BRIEFINGS

Requested by the DROI subcommittee

European Parliament

# Human Rights Due Diligence Legislation - Options for the EU




Policy Department for External Relations
Directorate General for External Policies of the Union
PE 603.495 - June 2020

EN

DIRECTORATE-GENERAL FOR EXTERNAL POLICIES
POLICY DEPARTMENT


BRIEFINGS

# Human Rights Due Diligence Legislation - Options for the EU

## ABSTRACT

The European Parliament (EP) has repeatedly underlined the need for stronger European requirements for companies to prevent human rights abuses and environmental harm and to provide access to remedies for victims. The debate — both in the EU institutions and in several Member States — has intensified surrounding due diligence obligations for companies throughout the supply chain. In this context, the EP Human Rights Subcommittee (DROI) requested two briefings on specific human rights related issues it should consider while preparing its position. The first briefing in this compilation addresses substantive elements, such as the type and scope of human rights violations to be covered, as well as the type of companies that could be subject to a future EU regulation. The second briefing discusses options for monitoring and enforcement of due diligence obligations, as well as different ways to ensure access to justice for victims of human rights abuses. The briefings offer a concise overview and concrete recommendations, contributing to the ongoing debate and taking into account the research undertaken on behalf of the European Commission.

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Briefing

Requested by the DROI subcommittee

European Parliament

# Substantive Elements of Potential Legislation on Human Rights Due Diligence

Policy Department for External Relations
Directorate General for External Policies of the Union
PE 603.504- June 2020

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DIRECTORATE-GENERAL FOR EXTERNAL POLICIES
POLICY DEPARTMENT

European Parliament

BRIEFING Nº1

# Substantive Elements of Potential Legislation on Human Rights Due Diligence

## ABSTRACT

This briefing provides an overview of the existing legislative approaches to mandatory Human Rights Due Diligence and proposals by non-state actors, concerning the scope of potential European Union (EU) legislation on binding human rights due diligence (HRDD) obligations for companies. The briefing discusses key substantive elements of potential EU HRDD legislation including options for human rights covered by the due diligence requirement; types of violations; specific references regarding women and persons in vulnerable situations and the duties of companies to respect and protect human rights. It is recommended that a potential EU HRDD legislation should comprise all human rights and cover all types of violations. The legislation should refer to additional duties, which can be based on existing human rights treaties and instruments such as CEDAW, CRC, CRPD and UNDRIP. The legislation should cover all companies independently of their size and take a non-sector specific approach. Furthermore, the legislation should not apply solely to the company's own activities, but also to its business relations including the value chain. Finally, the legislation should adopt a substantive due diligence model and require companies to engage actively in analysing, mitigating and remedying any adverse impacts on human rights based on their own activities and connected to them in their business relations.

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# Acronyms and Abbreviations

| | |
|---|---|
| BHR | Business and Human Rights |
| BHRRC | Business and Human Rights Resource Centre |
| CEDAW | Convention on Elimination of All forms of Discrimination Against Women |
| CEO | Chef Executive Officer |
| CoE | Council of Europe |
| CRC | Convention on the Rights of the Child |
| CRPD | Convention on the Rights of Persons with Disabilities |
| CSO | Civil Society Organisations |
| CSR | Corporate Social Responsibility |
| EC DG JUST | European Commission´s Directorate-General for Justice and Consumers |
| ECCJ | European Coalition for Corporate Justice |
| EP | European Parliament |
| EP DROI | European Parliament's Human Rights Subcommittee |
| ESD | EU Employers' Sanctions Directive |
| ETUC | European Trade Union Confederation |
| EU | European Union |
| HRDD | Human Rights Due Diligence |
| IBHR | International Bill of Human Rights |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| ICMW | International Convention on All Migrant Workers and Members of Their Families |
| ILO | International Labour Organization |
| mDD | Mandatory Due Diligence |
| mHRDD | Mandatory Human Rights Due Diligence |
| OECD | Organization on Economic Co-operation and Development |
| SMART | Sustainable Market Actors for Responsible Trade |
| SME | Small and Medium Enterprises |
| UDHR | Universal Declaration on Human Rights |
| UK | United Kingdom |
| UN | United Nations |
| UNDRIP | United Nations Declaration on the Rights of Indigenous Peoples |
| UNGPs | United Nations Guiding Principles on Business and Human Rights |
| UNHRC | United Nations Human Rights Council |

# 1 Introduction

This briefing aims to provide a concise and targeted legal overview of options for key elements of mandatory Human Rights Due Diligence (mHRDD) including their material scope, so as to support the European Parliament (EP) Committees in preparing Parliament's position on possible future human rights due diligence legislation at the European Union (EU) level. The briefing will focus on key issues requested by the EP's Human Rights Subcommittee (EP DROI). For a comprehensive analysis of existing national and European level legislation along with stakeholders' current mind-set and awareness of the issues covered, readers are advised to consult the study on due diligence requirements through the supply chain (EC DG JUST Study 2020) commissioned by the European Commission´s Directorate-General for Justice and Consumers (EC DG JUST).

The concept of human rights due diligence is understood here as being in line with the United Nations (UN) Guiding Principles on Business and Human Rights (UNGPs) (UNHRC 2011a, UNHRC 2011b), which described it as a process aimed at operationalising corporate responsibility to respect human rights. The UNGPs' approach indicating that business enterprises – irrespective of their size and sector – should have in place 'a human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights' (UNGPs Principle 15, Principle 17 and the commentary to it) has been subsequently reinforced by other international organisations, such as the Organization on Economic Co-operation and Development (OECD, 2011; OECD, 2018) and the Council of Europe (CoE, 2016), amongst others (EC DG JUST Study 2020, Ch.III (3), p. 156-191). Of particular importance in this context is the OECD Due Diligence Guidance for Responsible Business Conduct (OECD 2018), the plain, accessible language explanations of which help to promote a common understanding among all stakeholders on due diligence compliant with that of the UNGPs.

Over recent years, some states have at least addressed certain elements of Human Rights Due Diligence (HRDD) by establishing laws and policies (e.g. the United Kingdom (UK)'s *Modern Slavery Act* 2015, France's *Corporate Duty of Vigilance Law* and the Netherlands' *Child Labour Due Diligence Law*) that business enterprises within their scope are required to follow. Furthermore, the EU has implemented certain actions listed in a renewed strategy for Corporate Social Responsibility (CSR) adopted in 2011 (EC COM (2011) 681 final) and made progress through the Business and Human Rights agenda (EC SWD (2019)143 final). The past few years have seen a revision of the Public Procurement Directives (2014), the adoption of the EU Regulation on Conflict Minerals (2017) and of the Non-financial reporting Directive (2014), to name just a few. Yet, those efforts are insufficient. As is pointed by the EC DG JUST 2020 study, while the introduction of reporting requirements has created positive impact by raising awareness and stimulating internal conversations within companies, its effect on the actual improvement of due diligence seems to be minimal. Its inherent limitation lies in the requirement for enterprises to report on their due diligence only if they have introduced such policies, but none are obligated to do so. Thus despite efforts undertaken so far, the voluntary part of the 'smart mix' called for by the former UN Secretary-General's Special Representative for Business and Human Rights, John Ruggie, seems to have reached the limits of its potential and, as - stressed by Heidi Hautala, Vice-President of the European Parliament, 'There is more and more understanding that the smart mix prescribed by the UN Guiding Principles on Business and Human Rights means that there needs to be legislation in order to reach the stated aims' (BHRRC mDD portal)[1].

While demands for mandatory due diligence covering EU-based companies have been in place for a while – for instance, the 2016 corporate accountability 'green card initiative' from eight national parliaments and Council Conclusions from the same year as well as the European Parliament 2016 Resolution on corporate liability for serious human rights abuses in third countries (P8_TA(2016)0405), the European Parliament

[1] Business and Human Rights Resource Centre (BHRRC) - Mandatory Due Diligence (mDD) Portal, https://www.business-humanrights.org/en/mandatory-due-diligence, last accessed on 24 April 2020.

2017 Resolution on the impact of international trade and the EU's trade policies on global value chains (2016/2301(INI)) together with the European Parliament's Resolution of 29 May 2018 on sustainable finance (P8_TA(2018)0215) – during recent months there has been an intensification of calls for concrete actions, especially a general message from the December 2019 Finnish Presidency event, Business & Human Rights: Towards a Common Agenda. This suggests that legislation on human rights and environmental due diligence with enhanced access to judicial remedy as well as a comprehensive EU Action Plan on Business and Human Rights (Agenda for Action on BHR – Outcome Paper, 2019) is clearly expected from the current Commission (Patz & Saller, 2020). While such expectations have traditionally come mainly from civil society organisations (CSOs) (e.g. 100 CSO Statement 2019) and trade unions, more and more businesses are now calling for additional specific regulation to provide clarity and thereby a "level playing field for all' (Grabitz, Zacharakis, 2020; Fox 2019), as the patchwork of national laws and EU level legislation in some areas and sectors is becoming increasingly difficult to navigate (EC DG JUST Study, 2020, p. 226). Such an approach is aligned with shifting international trends, exemplified by the Business Roundtable Statement on the Purpose of a Corporation (Business Roundtable Statement on the Purpose of a Corporation, 2019), signed by 181 chief executive officers (CEOs). This statement attracted international public attention, because it moved away from the shareholder primacy in its Principles of Corporate Governance which it had endorsed ever since 1997, towards a commitment 'to lead their companies for the benefit of all stakeholders – customers, employees, suppliers, communities and shareholders'.

This briefing will undertake a comparative review of already existing – often contradictory – approaches (positions, proposals and recommendations) concerning various aspects of the envisaged mHRDD legislation at European level. Along with a substantive assessment of the feasibility, strengths and weaknesses of different approaches, the review's aim is to provide a clear picture of the current discussion to identify which approaches and solutions convey broader as well as more diversified support by experts and professionals active in the human rights and business areas.

The briefing has been developed on an assumption that EU human rights due diligence legislation would be horizontal (cross-sectoral) and would address a broad spectrum of negative effects on human rights. These could cover business-related abuses linked with companies operating in and from the EU, including their foreign subsidiaries and supply chains, particularly in situations where parent companies issue consolidated accounts covering foreign subsidiaries (as is the case in anti-trust and competition laws), and especially where they are linked either directly through their presence and investment in third countries or indirectly through liability along supply chain/established commercial relations (See also EC DG JUST Study, 2020, p. 206, 274-276).

Based on EU documents and instruments as well as national laws and proposals together with any gaps identified in previous sections, the final part of this briefing will develop recommendations on how the EP might approach the advancement of its position on mHRDD.

# 2 Methodology

Our briefing is based on a systemic desk-based, comparative review of existing relevant national and supranational level legislation along with selected proposals for legislation which are significantly concrete in addressing the key questions covered in this briefing. More specifically, we review existing national laws in the United Kingdom, France and the Netherlands; four EU legislative acts, and two proposals for national legislation from Switzerland and Norway. These instruments were selected because they are frequently referred to in the mHRDD debate, even though they do not all exemplify such legislation in the strict sense. However, the different instruments do illustrate the range of regulatory options available for the scope of potential EU legislation on binding HRDD obligations. Additionally, three position papers by non-state actors were examined, to explore whether or not the arguments they raise introduce new ideas and

different perspectives into the discussion. Where appropriate and relevant, the briefing also took other material into account, including policy proposals, institutional studies, scholarly materials as well as civil society and other non-state actors' reports, statements and proposals, as listed below. The latter were selected on the basis that they might suggest elements for legislation not found in the existing laws. While not necessarily exhaustive, this selection does cover all central aspects shaping the mHRDD debate.

**National laws:**

- Modern Slavery Act 2015 (c.30) (UK);
- Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, 2015 (France);
- Wet zorgplicht kinderarbeid, 2019 (the Netherlands).

**EU legislative acts:**

- Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups (hereafter: NFR Directive);
- Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas (hereafter: Conflict Minerals Regulation);
- Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals (hereafter: EU Employers' Sanctions Directive);
- Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market (hereafter: EU Timber Regulation).

**Proposals for national laws:**

- Proposal of the Swiss Responsible Business Initiative (Verein Konzernverantwortungsinitiative 2019);
- Draft for an Act relating to transparency regarding supply chains, the duty to know and due diligence of the Ethics Information Commission of Norway (Etikkinformasjonsutvalget, 2019).

**Non-state actors position papers and recommendations:**

- European Coalition for Corporate Justice (ECCJ) Legal Brief: EU Model Legislation on Corporate Responsibility to Respect Human Rights and the Environment, February 2020 (ECCJ, 2020) and Position Paper, June 2018 (ECCJ, 2018);
- Amfori, Human Rights Due Diligence Legislation in Europe. Position paper, February 2020 (Amfor,i 2020);
- The European Trade Union Confederation (ETUC), ETUC Position for a European directive on mandatory Human Rights due diligence and responsible business conduct, Adopted at the Executive Committee Meeting of 17-18 December 2019 (ETUC, 2019).

Additionally, attention was given to the recently released Study on due diligence requirements through the supply chain commissioned by the European Commission DG JUST (EC DG JUST Study, 2020).

# 3 Key elements of future HRDD legislation

The key elements of human rights due diligence regulations concern (i) human rights abuses and other types of violations covered by the legislative instruments, with special reference to vulnerable groups, (ii) the companies covered by the legislation and (iii) duties of companies imposed by the legislation.

