territorial autonomy and in a local self-government unit, performs certain duties. The responsible person, who acted based on orders of another responsible person or a management body and if he/she took all the actions that he/she was obliged to take based on the law, other regulation or act in order to prevent the commission of a misdemeanour, shall not be responsible for the misdemeanour. Liability of the responsible person shall not cease on account of the termination of his/her employment with the legal entity, public authority or an authority of the local self-government unit, or due to the occurrence of impossibility to declare the legal entity liable due to its dissolution," Article 30 of the Law on Misdemeanours (Official Gazette of the RS, nos. 65/2013, 13/2016, 98/2016 - CC Decision, 91/2019 - as amended, 91/2019).

The Misdemeanour Court of Appeal in Belgrade held a session of the panel of judges and on that occasion considered the case file together with the contested judgment, assessed the appeal allegations and examined the judgment ex officio within the meaning of Article 272 of the Law on Misdemeanours, and found that there had been a material violation of the procedural provisions referred to in Article 264, paragraph 2, item 3 of the Law on Misdemeanours.

The first-instance court committed the aforementioned material violation because it did not give valid and clear reasons for its decision. This is because, although the defence has shown that the employee T. G. as the responsible person was entrusted with the tasks of the chief engineer of mechanisation and production, the court based its decision on the liability of the responsible person solely on the data from the records of the Business Registers Agency, where director M. M. was registered as the legal representative of the defendant/legal entity. In fact, Article 30, paragraph 1 of the Law on Misdemeanours provides that a person in the legal entity entrusted with certain tasks which pertain to management, business or work process is considered liable. More precisely, in the specific case, the first-instance court did not establish, that is, it did not provide clear reasons as to who in the defendant legal entity was entrusted with the aforementioned tasks, because the fact that the defendant M.M. was registered as the legal representative of the defendant legal entity does not in itself mean that he was entrusted tasks related to the technical correctness of vehicles. Therefore, the first-instance court did not provide clear reasons for the liability of the defendant legal entity, bearing in mind the provision of Article 27, paragraph 1 of the Law on Misdemeanours, which prescribes that a legal entity is to be held liable for a misdemeanour committed by an action or omission of due

supervision of the responsible person, that is, it did not establish the fact whether the defendant legal entity, by its actions or failure to act, allowed the driver R.I. to drive a technically defective vehicle in its ownership".[100]

4. DUE DILIGENCE IN THE REPUBLIC OF SERBIA

A characteristic of companies, inter alia, is the existence of a number of different interests. Since at the time of registration, i.e. establishment, a company acquires a special status of legal personality and exists separately from its members, it may happen that the interests of the company, its management and its members are different. This has led to the development of special duties for a certain group of persons.

The management often has interests that differ from those of the members, and the company may have its own interest, considering that at the moment of registration, i.e. establishment, it acquires a status of legal personality and becomes separate from its members. This is precisely what led to the development of special duties that are imposed on a certain group of persons with the aim to protect society. Articles 61-75 of the Law on Companies of the Republic of Serbia[101] define who these persons are and what their duties are.

Under the influence of Anglo-Saxon law, a two-part concept of duty is accepted in our law: due diligence and duty of loyalty. In fact, the term "*dužnost"* is a literal translation from English to Serbian, and since it is not entirely in the spirit of the Serbian language, the term "*obaveze*" would be more appropriate. Anyway, the aim of the concept of due diligence is to give instructions on how persons charged with this duty should behave in managing the company's operations.[102]

Article 63 of the Law on Companies of the Republic of Serbia regulates due diligence as follows:

"Persons referred to in Article 61, paragraph 1, items 4 and 5 of this Law shall perform, in that capacity, their duties with due diligence, showing the care of a prudent businessman, and in a reasonable conviction that they act in the company's best interest.

Care of a prudent businessman as referred to in paragraph 1 above implies the degree of attention enacted by a reasonably diligent person who possesses knowledge, skills and experience which could reasonably be expected for carrying out of that duty in a company.

If the person from Article 61 paragraph 1, items 4 through 5 possesses specific knowledge, skills or experience, this knowledge, skills and experience shall be taken into account in assessing the degree of diligence.