## 3.1 Scope of human rights covered

The first question concerning any HRDD legislation relates to the scope of human rights it should cover. The UNGPs themselves are ambiguous in this regard as they state in Principle 12 that the responsibility of business enterprises to respect human rights 'refers to internationally recognised human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights (IBHR) and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work'. As explained in the respective commentary, the International Bill of Rights comprises the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) (Commentary to UNGPs Principle 12). These three instruments are central to the international human rights regime and cover many human rights which have been further detailed in additional conventions and instruments. However, this approach is not exhaustive. It does not refer to other core human rights instruments such as the Convention on Elimination of All forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC), the Convention on the Rights of Persons with Disabilities (CRPD) or the International Convention on All Migrant Workers and Members of Their Families (ICRMW)[2]. In this respect, it needs to be recalled that the Commentary to UNGPs Principle 14 clarifies that 'depending on circumstances, business enterprises may need to consider additional standards', including both human rights group-specific or issue-specific UN instruments and, in situations of armed conflict, also the standards of international humanitarian law[3]. Furthermore, in light of close links between the protection of human rights and the environment, consideration should be given to the inclusion of references to environmental protection and impact assessments, as suggested in the Framework Principles on Human Rights and the Environment developed by the Special Rapporteur on human rights and the environment in 2018[4].

While the UNGPs' approach seems to leave the decision up to a company as to whether or not it will follow more detailed, group- or issue-specific standards, the UNGPs should not be read as limiting the list of rights to be respected to the IBHR or the International Labour Organization's Declaration on Fundamental Principles and Rights at Work. It is noteworthy in this context, that the OECD Guidelines expect due diligence to cover all human rights and environmental impacts. As reinstated in the 1993 Vienna Declaration and Programme of Action (Optional Protocol 5), given that 'all human rights are universal, indivisible and interdependent and interrelated', excluding any single right from the protection or obligation to respect, would at the very least inevitably result in adverse impact and abuse of other rights, some of which might in fact fall within the scope of the IBHR and the ILO Declaration. The EP has also regularly reaffirmed that 'the activities of all companies, whether operating domestically or across borders,

[2] While ratification level of ICRMW is low (only 55 countries ratified it and 13 signed it; including none of the EU Member States), migrant workers are among the most vulnerable groups, and more easily subjected to forced labour and/or human trafficking than non-migrant population. They are also often less protected due to the specifics of temporary, posted, outsourced etc. work contracts than workers employed on standard employment terms. This situation is exacerbated during economic crisis,. For more information about the ICRMW please see dedicated United Nations website https://www.ohchr.org/EN/ProfessionalInterest/Pages/CMW.aspx . For up to date information on the status of ratifications see: https://indicators.ohchr.org/

[3] On the importance of human rights of persons in vulnerable situations see Section 3.3.

[4] Human Rights Council, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, Annex, 24/01/2018, A/HRC/37/59.

must be in full compliance with international human rights standards' (European Parliament, 2020, para. 50).

Existing and proposed HRDD laws differ concerning the scope of human rights covered. Three models can be identified:

1. A first model covers only a very narrow set of human rights. For example, the UK Modern Slavery Act of 2015 covers only the prohibition of slavery, servitude, forced or compulsory labour and human trafficking whilst the Dutch Child Labour Due Diligence Act of 2019 addresses only the prohibition of child labour, as understood in International Labour Organization (ILO) Conventions 182 and 138. While these specific human rights are arguably among the most commonly affected in supply chains, such a limitation significantly deviates from the approach of the UN Guiding Principles and relevant EP resolutions calling for HRDD (e.g. European Parliament, 2018, para.11, 2016, para.18, 19).

2. A second model covers all human rights. While the terminology differs among various instruments and proposals (e.g. 'droits humains et les libertés fondamentales' in the French Loi de Vigilance, 'internationally recognised human rights' in the Swiss initiative proposal or simply 'human rights' in the EU NFR Directive[5]), it is clear that these instruments are not limited in regard to the scope of human rights covered. The majority of existing and proposed HRDD obligations seem to follow such an approach. This concurs with the 2020 EC DG JUST Study, according to which the majority of respondents, including those in businesses, would prefer a non-issue specific approach (EC DG JUST Study 2020). Similar suggestions can be found in non-state actors' policy papers (Amfori 2020, p. 4; ECCJ 2020).

3. A third model covers all human rights, but refers to specific treaties. The legislative proposal in Norway covers 'internationally recognised human rights as expressed in the International Covenant on Economic, Social and Cultural Rights (1966), the International Covenant on Civil and Political Rights (1966) and the ILO's fundamental conventions on fundamental rights and principles at work.' It also contains special duties concerning forced labour, child labour and other collective labour rights and hence seems to combine both models. Some non-state actors' proposals highlight the need for specific rights to be given special attention (e.g. ETUC – worker's rights, 2019).

In light of the above arguments and existing laws and legislative proposals, it is suggested that any future HRDD should apply to all human rights. This would avoid legal uncertainties and the artificial separation of human rights, which could be the consequence of an approach focussing only on slavery or child labour. However, by way of clarification, it might be useful to mention the most important human rights instruments in order to avoid the uncertainties of an approach referring only to 'fundamental rights'. In light of its broad acceptance, the UNGPs seems to be a useful basis. The legislation could thus refer to the Universal Declaration on Human Rights (UDHR), the two covenants (ICCPR and ICESCR) and the human rights conventions addressing rights of persons in vulnerable situations such as CEDAW, CRC, CRPD and the ICRMW. Furthermore, the ILO core standards and other internationally accepted instruments of human rights, specifically the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), could be mentioned. These legal instruments and documents are specifically mentioned in the UNGPs, which are widely accepted both by businesses and their associations, as well as by civil society organisations. It is therefore suggested to build on this global consensus.

Human rights, as enshrined in the International Bill of Rights and other global instruments, are also reflected in regional instruments such as the European Convention on Human Rights, the European Social Charter, the Inter-American Convention on Human Rights (including the Protocol of San Salvador) and the

[5] It should be noted that while the Non-financial reporting directive refers to human rights generally, its operative elements may have a more limited approach. In particular, companies can choose to base their reporting only on the ILO Tripartite Declaration on MNEs. Companies choosing this option would then NOT report on all human rights.

African Charter on Human and Peoples' Rights. However, to the extent that these regional instruments contain substantially the same rights as global instruments, it seems that there is no additional value to be gained from referring to them in HRDD legislation. To the extent that they go beyond global instruments - for instance in the case of collective rights within the African Charter - they do not reflect a global consensus. Generally, references to regional instruments could be misunderstood as suggesting that EU companies would have to take different regional instruments into account depending on the country in which they operate.

## 3.2 Types of human rights violations covered

The next aspect of HRDD legislation's material scope concerns a possible distinction between different types of human rights abuses/violations based on their severity. The UNGPs themselves do not refer to such a differentiation, but nevertheless indicate that some negative impacts on human rights are more severe than others (UNGPs Principle 14 and commentary thereof). Yet, the UNGPs are clear that they cover all types of human rights violations[6].

Most existing legal instruments do not distinguish between different types of human rights violations based on their severity. Only the French *Loi de Vigilance* is limited to 'severe violations'. However, the law does not define this term. Moreover, there is no internationally recognised definition of 'severe violation' as such, which consequently makes its use ambiguous as well as problematic from the perspective of legal certainty and hence questionable as a model for EU level legislation. While international criminal law refers to 'severe violations', any reference to this term in mHRDD legislation would need to be defined for reasons of legal certainty.

It seems more appropriate to incorporate the seriousness of a human rights violation in companies' respective responses as part of the proportionality principle, as also indicated in the UNGPs. For example, Principle 24 states that '[w]here it is necessary to prioritise actions to address actual and potential adverse human rights impacts, business enterprises should first seek to prevent and mitigate those that are **most severe** or where delayed response would make them irremediable' (emphasis added). This also seems to be the French legislator's intention although the wording used in the Loi de Vigilance is not clear in this regard (Brabant et al, 2017). It should be also noted that salient human rights issues will differ not only between companies, but also within the same company at different times. This is due to different internal and external context aspects coming into play with each newly employed person or each new localisation or even simply with a change of government in the country of operations.

In light of the above, it is recommended that potential HRDD legislation not be limited to severe violations but cover all types of violations. Concerning the actual obligations, the legislation could refer to the language used in UNGPs Principle 24 and suggest that when companies need to prioritise, they should focus on situations and activities with more severe impacts.

## 3.3 Vulnerable groups

International human rights law specifies that the human rights of women, children, indigenous people and other groups may require special attention as well as additional activities by states and other actors due to the vulnerable situations in which these people find themselves. While their rights are covered by the core universal instruments of the International Bill of Rights, thematic instruments such as for example CEDAW, CRC, CRPD, or relevant instruments at regional level provide further clarity as to what is required to ensure respect for human rights in the case of particularly vulnerable groups.

[6] The present study uses the term 'violations' in general terms as suggested in the Specifications for this briefing, even though companies technically do not 'violate' human rights in the legal sense, because they are not formally and directly bound by international human rights. Hence, the UNGPs speak of human rights abuses or adverse impacts on human rights.

The UNGPs themselves do not spell out any specific obligations in this regard as far as the operative sections are concerned. However, the commentary to UNGPs Principle 12 clearly states that 'enterprises should respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them. In this connection, UN instruments have elaborated further on the rights of indigenous peoples; women; national or ethnic, religious and linguistic minorities; children; persons with disabilities; and migrant workers and their families.' (UNGPs, Commentary to Principle 12). This raises the question of whether, and if so, how human rights due diligence legislation should incorporate additional standards for groups or persons in vulnerable situations.

Existing legislation does not explicitly refer to any special duties in this regard with the exception of the Dutch Law which focusses only on the rights of children. In contrast, civil society organisations have called for 'additional standards defined in international treaties for the protection of the rights of particularly vulnerable groups or individuals such as indigenous peoples, migrants or women.' (ECCJ Position Paper, 2018). Furthermore, the CoE Recommendation on Business and Human Rights suggests that HRDD should contain additional protection for children and indigenous peoples (CoE Recommendation, 2016). It should be noted that these proposals do not go beyond a mere recognition of these groups' special vulnerability and the requirement for additional measures.

In light of the existing standards of international human rights law, it is recommended that HRDD legislation should refer to those additional measures which can be based on current human rights treaties and instruments such as CEDAW, CRC, CRPD and UNDRIP as these instruments either have to be ratified by all EU Member States (and the EU itself as in the case of the CRPD) or constitute customary law (such as the main principles of UNDRIP). However, any HRDD legislation should also emphasise the universal and indivisible character of all human rights and focus on the notion of 'special measures' which may be required to discharge an HRDD obligation fully.

## 3.4 Companies covered

UNGPs Principle 14 leaves no doubt that 'The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure.' Yet, while this UNGPs Principle goes on to stress that 'the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors' it also highlights that the severity of any enterprise's adverse human rights impacts, which is determined in this context by its graveness, scope and irreversibility of the negative impacts, also needs to be taken into account. The Commentary to UNGPs Principle 14 acknowledges that 'small and medium-sized enterprises may have less capacity as well as more informal processes and management structures than larger companies, so their respective policies and processes will take on different forms. But some small and medium-sized enterprises can have severe human rights impacts, which will require corresponding measures regardless of their size.'.

This raises the question of whether or not HRDD legislation should apply only to some companies – for instance, as far as size and sector are concerned. Existing legislation and proposals differ significantly in this regard. The French Due Diligence Law applies only to companies employing at least 5 000 employees, including its direct and indirect subsidiaries, for two consecutive financial years. The UK Modern Slavery Act's transparency requirement applies only to commercial organisations fulfilling a minimum turnover, as prescribed in regulations issued by the Secretary of State, although it is not limited to companies registered in the UK. Similarly, EU rules on non-financial reporting apply only to large (i.e. above certain annual turnover or annual balance sheet thresholds) public-interest companies with more than 500 employees. The EU Conflict Mineral Directive applies to EU importers, smelters and refiners, as long as their annual import volume of the minerals or metals concerned is above certain volume thresholds. Additionally, the EU Timber Regulation, which entered into force in 2013 although its adoption predates the UNGPs, applies only to timber importers who place timber and timber products on the EU market.

Conversely, the Dutch Law applies to any company registered in the Netherlands that sells or supplies goods or services to Dutch end users and to companies not registered in the Netherlands that sell or supply goods or services to Dutch end users. The EU Employers' Sanctions Directive (ESD) imposes obligations on all employers (and *de facto* all companies if consideration is made to the joint liability regime it introduces), additionally providing for a joint liability (art. 8 ESD) of a contractor and subcontractor, where a subcontractor breaches the terms of the directive (i.e. employs an undocumented third country national, or does not pay him/her remuneration, or does not pay fines and penalties, and back taxes or social insurance contributions). This applies unless the contractor can prove fulfilment of due diligence obligations as defined by national law, including informing any subcontractor about existing regulations as well as the illegality of employing undocumented third-country nationals (i.e. those who have no authorisation to stay in a given country) and its consequences (art. 8 ESD).

It is, therefore, clear that the majority of existing legislation applies only to companies of a **certain size**, as legislators seem to have considered that the respective requirements would be too burdensome for smaller companies. However, this is not the approach taken by the UNGPs. It is also difficult to come up with clear and coherent thresholds, as can be seen by the variety of approaches taken by existing legislation. Furthermore, any threshold carries with it a risk of circumvention or creative restructuring by companies. Finally, the risk of negative impact resulting in the irreversible abuse/breach of human rights is not limited only to bigger companies – lack of diligence by a small company can just as well result in serious violations as loss of health and life[7].

Regarding the issue as to whether the legislation should be **sector or non-sector specific**, national legislation has been adopting to date a non-sector specific approach, whereas EU legislation has so far taken a mixed approach. The NFR Directive takes a non-sector specific approach. However, the Conflict Minerals Regulation and the Timber Regulation apply to specific sectors (importers of minerals and metals and smelters, and in case of the latter, importers of wood). The EC DG JUST study, though, points out that 'stakeholders have confirmed that there is no sector of business which does not pose any potential risks to human rights or the environment' (EC DG JUST study, 2020, p. 226).

The EC DG JUST Study (in section 5 of Chapter II Market Practices and IV Problem analysis) provides a thorough breakdown of various regulatory options[8]. Option 4 ('New regulation requiring mandatory due diligence as a legal duty of care'), appears to have, depending on proper monitoring and enforcement, the most significant and positive human rights and environmental impacts (EC DG JUST mHRDD study, 2020, p. 23). It is divided into the following sub-options in regard to different scopes of business which should potentially be covered and different types of requirements:

- 'Sub-option 4.1: New regulation applying to a narrow category of business (limited by sector);
- Sub-option 4.2: New regulation applying horizontally across sectors:

[7] For example, the Interpretive Guide to the Corporate Responsibility to respect human rights highlights that while "in many instances, the approaches needed to embed respect for human rights in a smaller enterprise's operations can mirror the lesser complexity of its operations" yet "size is never the only factor in determining the nature and scale of the processes necessary for an enterprise to manage its human rights risks. The severity of its actual and potential human rights impact will be the more significant factor. For instance, a small company of fewer than 10 staff that trades minerals or metals from an area characterized by conflict and human rights abuses linked to mining has a very high human rights risk profile. Its policies and processes for ensuring that it is not involved in such abuses will need to be proportionate to that risk."(OHCHR, 2012, p.20)

[8] Apart from Option 4 referred to above, the EC DG JUST mHRDD study presents also pros and cons and initial impact assessment of three other main options i.e. no policy change (option 1), new voluntary guidelines/guidance (option 2) and new regulation requiring due diligence reporting (option 3). Yet it states also that the 'Options 2 and 3 are expected to have only a minor positive social impacts. Since these options only provide new guidance or require reporting but do not substantively require companies to take any due diligence measures, it is not expected that substantial additional measures would be taken by companies to address social matters.' (EC DG JUST mHRDD study, 2020, p. 23). This footnote is of relevance also to section 3.6 below.

- Sub-option 4.2(a): applying only to a defined set of large companies;
- Sub-option 4.2(b): applying to all business, including SMEs;
- Sub-option 4.2(c): 4.2 (c) general duty applying to all business plus specific additional obligations applying only to large companies;

- Sub-option 4.3: Sub-options 1 and 2 accompanied by a statutory oversight and/or enforcement mechanism:
  - Sub-option 4.3(a): mechanisms for judicial or non-judicial remedies;
  - Sub-option 4.3(b): state-based oversight body and sanction for non-compliance.'

Since the limited scope of this briefing does not allow for an analysis of the advantages and disadvantages of each option in terms of improved human rights protection as well as impacts and potential costs for businesses and states, readers are recommended to consult the full EC DG JUST Study or the Synthesis Report in Annex 1 thereof which provides a condensed overview of the different options[9].

However, aside from the variety of possible approaches to the scope of companies to be covered by mHRDD, the legislator should take into account that most companies' activities, irrespective of their size or sector, can have adverse impacts on human rights. Accordingly, size and sector should not be determining factors in allocating human rights obligations, as suggested by the Dutch Law on Due Diligence concerning Child Labour. However, it is a different matter whether all companies should comply with the same mHRDD requirements.

It is, therefore, suggested that HRDD legislation should not exclude a priori any company from its obligation to implement HRDD, but should address the special challenges of small and medium enterprises (SME) and/or specific sectors through various regulatory options, thereby concretising the proportionality principle which would allow for a differentiation of obligations. One of the options could be the adoption of a phased approach allowing smaller companies to start implementing the full set of obligations at a later stage[10]. This would also be in line with the EP (EP, 2016, OP 8, 9) indication that attention needs to be paid to the special features of SMEs, bearing in mind the fact that micro and SME enterprises constitute an overwhelming majority of businesses in the EU[11], with many not being in a position to carry the same burden of additional obligations large, multinational companies[12]

This approach (i.e. that all companies operating in the EU are to carry out HRDD, but proportionate to the size/leverage in the supply chain and commensurate with the nature of the adverse impact), seems also to be recommended by NGOs and some businesses organisations (e.g. Amfori, 2020) and coincides with the

[9] It should be stressed, though, that this briefing did not aim to provide recommendations as to any specific approach that the EU should take, but to provide pros and cons of various options.

[10] It should also be noted that even for large companies a certain time will be needed to adjust procedures, provide necessary training and budgets to ensure proper implementation of the potential new legislation. Hence some of the stakeholders (see e.g. Amfori, 2020) recommend that a phased/delayed approach is taken in terms of consequence for non-compliance. This approach has also been adopted by the EP.

[11] 'In 2015, the overwhelming majority (92.8 %) of enterprises in the EU's non-financial business economy were those with less than 10 persons employed (micro enterprises). In contrast, just 0.2 % of all enterprises had 250 or more persons employed and were therefore classified as large enterprises': *European Commission, Small and medium-sized enterprises: an overview*, https://ec.europa.eu/eurostat/web/products-eurostat-news/-/EDN-20181119-1.

[12] The extent to which the SMEs should meet the same mHRDD obligations is one of the most discussed issues. For example the EC DG JUST mHRDD study points that according to the survey results the overall preference appears for a general cross-sectoral regulation, but which takes into account the specificities of the sector, and the size of the company in its application to specific cases. Survey respondents expressed an overall preference for a standard which applies regardless of size, but views varied in this respect: many noted a concern about the potential burden for SMEs, whilst other argued that many of the risks in their supply chain relate to the activities of SMEs.' (EC DG JUST mHRDD Study, 2020, p. 17, See also p. 254-255).

preferences of business in the EC DG JUST mHRDD study (EC DG JUST mHRDD study, 2020, Chapter II – Market Practices).

Existing legislation and proposals do not specifically address the obligations and roles of **state-owned enterprises.** However, UNGPs Principle 4 clearly state that 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', and thus lead by example. This was also emphasised by the European Parliament which called on the EU and Member States to prioritise for immediate action the establishment of mandatory human rights due diligence for business enterprises which are owned or controlled by the state and/or receive substantial support and services from state agencies or European institutions as well as for businesses that provide goods or services through public procurement contracts (EP, resolution 2016). It is also noteworthy that some EU Member States have applied the non-financial reporting requirements to all state-owned enterprises (for example, Sweden: Swedish Government, 2017, p. 9; Swedish Government, 2018; Denmark: Danish Financial Statements Act[13], that covers also non-financial reporting, applies to all listed companies and to state-owned limited liability companies, irrespective of their size). It is, therefore, recommended that the special role and function of state-owned enterprises be addressed in potential mHRDD legislation. These enterprises should have the same duties as other larger enterprises, regardless of their size.

Finally, if the legislation is really to provide an equal level playing field, it should apply to companies domiciled in an EU Member State and also to those companies placing products or providing services in the internal market. Otherwise, EU companies bound by the rules will be competing with non-EU companies not subject to the same due diligence obligations. .

## 3.5 Business activities covered

A key issue in the debate about the scope of potential HRDD legislation concerns whether the relevant obligations should cover only the activities of the parent company oor extend to subsidiaries and contractors in the supply chains. The UNGPs refer to this issue in Principle 13 which states that companies should (also) seek to prevent or mitigate adverse human rights impacts 'that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.' The commentary states that business relationships 'include relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services.'

The French Due Diligence law requires that risk assessment covers the 'situation of subsidiaries, subcontractors or suppliers with whom the company maintains an established commercial relationship.' This wording clarifies that due diligence extends to subsidiaries and entities with which the company has an established commercial relationship. It is unclear whether this refers exclusively to the first tier of a supply chain (direct contractual partner) or to additional tiers further along the chain. Due diligence according to the Dutch Law addresses the question of whether 'goods or services to be supplied have been produced using child labour', which could also be understood as covering only the first tier of a supply chain if interpreted narrowly. The law stipulates that "a company which receives goods or services from companies which have issued a [due diligence] declaration […] is also exercising due diligence with respect to those goods and services" This suggests that a company may discharge its due diligence obligation by only considering its immediate contractual partner, because is refers to the direct reception of goods and services from other companies.

Most civil society actors and trade unions have suggested that due diligence should include supply and subcontracting chains, including suppliers and contractors operating abroad (ECCJ 2020, ETUC 2019, EC

[13] Årsregnskabsloven, LBK nr 838 of 08/08/2019, available at https://www.retsinformation.dk/eli/lta/2019/838

DG JUST Study 2020), in particular where parent company provides consolidated accounts for its foreign subsidiaries, as is often the case in anti-trust proceedings (Riesenkamff and Krauthausen, 2010), or in situations covered by the (rebuttable) presumption of parental liability as in cases concerning competition regulations [14].

In light of the UNGPs' approach and existing proposals for legislation, it is recommended that future HRDD legislation extends its application not only to the activities of the company itself, but also to business relations including the value chain. Limiting due diligence to the conduct of a company and its first-tier supplier might be less burdensome on businesses, but would exclude a significant number of cases in which the company's activity may have an impact on human rights. Such a limitation may create incentives to circumvent due diligence by further outsourcing or by artificially adding additional tiers to the supply chain. Furthermore, it would create arbitrary distinctions between companies (and sectors) operating with longer supply chains as opposed to those with integrated business models. Accordingly, for the sake of greater clarity, it would be beneficial if the legislation could explicitly state that companies' due diligence not only covers first-tier contract partners, but that obligations extend to a company's potential influence over additional tiers of the supply chain ('n-tier' suppliers).

## 3.6 Duties of companies and enforcement

The core concern about any HRDD legislation pertains to companies' duties and their enforcement. The UNGPs clearly state that human rights due diligence forms the main element of a corporate responsibility to respect human rights, but they do not specify the regulatory approach that states should be using regarding reporting, substantive due diligence obligation, civil/criminal liability, administrative fees, or all the aforementioned combined.

Existing state practice indicates two different approaches: a reporting (transparency) model and a due diligence model.

1. The UK Modern Slavery Act and the EU NFR Directive are typical examples of a reporting (transparency) model and rely on companies' requirement to inform. The UK Modern Slavery Act requires either a statement of the steps an organisation has taken during the financial year to ensure that slavery and human trafficking has not taken place or a statement that the organisation has taken no such steps. Hence, there is no obligation to engage in any activity. The EU NFR directive requires a statement of the company's impact on human rights. Existing evidence suggests that relying solely on reporting obligations has only a limited effect in incentivising companies to respect human rights. (ACT Research Report, 2019; EC DG JUST mHRDD study, 2020; Valuing Respect Project, 2019) [15].
2. The French Due Diligence Law and the Dutch Child Labour Law are examples of the due diligence model. The French Law requires companies to engage in due diligence and publish a vigilance plan

[14] The rebuttable presumption of parental liability is an instrument of the Commission in fighting Article 101 TFEU infringements.
[15] According to Corporate Human Rights Benchmark 2018 results, in 2018 40 % of the largest companies in the world failed to show any evidence of identifying or mitigating human rights risks in their supply chains, while the findings of the 2019 CHRB assessment which covered twice as many companies, show quite similar results – with companies scoring on average 21 % (3.2 out of 15) under the human rights due diligence assessment area, and nearly half (49 %) of the companies assessed scoring zero against every HRDD indicator. (CHRB, 2019, p. 8). According to the 'Study on due diligence requirements through the supply chain. Final Report' (European Commission, Study, 2020, p. 16), 'just over one-third of business respondents indicated that their companies undertake due diligence which takes into account all human rights and environmental impacts, and a further one-third undertake due diligence limited to certain areas. However, the majority of business respondents which are undertaking due diligence include first tier suppliers only.' Also the Alliance for the Corporate Transparency 2019 Research Report, based on the analysis of 1 000 EU companies reporting pursuant to the EU Non-financial Reporting Directive, underlines in its main conclusion that 'while there is a minority of companies providing comprehensive and reliable sustainability-related information, at large quality and comparability of companies' sustainability reporting is not sufficient to understand their impacts, risks, or even their plans.' (ACT, Research Report 2019, Executive summary, p. 10). This is also confirmed by the non-financial reporting analysis results conducted as part of the Valuing Respect Project (www.valuingrespect.org), which looked at non-financial disclosure across the globe (Valuing Respect Project, 2019) and specifically in as yet far-overlooked regions (Faracik & Mężyńska, 2019).

addressing the relevant issues. The law is enforced through a court action by 'any person with legitimate interest in this regard' in which the court is asked to urge the company to comply with the law. Furthermore, a company which has failed to meet its duties under the law shall be liable and obliged to compensate for any harm that due diligence would have sought to avoid.

The Dutch Child Labour Law requires companies to engage in due diligence regarding child labour in the supply chain and to disclose these activities. Implementation of the law is supervised by a regulatory authority (Toezichthouder), which publishes all reports and may impose administrative fines for non-compliance. Any natural person or legal entity whose interests are affected by the actions or omissions of a company relating to the Law may submit a complaint to the regulatory authority.