It is considered that the persons referred to in Article 61, paragraph 1, items 4 through

[100] Sentence with a part of the explanation of the Decision of the Misdemeanour Court of Appeal in Belgrade 1 Prž. no. 10766/19 of 13 August 2019

[101] Law on Companies of the Republic of Serbia (Official Gazette RS, nos. 36/2011, 99/2011, 83/2014 – other law, 5/2015, 44/2018, 95/2018, 91/2019 and 109/2021)

[102] Tijana R. Kovačević, Pravilo poslovne procene, Pregledni naučni rad, https://scindeks-clanci.ceon.rs/data/pdf/0039-2138/2020/0039-213820021 41K.pdf p. 142

5 of this Law may also base their actions on information and opinions of persons who are experts in a particular field, for whom they reasonably believe that they acted with diligence in that case.

The person referred to in Article 61, paragraph 1, items 4 through 5 who proves that he/she acted in accordance with this Article shall not be held liable for damages that such acting caused to the company."[103]

Persons referred to in Article 61, paragraph 1, item 4 are directors, supervisory board members, representatives, procurators and a liquidation administrator.[104] They are obliged to treat company with the care of a prudent businessman, that is, to act in its best interest. The care of a prudent businessman actually means a heightened level of attention, so the persons charged with this duty will be responsible not only for ordinary carelessness, but also for conscious negligence or intent. In addition, these persons are expected to use their knowledge and experience in performing business activities.[105]

Since the performance of the average director is being evaluated, the standard is set objectively or abstractly.[106]

For acting contrary to the provisions of this Article, persons referred to in Article 61, paragraph 1, items 4) and 5) are liable for the damage sustained by the company due to such behaviour. As regards the type of liability, this is liability based on guilt, and the designated persons are liable for both gross and ordinary negligence, as well as for conscious negligence and intent. However, these persons will not be liable if the damage cannot be attributed to them, i.e. if the damage could not have been foreseen or avoided even with a heightened level of attention.

[103] Law on Companies, Article 63
[104] Ibid, Article 61
[105] Zlatko Stefanović, Bojan Stanivuk, Komentar Zakona o privrednim društvima, Pravni instruktor, Beograd, 2012, p. 86.
[106] Tijana R. Kovačević, p. 151

IV EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE CASE OF ZOLETIC AND OTHERS v. AZERBAIJAN

An extremely important international document for this topic is the European Convention for the Protection of Human Rights and Fundamental Freedoms, which was ratified in our country (hereinafter: ECHR), specifically its Article 4.

Article 4 of the ECHR prohibits slavery and forced labour as follows:

1. "No one shall be held in slavery or servitude.

2. No one shall be required to perform forced or compulsory labour.

3. For the purpose of this Article the term "forced or compulsory labour" shall not include:
   (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
   (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
   (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
   (d) any work or service which forms part of normal civic obligations."[107]

Article 4 of the Convention, together with Articles 2 and 3, establishes one of the fundamental values of democratic societies, i.e. that "no one shall be held in slavery or servitude". It does not allow any exception or deviation based on Article 15, paragraph 2, even in the case of a state of emergency that threatens the survival of the nation, and also prohibits forced or compulsory labour.[108]

Regarding the interpretation of this provision, the Court is required to ascertain the ordinary meaning to be given to the words in their context and in the light of the object and purpose of the provision from which they are drawn. The Court must have regard to the fact that the ECHR must be read as a whole and interpreted in such a way as to promote internal consistency and harmony between its various provisions, but it also must be interpreted in harmony with other rules of international law of which it forms part.[109]

However, Article 4 of the ECHR does not mention human trafficking, but prohibits "slavery", "servitude" and "forced and compulsory labour". What is specific about human trafficking is that it is primarily based on exercising the powers attaching to the right of ownership. In this regard, human beings are treated as commodities

[107] Law on Ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Supplementary Protocols No. 11, No. 4, No. 6, No. 7, No. 12, and No. 13 (*Official Gazette of Serbia and Montenegro - International Treaties*, nos. 9/2003, 5/2005 and 7/2005 and *Official Gazette of the RS - International Agreements*, nos. 12/2010 and 10/2015), Article 4
[108] Guide on Article 4 of the European Convention on Human Rights, European Court of Human Rights, 31.12.2018, https://www.echr.coe.int/Documents/Guide_Art_4_SRP.pdf , p. 5
[109] Ibid.

that can be bought and sold, put to forced labour, often for little or no payment. It implies close surveillance of the activities of victims, whose movements are often circumscribed; it often involves the use of violence and threats against victims, who live and work in difficult conditions, and therefore human trafficking is described as the modern form of the old worldwide slave trade. Bearing in mind the above, the position of the ECtHR is "that human trafficking, in itself, in the sense of Article 3(a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, falls within the scope of Article 4 of the Convention".[110]

Regarding the term "slavery", the ECtHR adopts the classic definition of slavery from the 1926 Slavery Convention, according to which "slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised."

Based on the ECtHR case law, it can be concluded that it makes a clear distinction between the terms "slavery" and "servitude". Thus, in the case of *Siliadin v. France*, where an eighteen-year-old Togolese national, was made to work as a domestic servant fifteen hours a day without a day off or pay for several years, the Court found that the treatment suffered by her amounted to servitude and forced and compulsory labour, although it fell short of slavery. The court held that, although the applicant was clearly deprived of her personal autonomy, she was not held in slavery as there was no genuine right of legal ownership over her, thus reducing her to the status of an "object".[111] In this regard, the term "servitude" is understood as "particularly serious form of denial of freedom". It includes "in addition to the obligation to perform certain services for others ... the obligation for the 'serf' to live on another person's property and the impossibility of altering his condition". However, the ECtHR also makes a distinction between the terms "servitude" and "forced labour", noting that servitude was a specific form of forced or compulsory labour, or, in other words, "aggravated" forced or compulsory labour. According to the ECtHR, "distinguishing feature between servitude and forced or compulsory labour within the meaning of Article 4 of the Convention lies in the victims' feeling that their condition is permanent and that the situation is unlikely to change. The Court finds it sufficient that this feeling be based on the above-mentioned objective criteria or be brought about or kept alive by those responsible for the situation."

Article 4, paragraph 2 also prohibits forced labour. However, Article 4 does not define what is meant by "forced or compulsory labour" and no guidance on this point is to be found in any Council of Europe document. Therefore, in the case of *Van der Mussele v. Belgium*, the Court had recourse to ILO Convention No. 29 concerning forced or compulsory labour, and for the purposes of that Convention the term "forced or compulsory labour" means "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily". The Court has taken that definition as a starting point for its interpretation of Article 4, paragraph 2 of the Convention."[112] Furthermore, according to the understanding of the Court, the adjective "forced" brings to mind the idea of physical or mental constraint. As regards the second adjective "compulsory", for example, work to be carried out in pursuance of a freely negotiated contract cannot

[110] Ibid, p. 6
[111] Ibid, p. 7
[112] Ibid, p. 8

be regarded as falling within the scope of Article 4 on the sole ground that one of the parties has undertaken with the other to do that work and will be subject to sanctions if he does not honour his promise (*Van der Mussele v. Belgium*, paragraph 34). What there has to be is work "exacted ... under the menace of any penalty" and also performed against the will of the person concerned, that is work for which he "has not offered himself voluntarily".[113]

Regarding the violation of Article 4 of the ECHR, the judgment in the case of *Zoletic and Others v. Azerbaijan* is extremely significant. In this case, the respondent State of Azerbaijan, according to the applicant's allegations, failed to conduct an effective investigation of complaints that the applicants were victims of forced labour and human trafficking. According to the applicants' version of events, they were recruited in Bosnia and Herzegovina and taken to Azerbaijan, in groups of ten or more, as temporary foreign construction workers, by representatives of Serbaz Design and Construction LLC ("Serbaz"). According to the material in the case file, it was a company registered in Azerbaijan in 2007 and active in the construction sector until approximately the end of 2009.[114] Furthermore, regarding the circumstances of the case, the judgment states the following:

"*Serbaz arranged their travel to Azerbaijan by air on the basis of tourist visas, issued on arrival at the Baku airport for periods of thirty days or more. Once they entered Azerbaijan, their passports were taken away by representatives of Serbaz. No individual work permits for them were obtained from the authorities. While in Baku, the applicants lived in five houses transformed into dormitories, in rooms with bunk beds shared by twelve to twenty-four people. The dormitories were not equipped with drinking water, running hot water, gas or heating. The conditions were unsanitary owing to the accumulation of garbage. The applicants were not provided with medical care. They had to comply with strict internal rules established by Serbaz. Notices about those rules, written in their native language, were posted on the walls and doors of the dormitories. While the applicants themselves did not provide a detailed account of all those rules, they noted that they had been taken to work and back by a bus and, at other times, had not been allowed to leave their accommodation without a special written permission issued by representatives of Serbaz. Violations of rules were punished by fines, beatings, detention in "a specially designated place" and physical threats.*