If future legislation were to adopt a reporting (transparency) approach, be it as part of more comprehensive HRDD legislation or stand-alone, it would be advisable to state clearly what and how companies should report, by providing, for instance, a defined set of precise and universally applicable indicators (and underlying methodologies) at least as far as core labour rights, including living wages and gender pay-gaps, are concerned (see Gregor & Houston, 2020)[16]. For example, companies could be required to follow the UNGPs' Reporting Framework (UNGPs RF, 2015). Mandatory supply chain disclosure, suppliers' lists and subsidiary ownership, could also form part of such a report (or be provided online and with a link provided in the report). Legislation should define the minimum scope of information that needs to be provided in order for the report to meet the required standards and to allow comparability between companies (see: European Parliament, 2018, para. 17). Moreover, to ensure the credibility and accuracy of the information provided, the HRDD legislation should also consider including the requirement for third-party audited reporting (e.g. European Parliament resolution on sustainable finance, 2018, para. 17).

As the effectiveness of mere reporting and transparency requirements have proved limited. It is recommended that future HRDD legislation adopt a substantive due diligence model . It should require companies to engage actively in analysing, mitigating as well as remedying any adverse impacts on human rights based on and connected with their own activities in business relations. It should be mentioned that such an approach is recommended by certain business associations and networks, such as Amfori, which stresses that 'HRDD should be informed by an ongoing risk-assessment and impact-oriented approach to not only identify risks but also remediate adverse impacts' and should be regarded as 'a dynamic process of continuous improvement.' (Amfori, 2020, p. 4) This approach would also be in line with recommendations from both the EP and non-state actors, who point to the need for basing future mHRDD legislation on such recognised international frameworks as the UNGPs and OECD Due Diligence Guidance for Responsible Business Conduct, that set out the HRDD process in order to ensure the approach's conformity and coherent minimum standard (e.g. European Parliament, 2018, para. 11, ECCJ 2020). It would also build on provisions in the EU Timber Regulation, which not only requires timber importers to develop or use a due diligence system to assess the risk that timber has been logged or traded illegally[17], but also

[16] So far it seems that the greatest value gained from NFR reports lay in their shedding light on companies' low level of awareness in regard to human rights. Thus, further steps are needed to ensure that NFR reporting forms a meaningful part of the HRDD process, which informs strategic decision making in the company and results in changes as well as improvements that in turn lead to better respect for human rights. At the same time, research into the non-financial disclosure proved that the lack of clear obligations as to the minimum set of data that needs to be disclosed results in the lack of comparability between reporting companies (and thus limited usefulness to investors or the general public) caused by the companies taking a 'pick & choose' approach to what they want and do not want to show. This could easily be remedied, because as the ACT Research report documented (e.g. 70 % of Spanish companies reporting on the gender pay gap compared to the European average of 7,4 %), if companies are required by national law to disclose specific information, they do so (see also Gregor, Houston, 2020).

[17] This includes gathering information, evaluating on the basis of the information identified the risk of illegal timber in the supply chain, and taking steps to prevent importing illegal timber, including e.g. by requiring additional information and verification from the supplier.

regards failure to carry out due diligence as an offence, even if the wood itself is shown to be legal. Furthermore, the future mHRDD would also be building on existing EU legislation, given that the EU Employers' Sanctions Directive makes companies jointly liable for the misconduct of their subcontractors, unless they can prove that they have undertaken due diligence in line with the national legislation (art. 8 of the ESD) [18].

During the legislative process, attention should be paid to proposals coming from non-governmental spheres, which sometimes put emphasis on aspects overlooked by other actors. For example, the ECCJ Legal Brief calls for the duty of reporting, under which 'undertakings should publicly report on their due diligence and consultation processes and their results' (in particular actions taken to cease and remedy existing impacts or prevent future recurrences) 'in a public, accessible and appropriate manner' and the 4-stage Duty of due diligence (comprising a) Identification and assessment of real and potential impacts; b) Ceasing and remedying existing abuses; c) Preventing and mitigating risks of abuse; d) Monitoring the implementation and effectiveness of the adopted measures). It also puts strong emphasis on the need for the future legislation to make it clear that consultation – present in all HRDD standards - with stakeholders, representative trade unions and workers' representatives, is vital to HRDD operationalisation at the company level. It also points to the importance of adequate documentation, i.e. the obligation to maintain a written record of all due diligence actions and their results (ECCJ, 2020, p. 5).

Considering the diversity of implementing and enforcement mechanisms for company obligations in EU Member States, it may not be possible to adopt one implementation mechanism which would be universally suitable and effective. It might be more appropriate, therefore, to leave the choice of implementation mechanism to the Member States themselves, or to aim at a mix between EU and Member State responsibilities and mechanisms. The HRDD legislation could and should, though, apart from the definition of what due diligence needs to cover and ensure, include a set of different implementation mechanisms, including administrative, civil and possibly even criminal law instruments together with sanctions, requiring states to adopt approaches which will include penalties deemed sufficient to produce a deterrent effect. In any event, Member States would be required to implement the HRDD legislation effectively in accordance with generally accepted principles of EU law. [19].

Finally, it should be also born in mind, that adoption of HRDD legislation at the EU level will not solve all the problems unless at the same time effort is made to ensure consistency and coherence with the goals of existing legislation, lack of which not infrequently affects companies' ability to act responsibly and exert positive leverage on others[20].

Regularly updated information on developments relevant to the implementation and enforcement of the EU Timber Regulation can be accessed at the dedicated European Commission's website: https://ec.europa.eu/environment/forests/timber_regulation.htm#diligence.

[18] It should be noted however, that with the directive not providing even minimum standard of what that due diligence should entail, in some countries, e.g. Poland, it is enough to inform subcontractor of the legal consequence of employing third-country nationals staying illegally in the country to absolve oneself from responsibility. On the other hand, due to the very narrow interpretation of the General Data Protection Regulation by at least some of the national offices for the personal data protection, the companies have very limited, if any at all, possibility and tools to verify if the statements made by its subcontractors and temporary work agencies are reflecting truth.

[19] For an in-depth examination of those aspects within mHRDD legislation, readers may consult the EP 'Briefing on the EU human rights due diligence legislation: monitoring, enforcement and access to justice for victims' along with the EC DG JUST Study. Novel input into the ongoing discussion on this issue can be also found in the non-state actors recommendations, e.g. ECCJ recommends *i.a.* the **civil liability regime that foresees a different liability rules depending on the link between the parent company and the entity directly involved in the harm** (absolute liability for harm caused by controlled and economically dependent entities; strict liability otherwise); disclosure of evidence rules establishing a **fair distribution of the burden of proof**, making sure that it is the company that would have to, at least, clarify its relationship with the entities involved in the harm, and whether it acted with due care and took all reasonable due diligence measures; and **harmonised rules on the limitation period for bringing legal actions**. (ECCJ, 2020)

[20] See for example findings and recommendations of the project SMART (Sustainable Market Actors for Responsible Trade) funded under the European Union's Horizon 2020 research and innovation programme, available at: https://www.smart.uio.no/reform_proposals.

# 4 Conclusion and Recommendations

While development of the mHRDD is a very complex endeavour, it should nevertheless be borne in mind that its aim is to ensure respect for the rights of humans, who should not be sacrificed for the sake of company profits and accumulation of wealth. With a shift in the purpose of company paradigms, the time is ripe for adequate provisions to take on a legally binding form, not only to ensure protection of individual rights-holders, but also to ensure a level playing field for companies operating in and from the EU, so that those undertaking efforts to prevent and mitigate negative human rights impacts are not driven out of the market by other companies seeking a competitive advantage through the exploitation of human beings and their environment.

**Recommendations**:

- **Scope of human rights covered**

It is recommended that any future mHRDD legislation should cover all human rights. To clarify what this refers to, it is important to emphasise the UDHR, the two covenants, further global human rights treaties, the ILO core standards and other internationally accepted instruments of human rights, such as the UNDRIP.

- **Types of human rights violations covered**

It is recommended that a potential HRDD legislation is not limited to severe violations but covers all types of violations. Legislation could however build on the language used in UNGPs Principle 24 stating that when companies need to prioritise, they should focus on situations and activities with more severe impacts.

- **Vulnerable groups**

In light of the existing standards of international human rights law, it is recommended that HRDD legislation should refer to those additional measures, which can be based on existing human rights treaties and instruments, such as CEDAW, CRC, CRPD and UNDRIP. However, any HRDD legislation should also emphasise the universal and indivisible character of all human rights and focus on the notion of special measures which may be required to discharge fully an HRDD obligation.

- **Companies covered**

It is recommended that the overarching mHRDD legislation should cover all companies - either domiciled in an EU Member State or placing products or providing services in the internal market - regardless of their size and take a non-sector specific approach. However, special challenges faced by SMEs and/or issues specific to certain sectors should be addressed through various regulatory options, concretising the proportionality principle which would allow for carefully weighed differentiation of obligations and duties foreseen for enterprises.

- **Business activities covered**

It is recommended that future HRDD legislation should make explicit its application not only to the company's own activities, but also other business relations, including the supply chain. For greater clarity, it would also be beneficial for the legislation to state that it affects not only first tier contract partners, but that a company's obligations and influence must also extend to n-tier suppliers along the value chain.

- **Duties of companies and enforcement**

Having regard to the limited effectiveness of mere reporting and transparency requirements, it is recommended that future HRDD legislation should adopt a substantive due diligence model and require companies to engage actively in analysing, mitigating and remedying any adverse impacts on human

rights, based on their own activities and connected to them in their business relations. To ensure that those duties are implemented adequately, the mHRDD legislation should take a comprehensive approach by highlighting that meeting the duty of diligence requires adequate levels of consultation with stakeholders, documentation together with meaningful reporting that informs strategic decision-making by top management and ensures comparability with other enterprises.

The mHRDD legislation should also foresee provisions that would require EU member states to guarantee adequate country level enforcement and remedy mechanisms. The HRDD legislation should thus include a set of different implementation mechanisms, including administrative, civil and possibly even criminal law instruments together with sanctions in requiring states to adopt approaches that will result in penalties sufficient to have a deterring effect. In any event, Member States would be required to implement the HRDD legislation effectively in accordance with generally accepted principles of EU law.

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Briefing

Requested by the DROI subcommittee

European Parliament

# EU Human Rights Due Diligence Legislation: Monitoring, Enforcement and Access to Justice for Victims

Policy Department for External Relations
Directorate General for External Policies of the Union
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DIRECTORATE-GENERAL FOR EXTERNAL POLICIES
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BRIEFING Nº2

# EU Human Rights Due Diligence Legislation: Monitoring, Enforcement and Access to Justice for Victims

## ABSTRACT

This briefing explores options for monitoring and enforcement of European Union (EU) human rights due diligence legislation, and how such legislation should contribute to access to justice and remedy for victims of human rights abuses linked to the operations of businesses inside or operating from Member States (MS). The briefing reviews existing due diligence and disclosure schemes and considers the feasibility of specific options for monitoring, enforcement and access to remedy within a future EU due diligence law. The briefing recommends that such legislation should require effective monitoring via company-level obligations, national and EU-level measures, including repositories of due diligence reports, lists of companies required to report, information request procedures, monitoring bodies and delegated legislation or guidance further elaborating on due diligence under the law. Regarding enforcement, the law should *inter alia* require MS to determine appropriate penalties for non-compliance and to establish enforcement rights for interested parties. Finally, on remedy, the law should, besides requiring companies to establish complaint mechanisms, provide for national and EU measures, including requirements that MS ensure effective means of remedy and redress for victims and establish or identify bodies to investigate abuses, initiate enforcement and support victims.

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# Acronyms and Abbreviations

| | |
|---|---|
| ACT | Alliance for Corporate Transparency |
| Aus MSA | Australian Federal Modern Slavery Act 2018 |
| BHRRC | Business and Human Rights Resource Centre |
| CHRB | Corporate Human Rights Benchmark |
| COE | Council of Europe |
| CTSCA | California Transparency in Supply Chains Act 2012 |
| DG | Directorate General of the European Commission |
| LDV | French Law on Duty of Vigilance |
| EC | European Council |
| ECCJ | European Coalition for Corporate Justice |
| ECFR | European Charter of Fundamental Rights |
| ECHR | European Convention of Human Rights and Fundamental Freedoms |
| EIB | European Investment Bank |
| EP | European Parliament |
| ESG | Environmental, Social and Governance |
| EU | European Union |
| EU NFR | EU Non-Financial Reporting Directive |
| EU SRD | EU Regulation on Sustainability-Related Disclosures in the Financial Services Sector |
| FRA | European Union Agency for Fundamental Right |
| GRETA | Council of Europe Group of Experts on Human Trafficking |
| ILO | International Labour Organisation |
| MS | Member states of the European Union |
| MSA | United Kingdom Modern Slavery Act 2015 |
| NHRI | National Human Rights Institution |
| NSW MSA | New South Wales Modern Slavery Act 2018 |
| OECD | Organisation on Economic Cooperation and Development |
| RDR | Ranking Digital Rights Initiative |
| SDGs | United Nations Sustainable Development Goals |
| ToR | Terms of Reference |
| UK MSA | UK Modern Slavery Act 2015 |
| UN | United Nations |
| UNGPs | United Nations Guiding Principles on Business and Human Rights |
| US | United States of America |
| US FAR | United States Federal Acquisition Regulation |
| WBA | World Benchmarking Alliance |
| WBCSD | World Business Council for Sustainable Development |

# 1 Introduction

This briefing considers how EU legislation on corporate human rights due diligence should be monitored and enforced, and how such legislation should facilitate access to justice and remedy for victims of business-related human rights abuses. The UN Guiding Principles on Business and Human Rights (UNGPs) (UN, 2011) call for all businesses to undertake due diligence to operationalise their responsibility to respect human rights. Based on States' obligations under human rights treaties, the UNGPs prescribe that states should adopt a 'smart mix' of legislative and other regulatory measures 'to prevent, investigate, punish and redress' business-related human rights abuses (UNGP No 1 ). The EU and EU Member States (MS) have affirmed their commitment to uphold the UNGPs through numerous policy instruments (e.g. European Commission (EC), 2011; EC, 2015; EP, 2016). Some MS have enacted laws requiring businesses to perform human rights due diligence, including France's *Loi de Vigilance* (LDV) and the Netherlands' Child Labour Due Diligence Law. Other MS are considering adopting such legislation. At the same time, company implementation of due diligence across the EU remains at best uneven (CHRB, 2019; ACT, 2020; EC, 2020), while business-related abuses are not diminishing at home or abroad (FRA, 2019; International Labour Organisation (ILO), 2019; BHRRC, n.d.) and rather continue to manifest on new fronts (RDR, 2019; EP, 2017a, 2019a; COE, n.d.). As observed by the European Parliament (EP) (EP, 2016, 2017b), this suggests a role for EU due diligence legislation, to honour EU human rights obligations and commitments, to secure a 'level playing field' across the EU single market and to advance the accountability of governments and businesses. Furthermore, such legislation should support access to remedy for victims and help protect human rights defenders whilst also supporting the implementation of the Sustainable Development Goals (SDGs) (WBCSD, 2017; ILO, 2019b).

## 1.1 Purpose and Scope

This briefing aims to support the EP in developing its position on EU human rights due diligence legislation. It considers options for the **monitoring and enforcement** of such legislation, and how it should contribute to strengthening **access to justice and remedy** for victims of human rights abuses linked to businesses operating within or from MS. It assumes that EU human rights due diligence legislation would be horizontal (cross-sectoral), address a broad spectrum of human and labour rights (all internationally-recognised human rights) and cover business-related abuses inside the EU and in non-EU countries by EU-based companies, whether directly through their presence or investments, or indirectly through supply chain or established commercial relations[1].

Under the UNGPs, **monitoring** is an essential dimension of due diligence for individual companies. Outcomes revealed by company monitoring should drive remediation efforts as well as continual improvement in company policies and practice (UNGP 20). At the same time, in the context of EU due diligence legislation, monitoring should refer to steps taken by other parties, at national or EU level, to track companies' compliance with due diligence obligations or the overall effectiveness of a legislative scheme in preventing or addressing corporate abuses. **Enforcement**, whether by MS, EU-level authorities, or at private initiative, secures the fulfilment of legal responsibilities. In the due diligence context, enforcement should seek to fulfil companies' procedural or substantive obligations. It might operate via complaints procedures, civil litigation, or criminal prosecution of individuals or corporations, and should result in the imposition of pecuniary or other penalties. **Access to justice and remedy** refers to judicial, administrative or other mechanisms to ensure that when business-related human rights abuses occur, those affected can avail themselves of an effective remedy (UNGP No 25).

[1] In line with the TOR, it is not assumed for the purpose of this analysis that EU due diligence legislation would extend beyond human rights to environmental and governance risks and impacts.

Parts 2, 3 and 4 of this briefing address monitoring, enforcement and remedy respectively. Each Part identifies and evaluates elements that could feature in an EU corporate human rights due diligence law, on the basis of a review of existing **disclosure-based regimes** and **corporate human rights due diligence laws**. Part 5 makes recommendations for measures that could be included in such a law and addressed to the EU, MS and other actors.

## 1.2 Methodology

This briefing draws on a desk review of selected legislation; soft laws and policies; judicial decisions; institutional studies; civil society, scholarly and other relevant material (see Bibliography). Annex I summarises, in table form, an evaluation of possible measures that could be included in EU due diligence legislation in relation to monitoring. Annex II presents the same analysis in relation to enforcement measures, and Annex III lays this analysis with regard to remedies. Annexes IV and V respectively review provisions on monitoring and enforcement of selected due diligence and disclosure schemes.

# 2 Monitoring

Monitoring is intrinsic to the process of human rights due diligence, as the UNGPs and other relevant guidance (e.g. EC, 2017; OECD, 2018) make clear. Where disclosure obligations address due diligence processes, these logically entail that companies will undertake monitoring, albeit this may not be explicitly stated. Companies need to monitor actual and potential impacts of activities across their own operations, business relationships and partners, and the effectiveness of their due diligence arrangements in preventing and redressing harm. Yet external monitoring of human rights due diligence is also essential. Even if human rights reporting practices can trigger positive changes at company level (e.g. McPhail and Adams, 2016; Ethical Trading Initiative and Hult International Business School, 2016; McCorquodale et al, 2017), non-financial reports remain an unreliable guide to companies' sustainability risks, impacts and performance (e.g. Parsa et al, 2018; Doan and Sassen, 2020). Furthermore, disclosure obligations, in isolation, are a weak driver of effective due diligence and remediation (Methven O'Brien and Dhanarajan, 2016; LeBaron and Rühmkorf, 2017; United Kingdom (UK) Government, 2019; CHRB, 2019; ACT, 2020). Companies' internal monitoring processes should, then, involve third parties and be supplemented by external monitoring by governmental and third party mechanisms (EC, 2017).

## 2.1 Monitoring: review of current approaches

**Company-level due diligence monitoring:** Most legislative schemes (see Annex IV refer to or entail the need for companies to undertake monitoring as part of the due diligence process (EU Non-Financial Reporting Directive (NFR); California Transparency in Supply Chains Act (CTSCA); UK Modern Slavery Act (UK MSA); Australia Federal MSA (AusMSA); Dodd Frank Act Final Rule 1502; French Law on Duty of Vigilance (LDV); Dutch Child Labour Due Diligence Act; EU Conflict Mineral Regulation). The LDV makes explicit that each company must establish a monitoring scheme (« *Un dispositif de suivi des mesures mises en œuvre et d'évaluation de leur efficacité* ») as one of five specified 'reasonable vigilance measures' (*"les mesures de vigilance raisonnable"*). In most cases, monitoring is periodic: few schemes establish one-off disclosure requirements (CTSCA; Dutch Child Labour Due Diligence Act).

Non-compliance with company-level monitoring duties does not attract penalties under some schemes (UK MSA). Others are more clearly mandatory (LDV; EU Timber; EU Conflict Minerals). Monitoring requirements generally follow the purpose and scope of obligations under the scheme in question. Thus, where the due diligence duty covers business partners, companies' monitoring duties follow accordingly (e.g. monitoring under the LDV covers subsidiaries and subcontractors/suppliers linked by an 'established commercial relationship'; under the Dutch Child Labour Due Diligence Act it should cover the entire supply chain). Non-financial statements under the EU Non-Financial Reporting Directive (EU NFR) Directive should

cover 'business relationships, products or services which are likely to cause adverse impacts… and how the undertaking manages those risks', where 'relevant and proportionate' (Art 19a). Some schemes mandate that disclosures cover grievance or early warning mechanisms, implying that monitoring arrangements at company level should integrate these elements (EU Conflict Minerals; LDV). Others mandate board approval of the company's monitoring scheme and/or reports based thereon (UK MSA; Aus MSA), or internal training for the board and company staff (NSW MSA), in line with international guidance on effective human rights due diligence (e.g. UNGPs; OECD, 2018).

**Government monitoring:** Legislation may seek to involve government bodies in due diligence monitoring, for instance, by requiring companies to file due diligence reports (Dutch Child Labour Due Diligence Act; NSW MSA), in some cases for subsequent publication (US Dodd Frank; CTSCA; Aus MSA). Certain laws and proposals go further, imposing on national authorities the obligation to monitor individual companies' fulfilment of due diligence or disclosure obligations (EU Conflict Minerals; Dutch Child Labour Due Diligence Law; Norway Ethics Information Committee, 2019). Independent bodies may be tasked to review the legislation's overall application and effectiveness (UK MSA; NSW MSA). EU legislation may require MS to appoint competent national oversight authorities (EU Timber), to identify and publish lists of companies subject to due diligence requirements and to undertake checks on company compliance (EU Conflict Minerals). Legislation may also provide for time-bound review of its effectiveness (EU Conflict Minerals; Aus MSA).

**Third party monitoring:** Theoretically, disclosure obligations ought to permit monitoring and evaluation of individual companies' due diligence processes, and their effectiveness, by third parties, such as NGOs, investors and business partners. Associated reputational risk could encourage companies to implement and report on due diligence, even where disclosure obligations are imposed on a 'soft', or 'comply or explain' basis. Yet disclosure regimes have not in themselves been effective drivers of due diligence (Methven O'Brien and Dhanarajan, 2016; CHRB, 2019; Doan and Sassen, 2020; EC, 2020). Even rates of compliance with formal reporting obligations under MSA, CTSCA and EU NFR are lower than 30 % (NYU Stern, 2019; ACT, 2018).

This explains the growing interest in mandatory due diligence legislation (LDV; Dutch Child Labour Due Diligence Law) and the spread of initiatives ranking human rights performance of businesses. Some of the latter are horizontal while others target specific sectors (CHRB, 2019; BHRRC, 2018; Ergon, 2018; Terre Solidaire 2019; Know the Chain, 2019a, b and c). Where legislation has failed to establish national repositories of due diligence reports (UK MSA; LDV) civil society initiatives have sought to fill this gap by collecting and publishing such reports[2].

Complaint mechanisms have both monitoring and remedial functions. They are recommended or required by various schemes which may distinguish early alert or warning mechanisms (LDV) from complaints based on substantiated concerns (EU Timber). The role of third parties in monitoring has been sharpened under later schemes via associated enforcement mechanisms (LDV; Dutch Child Labour Due Diligence Law; see further Section 3 below). Draft legislation on transparency in Norway goes further. This would support monitoring by establishing a right to information on 'how an enterprise conducts itself with regard to fundamental rights and decent work within the enterprise and its supply chains', along with an information request procedure, applicable to all businesses, not just to large companies subject to formal reporting requirements (Norway Ethics Information Committee, 2019).

Some regimes require that supply chain audits are undertaken by independent auditors and thus envisage a role for third parties (CTSCA; EU Conflict Minerals; under the EU Timber Regulation, those private entities

[2] E.g. the Modern Slavery Registry gathers modern slavery statements under the UK MSA, AU Fed MSA and CTSCA (https://www.modernslaveryregistry.org/); the Duty of Vigilance Radar likewise collates vigilance plans under the LDV (https://vigilance-plan.org/). The NSW MSA establishes an electronic public register.

must be recognised as such by the EU). In practice, third party audit is widely relied on by companies to support monitoring and reporting independently of such laws. Yet the weaknesses of professional audit (often referred to as social audit) in identifying risks and securing remediation are well documented (ILO, 2016; Outhwaite and Martin-Ortega, 2019), leading many NGOs to advocate worker-driven supply chain monitoring instead (Worker Rights Consortium, n.d.; Electronics Watch, n.d.; Worker Driven Social Responsibility Network, n.d.).

## 2.2 Monitoring: evaluating possible mechanisms

Monitoring provisions of an EU due diligence law will be influenced by the legislation's scope and approach in other areas as well as wider EU legal and policy frameworks. For example, if only larger companies are addressed by a due diligence duty, it should be considered how that class of companies relates to the class of companies addressed by existing (or revised) EU NFR legislation. It would make little sense to oblige companies to report on due diligence (via NFR) but not to monitor its impact under a new due diligence law. On the other hand, the value of a legal due diligence obligation without a corresponding 'hard' reporting obligation can be questioned — as can the value of reporting as an aid to monitoring, where this is not undertaken periodically on a standardised basis and in accordance with adequate reporting formats. While investors' potential monitoring role may be advanced by the recent EU Regulation on sustainability-related disclosures in the financial services sector (EU SRD), it would seem reasonable to expect financial services providers themselves to be included within the scope of EU due diligence law. The same is true for large public entities, given the need for a level-playing field in the context of procurement, and for government to 'lead by example'.

Full consideration of such interdependencies exceeds the scope of the present briefing. It can be said, though, that periodic monitoring should be part of the due diligence process required of companies under any future EU due diligence law. To promote the effectiveness and accountability of their monitoring schemes, companies should be required to ensure adequate worker, stakeholder and board-level involvement in their design and implementation, and to establish early warning and/or complaint mechanisms. Such measures appear feasible, at least for large companies, mirroring requirements of existing schemes; their details could be addressed through delegated legislation or formal guidance. An information request procedure would further strengthen transparency and accountability.

In terms of monitoring by MS or an EU body, this might relate to formal due diligence requirements, such as the publication of due diligence plans. More impactful would be monitoring which would seek to evaluate effectiveness of due diligence efforts through verification measures such as checks, qualitative and thematic analyses. MS repositories and publication of lists of companies subject to and meeting (or not) the due diligence duty would also appear valuable and feasible. Repositories and lists could enhance EU level evaluation, and thus convergence, particularly if supplemented by an EU-wide repository and e.g. regional sector analyses. Costs of the latter might be modest, given the scope to base these on data already collected at MS-level. However, costs associated with establishing and maintaining either MS or EU level monitoring bodies could challenge their feasibility where monitoring duties are more expansive or where independent entities are envisaged. An EU-level recognition procedure for auditing organisations might allow for quality assurance of company-level monitoring processes, but in the context of broad-spectrum human rights due diligence going beyond compliance with technical matters such as chain of custody requirements raises issues requiring further reflection.