The applicants worked in the construction of several buildings in Baku, including Buta Palace, the Baku Expo Centre and 28 Mall. Some people brought by Serbaz worked in the construction of the Kur Olympics educational and training centre in Mingechevir, commissioned by the Ministry of Youth and Sports. As from May 2009 the applicants were not paid any wages and could not meet the necessities of life. According to them, each worker was deprived of approximately 10,000 US Dollars (USD) in wages."[115]

Further on, the ECtHR particularly stresses the ASTRA report as extremely important, and states in paragraph 162 of the Judgment as follows:

[113] Ibid., p. 9
[114] European Court of Human Rights, Fifth Section, Case of Zoletic and Others v. Azerbaijan (Application no. 20116/12), Judgment, https://hudoc.echr.coe.int/eng#{%22languageisocode%22:[%22ENG%22],%22appno%22:[%2220116/12%22],%22documentcollectionid2%22:[%22CHAMBER%22],%22itemid%22:[%22001-212040%22]} p. 3
[115] Ibid.

"The ASTRA Report provided more details and additional information concerning the allegations raised by the applicants, in particular concerning, inter alia, the circumstances in which workers were hired in their home countries, absence of not only work permits but also residence permits, alleged compulsory work even when workers were sick, alleged threats that workers would be arrested by the local police if they left the accommodation without their passports and the employer's permission, alleged lack of proper nutrition, alleged excessive overtime work, and several alleged incidents of alleged use of force and detentions."

Paragraph 163 of the Judgment, *inter alia*, states: "*It is true that an NGO report would not, in itself, have significant evidentiary value without further investigation. However, given the area of expertise of the NGOs involved in preparation of the report, which was assistance to migrant workers and combating human trafficking, the prima facie information provided in it constituted material corroborating the applicants' submissions",* by which the ECtHR[116] gave great importance to this report in terms of evidence, since from the court's point of view, that report significantly corroborated the claims of the affected workers.

In the final assessment, the ECtHR states in paragraph 180 that the "*State may be held responsible not only for its direct actions but also for its failure to effectively protect the victims of slavery, servitude, or forced or compulsory labour by virtue of its positive obligations",* while paragraph 182 states: "*The general framework of positive obligations under Article 4 includes: (1) the duty to put in place a legislative and administrative framework to prohibit and punish trafficking; (2) the duty, in certain circumstances, to take operational measures to protect victims, or potential victims, of trafficking; and (3) a procedural obligation to investigate situations of potential trafficking. In general, the first two aspects of the positive obligations can be denoted as substantive, whereas the third aspect designates the States' (positive) procedural obligation."*

In order to comply with their obligation to penalise and prosecute those who acted contrary to Article 4 of the ECHR, "*member States are required to put in place a legislative and administrative framework that prohibit and punish forced or compulsory labour, servitude and slavery (see Chowdury and Others, cited above, § 105). So, in order to determine whether there has been a violation of Article 4, the relevant legal or regulatory framework in place must be taken into account."*[117]

Analysing this decision, we have found that paragraph 192 of the Judgment is extremely important:

"At the outset, having had regard to the relevant provisions of the domestic criminal law and the relevant international treaties ratified by Azerbaijan (see paragraphs 71-72 and 96-99 above) and other relevant domestic legal and regulatory framework (see, in particular, paragraphs 79-95 above), the Court notes that at the relevant time the domestic legal system ***provided for the criminal law mechanisms protecting individuals from human trafficking and forced labour,*** *as well as some* ***legal framework regulating businesses that could potentially be used as a cover for human trafficking,*** *and immigration rules that could arguably address relevant concerns relating to encouragement, facilitation or tolerance of trafficking. However, the Court*