In summary, the present analysis suggests that company-level monitoring should be specified as an element of the corporate duty of due diligence under EU law. This should be supplemented by monitoring by executive authorities and/or independent bodies at MS and EU level and statutory review. Third-party monitoring should be supported by additional mechanisms including complaint mechanisms, public registers and a right to know/information request procedure. All such measures appear feasible at least for large companies.

# 3 Enforcement

Monitoring mechanisms promote fulfilment of due diligence duties indirectly. Enforcement mechanisms, by distinction, should trigger compliance with procedural or substantive duties, or both, in specific cases[3]. Enforcement provisions vary across existing regimes. Yet the persistence of weak compliance with both disclosure requirements (NYU Stern, 2019; ACT, 2020; Parsa et al, 2018; Doan and Sassen, 2020) and due diligence obligations (Methven O'Brien and Dhanarajan, 2016; CHRB, 2019) points to the inadequacy of existing enforcement mechanisms.

## 3.1 Enforcement: review of current approaches

Where powers to initiate enforcement action rest exclusively with executive authorities, their use tends to remain theoretical or marginal (UK MSA; NSW MSA; CTSCA). Under the UK MSA companies can in principle be compelled to publish statements via injunction on the application of the Secretary of State. Yet this mechanism has never been used (UK Government, 2019). Approaches allowing for enforcement at the motion of third parties appear more promising. Under the LDV any interested party can seek a formal notice to comply if a company fails to establish, implement or publish a vigilance plan. If there is no response from the company within a 3-month period, the company may, on the application of a party with standing under French law, be required by a judge to comply, subject to a penalty, by establishing the vigilance plan, ensuring its publication and accounting for its effective implementation or to give an account of the absence of a plan. These provisions have already been relied on by civil society on several occasions (Bright, 2018; Cossart and Chatelain, 2019; Renaud et al, 2019) albeit their ultimate impact is as yet unclear (Conseil Général de l'Économie de l'Industrie, de l'Énergie et des Technologies, 2020; Brabant and Savourey, 2020; Savourey 2020; Claude and Amati, 2020).

Under the Dutch Child Labour Law, failures to comply with requirements to conduct investigations or submit statements may result in administrative orders and fines, at the motion of the supervisory authority identified by the law. If initial fines are set at a "symbolic" level, they may be raised for repeated defaults (MVOPlatform, 2019). Besides, under the Dutch Law, any natural person or legal entity whose interests are affected by the actions or omissions of a company (relating to compliance) may submit a complaint to the supervisory authority, after having first attempted to resolve the complaint directly with the company, or six months after the submission of the complaint to the company without it having been addressed. Norway's draft law on transparency envisages penalties for contravention *inter alia* of right to information requests and, for large enterprises, the annual due diligence reporting duty (Norway Ethics Information Committee, 2019). The NSW MSA provides for administrative sanctions on companies for giving false or misleading information and for failing to prepare or publish an annual modern slavery report.

EU instruments require MS to determine the consequences of non-compliance (NFR) or appropriate penalties (EU Timber; EU Conflict Minerals regulation does not require MS to establish penalties but foresees this possibility after revision of the Regulation from 2023). The EU Timber regulation requires that such penalties as established by MS are 'effective, proportionate and dissuasive' (Art 19), and has included indicative lists of penalties such as fines and suspension of authorisation to trade.

The Dutch Child Labour Law envisages criminal liability in certain cases. Beyond initial fines for failure to submit a due diligence statement, a company director may face a prison sentence when the company has been fined twice within a five year period for not conducting due diligence in line with the legislation. The company may, in this situation, be fined up to EUR 750 000 or 10 % of annual turnover. Under the UK MSA,

[3] Though technically enforcement action could also refer to performance by MS of their obligations under EU due diligence legislation, this is not considered further here; neither are the various issues raised by possible EU accession to the ECHR.

failure to comply with an injunction requiring production of an annual slavery and human trafficking statement would be a contempt of court, punishable by a fine through a civil procedure. The French Conseil Constitutionnel declared unconstitutional provisions of the draft LDV which had sought to establish criminal sanctions (in the form of civil fines, '*amende civile*') for failures to develop, publish or effectively implement a human rights due diligence plan on the basis of the principle of legality[4]. Finally, some regimes require government entities (United States of America (US) FAR; Aus MSA) or companies (EU Conflict Minerals) to cascade due diligence requirements to business partners via contract clauses.

## 3.2 Enforcement: evaluating possible mechanisms

Effective enforcement is essential to promote homogeneous application of due diligence nationally (Conseil Général de l'Économie de l'Industrie, de l'Énergie et des Technologies, 2020) but also, through coordination and information sharing, to building common enforcement practice and a level playing field across the EU (Client Earth and Global Witness, 2019). The attribution to MS bodies of the power to initiate enforcement proceedings and impose administrative sanctions in individual cases would be ideal. Still, such activities have resource implications even if undertaken, following appropriate amendments to legal mandates, by existing bodies (e.g. NHRI; FRA). Accordingly, EU legislation should also harness the potential of third-party enforcement action, via rights of complaint for interested parties for breaches of procedural due diligence requirements. Enforcing qualitative due diligence standards would be more resource intensive for third parties as well as administrative or judicial bodies and defendant companies and may for this reason be considered less feasible.

Affording discretion to MS to determine sanctions for non-compliance (subject to the overall requirements of effectiveness, proportionality and dissuasiveness) has the virtue of flexibility. Based on experiences under e.g. the EU Timber Regulation, however, a prescriptive approach may be more likely to secure the EU 'level playing field' desired by business and governments (EC, 2020). Yet, scope for an EU due diligence law to define criminal sanctions appears limited given the EU's restricted competences in this area (Art 4 TFEU).

As for monitoring (Section 2), enforcement measures under an EU due diligence law will be influenced by the scope of corporate obligations established and the class or classes of companies to which due diligence obligations apply, as well as the general division of competences between EU and MS. Leaving such matters aside, based on the evidence considered here, an effective EU human rights due diligence law should combine state-based and third-party enforcement mechanisms. These should relate at least to procedural due diligence requirements such as the adoption and publication of a due diligence plan (and by implication performance of a due diligence process) as well as failure to comply with an information request. A law should also promote consistent standards and approaches to enforcement across the EU, by defining required elements in legislation or guidance, and via periodic reporting by MS on enforcement action. Finally, in line with the 'smart mix' (Methven O'Brien, 2019b) and in light of the US FAR, further consideration should be given to leveraging EU public procurement law to promote compliance with due diligence obligations (Methven O'Brien, Martin-Ortega and Conlon, 2018; Martin-Ortega and Methven O'Brien, 2019) and how to align 'development, governance and diplomatic initiatives' by MS and the EU (EC, 2015) with new EU due diligence legislation.

[4] Décision no 2017-750 DC du 23 Mars 2017 du Conseil Constitutionnel ; see further Cossart, Chaplier and Beau de Lomenie (2017).

# 4 Access to justice and remedies for victims

## 4.1 Remedy

Human rights standards establish a right to effective remedy with substantive and procedural dimensions[5]. What constitutes an effective remedy is context-dependent and may range from prosecution and punishment of perpetrators in case of serious abuses, to compensation for economically assessable damage, orders for restitution of victims, changes in company policies, guarantees of non-repetition or disciplinary action against responsible personnel and public apologies[6].

Accordingly, the UNGPs provide that 'States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy' (UNGP No25). This formulation highlights that in general current human rights law does not formally oblige states to guarantee the right to remedy 'extraterritorially' (Methven O'Brien, 2019b). Equally, not all kinds of harm to individuals resulting from business activities entail human rights violations (e.g. if adequate remediation is available through existing mechanisms at national level or where interference with rights is insufficient to trigger third party effects).

Nonetheless, MS, EU and other regional institutions have repeatedly undertaken to uphold effective access for justice and remediation of business-related human rights abuses, inside and outside their territory or technical legal jurisdiction, via both legal and policy commitments (EC, 2020; ECCJ, 2020; COE, 2016). Securing effective remedy would also support realisation of the 2030 Agenda and Sustainable Development Goals (ILO, 2019b).

Yet victims continue to face legal and practical obstacles to access to justice and effective remedy. These include limits on parent company liability (the 'corporate veil'), inequality of arms, access to legal representation, information and evidence, attacks on human rights defenders, victims, witnesses, lawyers, judges and journalists, the risk of counter-litigation, including Strategic Lawsuits against public participation actions (SLAPP suits) as well as the limits of representative and collective redress mechanisms (UN Human Rights Council, 2016; EU FRA, 2017, 2019; EC, 2019; Rubio and Yiannibas, 2017; Bonfanti, 2019). Since 2011, such issues have been only weakly addressed by relevant laws, at EU and MS level, or policy initiatives such as National Action Plans to implement the UNGPs (DIHR, n.d.; ICAR and ECCJ, 2017b).

## 4.2 Remedy: review of current approaches

Disclosure regimes can support the substantive dimension of remediation, for instance, where reporting requirements encourage the establishment of internal complaints mechanisms (Aus MSA, Norway proposal). However, disclosure regimes are generally more relevant to the procedural aspects of remedy. Under CTSCA and UK MSA, government officers can enforce company reporting obligations; under NSW MSA fines can be imposed for non-compliance with procedural requirements. Information yielded by the operation of such mechanisms can in principle support victims in obtaining remedies. Yet such provisions

[5] See Methven O'Brien (2019a) for further discussion in relation to the right to remedy under ECHR and ESC.

[6] Article 8 UDHR, Art 2(3) ICCPR, Art 6 CERD, Art 14 CAT, Art 39 CRC. ICESCR and CEDAW do not explicitly provide for a right to remedy. Article 13 ECHR establishes the right to remedy for violations of Convention rights: 'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity'. Article 47 ECFR establishes the right to remedy for violations of rights guaranteed by EU law. See further UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005).

are rarely used in practice (see Section 3) and overall disclosure regimes' impact on remediation is both indirect and weak.

Enhancing remedies for victims was one goal of the French LDV. The LDV establishes a right of civil action for victims of tortious damage caused by failures of due diligence by a parent company, its subsidiaries, suppliers or subcontractors with an established commercial relationship[7]. In addition, as discussed earlier, the LDV further permits interested parties to seek a formal notice and injunction to comply with its due diligence requirements. This also supports remediation as such measures may be probative of a lack of vigilance during a subsequent civil claim[8]. Further, the LDV allows a court to order publication, dissemination or display of its decision with costs to be paid by the defendant.

The Dutch Child Labour Due Diligence Act does not establish any new basis for claims by victims in tort. Rather it permits complaints by any natural person or legal entity affected by a company's actions or omissions (Art 3), along with administrative fines and, in limited circumstances, criminal convictions for repeated failures to comply with due diligence obligations (see Section 3).

In the UK, courts have established that a duty of care may be owed by the parent company not only to a subsidiary's employees, but also to other persons affected by its operations[9]. Yet, in general, parent company liability for human rights abuses remains restricted (EP, 2019b; FRA, 2019a). Neither do existing schemes shift the burden of proof, a recognised challenge for victims in civil litigation addressing business-related human rights harms (ECCJ, 2018; EP, 2019b; EC, 2020). However, some proposed laws would require a defendant company in civil proceedings to prove that it met its due diligence obligation (e.g. Swiss Coalition for Corporate Justice, n.d.) or that it lacked effective control over a subsidiary (Swiss Parliament, 2018) once a *prima facie* case has been made.

Turning to EU level, the EU Conflict Minerals Regulation requires companies to establish a grievance mechanism (Art 4(e)), which means an early-warning risk awareness mechanism allowing any interested party, including whistle-blowers, to voice concerns regarding the circumstances of extraction, trade and handling of minerals in and export of minerals from conflict-affected and high-risk areas. Besides, proposals have been advanced to revise the Brussels I Recast Regulation (EP, 2019). Firstly, it has been suggested that a new jurisdictional rule specific to business-related human rights claims should extend jurisdiction to MS courts where an EU parent company is domiciled to claims against its foreign subsidiaries or business partners permitting claims against the parent company and the subsidiary to be heard together. A second proposal would establish *forum necessitatis* for MS courts where the right to a fair trial or access to justice so requires and the dispute has sufficient connection with the MS in question (EP, 2019b).

Anti-corruption laws may impose strict liability for compliance failures, subject to a defence based on 'adequate procedures'[10]. Some proposals have suggested the adoption of similar approaches in the context of corporate human rights harms (e.g. Pietropaoli et al, 2019). Their viability in the context of an EU human rights due diligence law seems questionable, given *inter alia* requirements for legal predictability, a lack of precedents at national or EU level and the principle of subsidiarity (Art 5(3) TEU).