[116] Ibid, pp. 46-47
[117] Ibid., p. 52

need not examine the domestic legal framework further since the applicants did not complain specifically in that respect. As noted above, their complaint is rather of a procedural nature ***relating to a lack of an appropriate response of the domestic authorities to their allegations of having been subjected to forced or compulsory labour and human trafficking."***[118]

In other words, in this particular case it was not disputable at all whether or not Azerbaijan has established a legal framework that prohibits and punishes forced labour and human trafficking - such a legal framework undoubtedly existed, but the disputed issue was that the criminal prosecution authorities simply did not do their job and failed to prosecute the perpetrators of the criminal offences in question, although according to the Court's opinion, the relevant authorities were sufficiently informed about the whole case, and they could and had to conduct an investigation.

Finally, the ECtHR declared the application admissible and found that there had been a violation of Article 4, paragraph 2 of the ECHR under its procedural limb, and obliged Azerbaijan to pay each applicant EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Bosnia and Herzegovina convertible marks at the rate applicable at the date of settlement.[119]

[118] Ibid., p. 55
[119] Ibid, p. 61

V PROPOSAL FOR IMPROVING THE LEGISLATIVE FRAMEWORK

As shown above in the first part of the research – i.e. the comparative legal analysis, an increasing globalisation, creation of the so-called supply chains, at the international level, opens up space for a series of abuses of workers' rights, starting from relatively "benign" ones, such as non-payment of wages, to very serious violations of human rights, such as human trafficking, enslaving workers or placing them in servitude, etc. In this regard, and as seen in the comparative legal analysis, there is a noticeable tendency in the developed countries to develop a legislative framework that is primarily focused on the due diligence of companies in their supply chains.

In the second part, the authors provide a comprehensive analysis of the national regulations related to the given topic. In this context, as regards the violation of both the rights of workers and human rights in the territory of the Republic of Serbia, there is an elementary legislative framework that would punish such behaviour.

Pursuant to Article 194 of the Constitution of the Republic of Serbia, the ECHR has a stronger legal force than the laws of the Republic of Serbia, given that laws and other general acts adopted in the Republic of Serbia may not be contrary to the ratified international treaties and generally accepted rules of international law.[120] Article 4 of the ECHR prohibits slavery and forced labour.

In addition to the ECHR, the Criminal Code of the Republic of Serbia prohibits human trafficking and holding in slavery and transportation of enslaved persons. These criminal offences belong to the group of crimes against humanity and other goods protected by international law, and are punishable by long terms of imprisonment. Moreover, the Law on Misdemeanours regulates the misdemeanour liability of a legal entity, as well as of the responsible person in a legal entity.

We also saw that in addition to penal provisions our law includes the concept of due diligence, which has been adopted from the Anglo-Saxon legal system.

However, all potential abuses of both human rights and the rights of workers in supply chains require a more detailed legal regulation, primarily in the context of a specific due diligence that companies need to undertake with respect to their obligations prescribed by law in order to reduce, as much as possible, the possibility of the occurrence of abuses of rights and violations of basic human and labour rights of workers. This is precisely the reasoning underlying all the regulations that we have analysed within the comparative legal analysis. In this context, there is a legal gap in the law of the Republic of Serbia and therefore room for improvement of its legislative framework. The question of whether the legislative framework should be improved by adopting a new law, or by amending some of the existing laws, and what specific legal solutions would be adopted, is very complex, and the answer should derive from an additional detailed analysis; however, considering the findings of the present comparative legal analysis, which indicates that the general tendency is to regulate this area by a new law, the authors are more inclined to this solution. After all, even at the EU level, for the time being there is only the Proposal for a

[120] Constitution of the Republic of Serbia, Article 194

Directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, which, as we have seen, is already suffering major criticism from civil society organisations and companies. The authors also believe that the Republic of Serbia, on the way to EU accession and harmonisation of its legislation with EU regulations, should at a certain point adopt an appropriate legal framework, which should be in accordance with the (final version) of said Directive.

As far as particular solutions are concerned, the scope of law should be defined in the first place, that is, it should be defined to whom the law would [121]apply. It seems that it would be optimal to have a legal solution in the Republic of Serbia in principle in line with the solution from the German Law on Due Diligence Corporate Obligations in Supply Chains. In other words, the law would apply to companies that are registered/operate in the Republic of Serbia; in Germany, the law applies to companies with more than 3,000 employees, while considering the development of the economy of the Republic of Serbia, it would be necessary to establish the optimal threshold applied to a particular company (if a special analysis justifies such a solution, the law could also apply to small and medium-sized companies). It is not necessary to take the number of employees as an element for determining the threshold, but it can be also annual turnover, or annual turnover and number of employees cumulatively.