## 4.3 Remedies: evaluating possible mechanisms

Effective remediation remains out of reach for most victims, inside and beyond EU borders, and even for victims of the most serious abuses, including human trafficking and modern slavery, violations of ILO Core

[7] A claimant must still prove the elements of liability while the obligation on companies remains procedural, and not one of result.
[8] It has also been said that the LDV promotes remediation indirectly by helping victims to overcome hurdles to access to justice because 'it requires companies to identify risks of severe impacts. This makes it easier for victims to argue that a company could have influenced the production of harmful impacts, and that it should have taken appropriate measures to prevent them' (ECCJ, 2017a).
[9] *Vedanta Resources PLC and another v Lungowe and others*, UKSC 2017/0185, [2019] UKSC 20, Judgment, 10 Apr 2019.
[10] US Foreign Corrupt Practices Act of 1977, 15 USC §§ 78dd-1 et seq, UK Bribery Act 2010, s23.

Labour Standards and serious environmental incidents harming human health (FRA, 2018; OECD Watch, 2015; EP, 2019b; EC, 2019; EC, 2020). At the same time, abuses may have complex root causes: identifying what would be an effective remedy may be straightforward, but in global value chain settings effective remediation may also demand long-term multi-actor solutions (Bangladesh Accord, n.d.; ILO, n.d.; IOE, 2018). In addition, remediation of certain types of abuse (e.g. human trafficking) is already addressed via specific legislative and policy schemes at MS or regional level (Lietonen Jokinen and Pekkarinen 2020).

Nevertheless, in line with obligations under human rights treaties and the UNGPs, an EU due diligence law should aim to contribute to advancing effective remediation for victims. As already highlighted in Section 2, EU due diligence legislation should therefore require company grievance mechanisms as part of human rights due diligence procedures (UNGPs; OECD, 2019). These are relatively low-cost, while also potentially expeditious and effective for victims. Still, concerns remain, including independence, inequality of arms, lack of access to information and evidence for victims, and a weak deterrence effect, especially where they operate subject to non-disclosure clauses. In isolation, such mechanisms are inadequate to guarantee redress for victims.

Administrative sanctions linked to procedural due diligence obligations contribute to certain aspects of remediation. Like internal grievance mechanisms, they should be expeditious, cheaper and more accessible than judicial proceedings. They also appear feasible at MS level. Yet civil liability for the consequences of due diligence failures, at least in relation to abuses that are severe based on their seriousness or extent, is potentially more impactful. The award against companies of significant money damages ought to have a deterrent effect, both on an individual defendant and more widely. On the other hand, civil litigation is slow, expensive, assumes the availability of adequate legal representation and can be burdensome for victims, despite appropriate arrangements for representative or collective claims (FRA, 2019a, 2019b; EC, 2019; UN, 2016; Claude and Amati, 2020). Even if a due diligence law established a duty of care across the 'corporate veil' and hence 'foreseeability', where causation remains linked to the adequacy of a due diligence plan, proving this will not be easy[11]. Quantifying reparation or achieving restitution can also be difficult where corporate abuses have long-term effects, while designing collective remedies is challenging whether inside or outside a judicial process. Civil remedies should then be supplemented by non-financial reparations when restitution is not possible[12], as well as operational, company- and/or sector-level grievance mechanisms (SER, n.d.), state-based non-judicial remedy mechanisms (e.g. NCPs and NHRIs) and, ideally, MS and EU bodies with powers to support and advise victims, for instance through investigations and legal representation.

Such measures are not just desirable, but essential to ensuring effective remedy for victims of abuses both intra- and extra-EU. Yet addressing them in a single EU instrument establishing due diligence duties for companies would appear challenging in feasibility terms, given *inter alia* the subsidiarity principle and restricted EU competences. On this basis, it seems more likely that an EU due diligence law could support effective remedy for victims by requiring the establishment of effective grievance mechanisms as an element of due diligence and by requiring MS to provide not only for effective, proportionate and dissuasive penalties for breaches but also effective means of remedy and redress for victims. Guidance could then address more specific issues surrounding civil and criminal liability of companies or responsible officers for harms caused by failures of human rights due diligence and other forms of remediation for victims.

[11] *Vedanta:* fn 10.

[12] Including rehabilitation, satisfaction, verification of facts and full and public disclosure of the truth, official declaration or a judicial decision restoring the dignity, reputation and rights of the victim and of persons closely connected with the victim; public apology, including acknowledgement of the facts and acceptance of responsibility; and guarantees of non-repetition.

# 5 Recommendations

As noted in earlier sections, provisions on monitoring, enforcement and remedy in a future EU due diligence law will be influenced by the legislation's scope in other areas, for instance, the class of companies to whom a due diligence duty is addressed. The latter is beyond the scope of this briefing. However, for the purpose of advancing recommendations, this briefing will assume that the due diligence duty applies at least to a fixed class of large companies, requires that the due diligence process address those companies' own operations and supply chains, and also conform to nationally or internationally recognised due diligence frameworks, such as the OECD Guidelines on Due Diligence for Responsible Business Conduct (OECD, 2018).

## 5.1 Monitoring

Taking due account of considerations including size, an EU due diligence law should require that companies:

1. Undertake periodic monitoring to address *inter alia* their business' structure, activities, actual and potential human rights risks and impacts, complaints received, and effectiveness of remediation, as a required element of human rights due diligence and in line with the scope of due diligence duty prescribed by the legislation.
2. Establish an alert/complaint mechanism open to workers and third parties.
3. Adequately involve stakeholders, including workers, in the design and operation of monitoring arrangements under the due diligence process.
4. Periodically disclose information on company monitoring and its outcomes; and publish this, in a standardised format, based on an adequate reporting framework, using appropriately prominent and accessible media (e.g. homepage).
5. Secure board-level approval for monitoring schemes and reports.

An EU due diligence law should require that MS:

6. Provide for a right to know/information request procedure.
7. Establish a repository of due diligence reports that is publicly accessible without charge.
8. Publish lists of companies within the law's scope and identify on a regular basis those that have complied with procedural obligations and those that have not.
9. Establish/identify national monitoring bodies, ideally independent, with *inter alia* duties to report on procedural compliance but also substantive effectiveness at national level.

Under an EU due diligence law, the EU should:

10. Establish a repository of due diligence reports that is publicly accessible without charge.
11. Publish lists of companies within the law's scope and identify on a regular basis those that have complied with procedural obligations and those that have not.
12. Undertake periodic monitoring of procedural compliance but also substantive effectiveness at EU level.
13. Further elaborate on due diligence required under the law via delegated legislation and/or formal guidance.

Further analysis is required before recommendations can be advanced in relation to:

- Certification or assurance by third-party organisations of company monitoring and accreditation of such organisations at EU level.
- Specific arrangements for involvement of workers, human rights defenders and other stakeholders in monitoring under an EU due diligence law.

Finally, while these matters exceed the current briefing, including financial actors and relevant regional financial institutions (e.g. EIB), as well as large public entities in the scope of due diligence requirements could contribute further to promoting effective due diligence monitoring.

## 5.2 Enforcement

An EU due diligence law should require that MS:

1. Determine effective, proportionate and dissuasive penalties for non-compliance by companies with due diligence obligations, including in relation to the making of false or misleading statements regarding due diligence.
2. Establish rights to enforce at least procedural aspects of due diligence requirements for interested parties.
3. Establish/identify national bodies with competence *inter alia* to enforce at least procedural aspects of due diligence requirements.
4. Periodically report at EU level on national enforcement procedures, actions and outcomes.

Under an EU due diligence law, the EU should:

5. Publish guidance addressing effective enforcement action at MS level.

Further analysis is required before recommendations can be advanced in relation to:

- Leveraging EU public procurement law to promote compliance with due diligence obligations and securing policy coherence and a level playing field as between the public and private sector.
- Steps required to align EU development, governance and diplomatic initiatives with new EU due diligence legislation, in line with 'policy coherence' as directed by the UNGPs.

## 5.3 Remedy

Taking due account of considerations including company size, an EU due diligence law should:

1. Specify adequate remediation as a required element of human rights due diligence in line with the scope of due diligence duty prescribed by the legislation.
2. Require companies to monitor and disclose information relating to due diligence and its outcomes and to establish, monitor and report on the operation of alert/complaint mechanisms, in line with recommendations made above in Section 5.1.

An EU due diligence law should require that MS:

3. Provide for effective, proportionate and dissuasive penalties for breaches (see above, point 5.2.)
4. Provide for effective means of remedy and redress for victims, to include state level judicial and non-judicial remedies, for human rights abuses caused by due diligence failures.
5. Establish/identify bodies competent to investigate abuses, initiate enforcement actions and support victims, for instance through legal advice and representation.

Under an EU due diligence law and/or other EU legislation and policy initiatives, the EU should:

6. Publish formal guidance on securing effective remedies for victims via civil and criminal liability of companies or responsible officers for harms caused by failures of human rights due diligence and in relation to broader mechanisms by which effective remediation can be secured for victims inside and beyond MS jurisdiction.
7. Continue to cooperate with MS towards removing barriers to access to judicial and non-judicial grievance mechanisms as well as legal and other threats to human rights defenders, civil society organisations and other actors or participants in the justice system inter alia via SLAPP suits.

Further analysis is required before recommendations can be advanced in relation to:

- The feasibility of reviewing the Brussels I regime in the context of an EU due diligence law.

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# Annex I: Monitoring - evaluation of potential measures

| Mechanism | Strengths | Weaknesses | Impact | Feasibility* |
|---|---|---|---|---|
| Due diligence law/formal guidance mandates internal company monitoring scheme including complaint mechanism, board approval; periodic public reporting e.g. via website. | Effective internal monitoring critical to identification of material risks, effective due diligence and remediation processes. Reliability of monitoring can be increased through stakeholder involvement in monitoring and specification of required elements. | In isolation, internal monitoring may not identify material risks or provide a sufficient basis for accountability to stakeholders. Resource implications for small companies. | High | High |
| MS/EU bodies to: establish repository of companies' due diligence monitoring reports; promote and review legislation's effectiveness, e.g. by checks, analysing reports. | Enhances third party access to information on company due diligence reports. Promotes availability of information, homogenous implementation of monitoring duties, early recognition of risks and timely responses. | Limited capacity of third parties to review and evaluate company reports; does not guarantee quality of reports. Costs and coordination issues. | High | Medium |
| Law/guidance requires company to involve stakeholders in monitoring, including trade unions and workers' representatives. | Worker and rights-holder involvement in monitoring demonstrated to enhance effectiveness of due diligence and remediation. | Detailed legislative provisions may not attract cross-jurisdictional support. | Medium | Medium |
| Establishment of formal right to information / request procedure for parties affected by non/compliance with monitoring. | Enhances accountability and effectiveness of due diligence legislation and process. | Requires body competent to deal with complaints / where right to know is not complied with; running costs could be high. | High | Medium |
| Due diligence law requires external audit/certification of companies' due diligence process. | Independent third party assessment providing further information and understanding of supply chains and risks and identification of actual and potential harms. | Concerns regarding impartiality and conflict of interest of social audits. | Low | High |
| EU recognition of private bodies as recognised monitoring organisations. | Independent third party assessment providing further information and understanding of supply chains and risks and identification of actual and potential harms following a homogeneous approach and guarantying quality and independence of monitor organisation. | Cost and organisation of the network of monitoring organisations. | Medium | Medium |

* Feasibility refers to the likelihood of adoption of the measure or mechanisms given the legal, political and institutional context and costs and investment needed.

# Annex II: Enforcement - evaluation of potential measures

| Measures and mechanism | Strengths | Weaknesses | Impact | Feasibility |
|---|---|---|---|---|
| Government enforcement of failure to comply with procedural DD requirements | Relatively fast and low-cost process. Precedents in existing schemes. | Does not address quality or impact of due diligence process. May not be effective where penalties are minimal. | Medium | High |
| Government enforcement relating to quality of DD scheme/process | Addresses quality and effectiveness of due diligence process. Precedents in existing schemes. | Resource intensive. Potentially requires investigative powers with extraterritorial reach. | High | Medium |
| Third party enforcement of failure to comply with procedural DD requirements | Relatively fast and low-cost process. Precedents in existing schemes. | Does not address quality or impact of due diligence process. Resources and potentially legal representation needed. Assumes third-party resources and capacities to utilise. May not be effective or used where penalties are minimal. | Low | Medium |
| Penalties for false/misleading information | Precedents in existing schemes. Extends beyond procedural obligations to limited extent. | May not be effective where penalties are minimal. | Medium | High |
| Third party enforcement relating to quality of DD scheme/process | Message of importance of the issue and relevance of the offence. Potential deterrence effect. My generated wider lessons learned. | Resources and legal representation potentially needed. Resource-intensive for civil/judicial authorities; predictability/legal certainty issues. | Medium | Low |
| MS bodies with enforcement mandates | Promote convergent practice at national /EU level. Independence would enhance perceived legitimacy by civil society, stakeholders and victims. | Dependant on government support and resources. Potential conflicts of interest if not independent. Potential obstacles to access to information. | Medium | Medium |
| Criminal sanctions relating to due diligence failures | Potential deterrence effect and symbolic value. | Duration of legal processes. Evidentiary requirements for complex offences. Limited EU legal competence. | Medium | Low |
| Integration of due diligence requirements into EU-public procurements / state-support for investments / development aid / IFI lending conditions | Policy coherence. Potential deterrence effect<br>Governments lead by example / level playing field across public and private sectors. | Requirements for other regulatory and/or policy reforms at EU/MS level. Capacity constraints in public buyers and possible higher procurement costs. | Medium | Medium |