The law should additionally prevent the violation of human rights protected by international conventions. In this regard, companies to which the law would apply should have an obligation of due diligence in terms of respecting human rights, and to strive to prevent the violation of human rights in their supply chains, especially human trafficking and all forms of modern slavery. The authors also note that it is noticeable in the comparative law solutions that companies have an obligation to prevent environmental impairment in addition to human rights violations.

Regarding the method of fulfilling the obligation of due diligence in supply chains by companies, the relevant comparative law solutions indicate that it is possible to do this either through a kind of report, as prescribed in Australia and the UK, or through a "vigilance plan", as prescribed in France. We can mention the 2021 Deloitte Modern Slavery and Human Trafficking Statement as an excellent example of good practice.

The statement says that Deloitte operations are free of modern slavery, that all employees and subcontractors respect their defined ethical principles, as they strive to maintain a responsible supply chain, without any unethical or illegal behaviour by suppliers or contractors. Further, they established a confidential "Speak Up" line whose purpose is to report completely anonymously any violation of ethical principles, including suspected instances of modern slavery. In addition to the above, they strive to ensure that everyone who works for them is paid their full wages. All subcontractors must answer the question of whether they have taken appropriate steps to ensure that there supply chains are free of slavery or human trafficking. Also, all suppliers must be fully compliant with the Sustainable Procurement Policy, and if it turns out that they are not, it would be considered a material breach of their contract with Deloitte. In addition to all the above, they organised appropriate training sessions to raise awareness of Deloitte's commitment related to modern slavery.[122]

[121] For the purpose of this analysis, the word "law" refers to both a new law and amendments to one of the existing laws (author's note).
[122] Deloitte Modern Slavery and Human Trafficking Statement: FY21, https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/about-deloitte/deloitte-uk-modern-slavery-statement-fy21.pdf

As regards sanctions, in addition to the criminal sanctions already prescribed by the Criminal Code for the described criminal offences, and civil sanctions, in terms of damage compensation, it seems that most appropriate for our legal system would be misdemeanour sanctions in the form of fines, both for legal entities and for responsible persons in legal entities, in case of failure to fulfil the obligations prescribed by law. The authority that would supervise the implementation of the law should be determined through a special in-depth analysis.

At this point, it is important to refer to the Model Guidelines on Government Measures to Prevent Trafficking for Labour Exploitation in Supply Chains. We have already seen in the example of *Zoletić and Others v. Azerbaijan* that the state of Azerbaijan lost the case before the ECtHR not because there was no legal framework to prevent slavery and forced labour, but because despite the existing legal framework, the state did not do anything to implement its own regulations, even though it was well aware of the violation of basic human rights. These guidelines deal with reducing the risk of human trafficking and labour exploitation in public procurement procedures. In order for the Republic of Serbia to raise respect for human rights to a higher level, it would be good to formally adopt some of these guidelines.

With respect to this, States should "revise their own public procurement policies to cover THB issues, and implement or further strengthen disclosure requirements for companies mandating them to report on their antitrafficking policies and practices".[123]

In addition, as regards some important recommendations, "at the planning stage of procurement, it is important for public authorities to identify product or service categories that are most likely to be prone to human rights abuses, in particular to THB/LE."[124]Moreover, public authorities can include special requirements concerning the respect for human rights[125] in contract awarding criteria, in addition to price and quality, and require contractors to take measures to prevent and address human trafficking for labour exploitation in their supply chains by adopting a policy aimed at mitigating the risk of human rights violations, and to "define award criteria that require the implementation of human rights standards in the supply chain",[126] to "establish an "ineligibility list" of companies that are not fulfilling anti-THB criteria that is monitored and updated annually, or in accordance with procurement cycles."[127]

[123] Model Guidelines on Government Measures to Prevent Trafficking for Labour Exploitation in Supply Chains, OSCE, p. 23
[124] Ibid, p. 25
[125] Ibid, p. 27
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