# Annex III: Remedy - evaluation of potential measures

| Mechanism | Strengths | Weakness | Impact | Feasibility |
|---|---|---|---|---|
| Require companies to establish or participate in internal grievance mechanisms as part of HRDD. | Low cost for victims and MS. Potentially fast access to grievance process and remediation. May be preventive. | Concerns regarding independence including potential lack of access to evidence by victims. Weak deterrence effect, especially if confidentiality clauses attached. | Low | High |
| Require companies to monitor and disclose DD information. | Can support procedural dimension of right to remedy by making information accessible; may contribute to prevention. | Quality of DD information and relevance to specific cases. | Low | High |
| Right of civil action for harm due to due diligence failures for victims/representative third parties. | Guarantees access to judicial mechanisms. Provides compensation to victims. Potential deterrence effect. | Cost and resource intensive for MS and victims. Burden of proof on victims. *Ex-post* rather than preventive. Subsidiarity. | High | Medium |
| Criminal procedures against companies, directors or personnel linked to serious abuses caused by failures of due diligence. | Serious abuses may require criminal accountability against perpetrators. High deterrence effect. | Limited EU competences; proceedings cost and resource intensive for MS and victims. Low number of cases to reach court and end in conviction. | High | Low |
| National supervisory authorities can advise potential victims (e.g. NHRI, Ombudsperson or dedicated body). | MS seen to support victims of harm. Resources invested in supporting access to remedy. | Need to revise competences of existing bodies or create new bodies - resources and capacities. Access to corporate information and evidence of harm if no specific executive powers are provided. | High | Medium |
| Require MS to prohibit companies from launching SLAPP suits against complainants under HRDD legislation and/or other judicial or non-judicial remedy mechanisms. | Strong commitment to victim redress. Addresses the imbalance of power between corporations and victims and their representatives and civil society. | Prescriptive approach to EU due diligence law decreases chance of enactment. | Medium | Medium |
| Require MS to extend legal aid to complainants under HRDD legislation. | Strong commitment to victim redress. Guarantees access to judicial procedures. | Costs to MS. Competence; prescriptive approach to EU due diligence law decreases chance of enactment. | High | Low |
| Require MS/EU to publish lists of companies subject to DD duty / complying with procedural aspects / defending /held liable under legal DD proceedings. | Access to information and transparency. May support victims' further actions against a company. | Competence; prescriptive approach to EU due diligence law decreases chance of enactment. Conformance with confidentiality and libel provisions (for defendants). | High | Medium |

# Annex IV: Human rights due diligence instruments – monitoring provisions

| EU legislation | | | |
|---|---|---|---|
| **Monitoring approach** | **EU NFR Directive** | **EU Timber Regulation 2010** | **EU Conflict Minerals (2017)** |
| Company monitoring of implementation of DD duty | Statement to include information on policies and due diligence processes of the entity and where proportionate its supply chains, to the extent necessary for understanding its development, performance and position and impact (on HR). | Operators shall exercise due diligence when placing timber or timber products on the market.<br><br>Each operator shall maintain and regularly evaluate the due diligence system which it uses, except where the operator makes use of a due diligence system established by a monitoring organisation.<br><br>[Article 4] | Implied by requirement that companies must conduct DD (develop management systems / identify and assess risks, implement a strategy for risk management, carry out third party audits and report annually on policies and practices for responsible sourcing) on their supply chain (Art 4(c)).<br><br>Companies required to establish chain of custody or supply chain traceability system (Arts 4(f) and (g)). |
| Company to publish HRDD report | Statement to be provided in management report on non-financial matters and made publicly available. | | Companies required to report on due diligence on their supply chain. |
| Rights-holder or third party involvement in monitoring /verification | | The regulation creates the figure of 'monitoring organisations'.<br><br>A monitoring organisation shall:(a) maintain and regularly evaluate a due diligence system as set out in Article 6 and grant operators the right to use it; (b) verify the proper use of its due diligence system by such operators; (c) take appropriate action in the event of failure by an operator to properly use its due diligence system, including notification of competent authorities in the event of significant or repeated failure by the operator.<br><br>An organisation may apply for recognition as a monitoring organisation if it complies with the following requirements: (a) it has legal personality and is legally established within the Union; (b) it has appropriate expertise and the capacity to exercise the functions referred to in paragraph 1; and (c) it ensures the absence of any conflict of interest in carrying out its functions. | Companies required to undertake independent third party audits of their due diligence practices (unless show source only from approved sources).<br><br>Competent authorities may undertake *ex-post* checks on importers' effective compliance based on 'substantiated concerns by third parties' (Art 11(2)).<br><br>Regulation provides for recognition as equivalent of due diligence schemes (Art 8(1): '1. Governments, industry associations and groupings of interested organisations having due diligence schemes in place ('scheme owners') may apply to the Commission to have the supply chain due diligence schemes that are developed and overseen by them recognised by the Commission. Such applications shall be supported by adequate evidence and information'.); EC to adopt delegated acts on methodology and criteria for assessing if schemes facilitate fulfilment of the requirements of the Reg (Art 8(2)). |
| National monitoring | Member States shall ensure that undertakings publish within a reasonable period of time, which shall not exceed 12 months after the balance sheet date, the duly approved annual financial | Each Member State shall designate one or more Competent Authorities (CA) responsible for the application of this Regulation.<br><br>Competent Authorities (CA) are tasked with performing checks on operators, traders and monitoring organisations to ensure that they fulfil their obligations under the regulation (they should monitor that operators effectively fulfil the obligations laid down in this Regulation. For that | EU MS required to adopt measures to identify national mineral and metal importers and to access data on their economic activities and DD checks and reporting. Regulation requires Member States' competent bodies to ensure that a list of all Union importers within their country is publicly available (cf. objections by Member States' Customs Agencies). |

| EU legislation | | | |
|---|---|---|---|
| **Monitoring approach** | **EU NFR Directive** | **EU Timber Regulation 2010** | **EU Conflict Minerals (2017)** |
| | statements and the management report, together with the opinion submitted by the statutory auditor or audit firm. | purpose, the competent authorities should carry out official checks, in accordance with a plan as appropriate, which may include checks on the premises of operators and field audits, and should be able to require operators to take remedial actions where necessary).<br><br>Member States shall inform the Commission of the names and addresses of the CA by 3 June 2011. Member States shall inform the Commission of any changes to the names or addresses of the competent authorities. | Competent authorities must undertake appropriate *ex-post* checks, including on the spot inspections, to 'ensure that Union importers of minerals or metals comply' .<br><br>Such checks to examine at minimum importers' implementation of obligations; documents and records; audit obligations.<br><br>Checks can be initiated based on substantiated concerns by third parties. |
| Supranational monitoring (procedural) | | Member States shall submit to the Commission, by 30 April of every second year following 3 March 2013, a report on the application of this Regulation during the previous two years. | MS required to inform EC of name/address of competent authority; to obtain information on annual import volumes per importer; identify all importers in their jurisdiction.<br><br>Regulation/delegated Regulation[13] establishes methodology and criteria that EC will use to assess whether DD schemes (industry-led responsible sourcing initiatives) can be recognised as facilitating company's compliance with the Regulation (currently based on policies and standards of schemes).<br><br>MS have to submit annual reports on the implementation of the regulation, and, in particular, on notices of remedial action issued by their competent authorities and on the third-party audit reports made available by union importers. |
| Supranational monitoring (effectiveness) | | On the basis of reports (above) the Commission shall draw up a report to be submitted to the European Parliament and to the Council every two years. In preparing the report, the Commission shall have regard to the progress made in respect of the conclusion and operation of the FLEGT VPAs pursuant to Regulation (EC) No 2173/2005 and their contribution to minimising the presence of illegally harvested timber and timber products derived from such timber on the internal market. | In 2023 and triannually thereafter, EU shall determine based on Member States' reports, the effectiveness of the regulation and assess whether Member States should have competence to impose penalties on entities 'in the event of persistent failure to comply' (Article 17(3)).<br><br>EU may also review legislation before 2023.<br><br>EC to publish handbook for competent authorities (Art 11) and handbook for economic operators (Art 14). |

[13] Delegated Regulation (EU) 2019/429.

| National legislation / initiatives | | | |
|---|---|---|---|
| **Monitoring approach** | **LDV France** | **Dutch Child Labour Due Diligence Act** | **Norway proposed law [14]** |
| Company monitoring | Art 1 / Art L.225-102-4 Vigilance includes: i) establishing procedures regularly to assess subsidiaries and subcontractors and suppliers with established commercial relationship; ii) monitoring scheme to assess efficiency of measures implemented; iii) alert / whistleblowing mechanism to collect reports. | Requirement that companies declare that they exercise due diligence per Art 5 to prevent goods or services from being produced using child labour (Art 4(1)).<br><br>Due diligence includes investigation of whether there is reasonable suspicion of use of child labour, and in that case adoption and implementation of an action plan<br><br>An Order in Council will establish further requirements for the investigation and the plan of action.<br><br>However, not an annual but a one-off requirement. | Enterprises producing goods for consumers must publish information on the production site (s6) [so must monitor production sites].<br><br>All enterprises obliged to know salient risks that may impact adversely on human rights and decent work in own business and supply chains (s5).<br><br>Larger enterprises shall report on structure, area of operations, supply chains (including management systems and early warning channels) for preventing/ reducing adverse impacts; on due diligence and adverse impacts/salient risks of such impacts and results of due diligence (s10(2)). |
| Company publish HRDD report | Companies must disclose DD processes, including Vigilance Plan and report (can be integrated into e.g. annual financial report; not required to be a stand-alone document). | Companies must register declarations in trade register and send them to the superintendent (Art 4(2)) – but on one-off rather than annual basis. | Production sites to be published on enterprise's website or otherwise made easily accessible (s6(2)).<br><br>Larger enterprises' report may be included in annual report on social responsibility or publicly disclosed in another manner. |
| Rights-holder or third party involvement in monitoring /verification | Company's representative trade unions to be consulted on design/implementation of alert mechanism / 'to be developed in working partnership'.<br><br>The vigilance plan shall be drafted in association with the company's stakeholders and where appropriate within multiparty initiatives that exist in the subsidiaries or at a territorial level (Art 1); however, this is not a mandatory requirement. | Any natural person or legal entity whose interests are affected by the actions or omissions of a company relating to compliance [under this Act] may submit a complaint to the superintendent (Art 3(2)) on basis of a concrete indication of non-compliance (Art 3(3)) only after the complainant has attempted to work with the company directly or if having attempted to do so the company has not addressed the issue in six months (Art 3(4)).<br><br>Minister may approve joint multi-stakeholder plans of action. | Draft law establishes 'right to information' on 'how an enterprise conducts itself with regard to fundamental human rights and decent work within the enterprise and its supply chains' (s7).<br><br>Also establishes an information request procedure extending to how enterprise manages any adverse impact or risk (s7). |

[14] Norway Ethics Information Committee (2019), Report from the Ethics Information Committee, 28 November 2019, available at: https://nettsteder.regjeringen.no/etikkinformasjonsutvalget/norwegian-ethics-information-committee/ (accessed 10 March 2020).

| National legislation / initiatives | | | |
|---|---|---|---|
| **Monitoring approach** | **LDV France** | **Dutch Child Labour Due Diligence Act** | **Norway proposed law [14]** |
| National monitoring (procedural) | | Superintendent shall publish all declarations in a public register on its website (Art 4(5)). | The Consumer Authority and the Market Council conduct monitoring to ensure compliance with the provisions of this Act (s13). |
| National monitoring (substantive) | | Superintendent is charged with supervision of compliance with the provisions of the Act (Art 3(2)).<br>Within five years of entry into force of Act, Minister to send a report on effectiveness and practical effects of the Act (Art 10). | The Consumer Authority and the Market Council conduct monitoring to ensure compliance with the provisions of this Act (s13). |

| Disclosure-based regimes | | | | | |
|---|---|---|---|---|---|
| **Monitoring approach** | **Dodd Frank Act Final Rule 1502 (2012)** | **CTSCA 2012** | **UK MSA 2015** | **Aus MSA 2018** | **NSW MSA 2018** |
| Company monitoring | (If company determines itself high risk on basis of country of origin inquiries) company must do due diligence on the source and chain of custody that conforms to nationally or internationally recognised DD framework in good faith and reasonably designed. | Ongoing monitoring not implied as disclosure is one-time. | Companies to report annually on 1) nature and structure of the business; 2) human rights supply chain risks associated to the business; 3) The implemented due diligence procedures; 4) Effectiveness of due diligence procedures; 5) Training made available to staff (S54 MSA). | Annual MSA statements must detail against mandatory criteria i) identity, structure, operations and supply chains; ii) MS risks identified; iii) actions taken to assess and address risks including DD and remediation; iv) effectiveness of the actions v) consultation process with other entities owned or controlled.<br><br>Statements must be approved by Board or equivalent. | Described in regulations / formal guidance.<br><br>May include management steps and training for employees. |
| Company publish HRDD report | Company must include description of measures taken to exercise due diligence on conflict minerals' source and chain of custody in an annual special disclosure report to SEC.<br><br>If low risk, then company only required to disclose determination and description of enquiry and results on 'reasonable country of origin' inquiries and to make information available on website.<br><br>If high risk, company must do due diligence on the source and chain of custody that conforms to nationally or internationally recognised due diligence framework´; depending on outcome, company may be required to submit a 'Conflict Minerals Report' in addition, identifying non-conflict free products, facilities used to process | Company must disclose to what extent if any it 1) verifies its product supply chains to evaluate and address risks of human trafficking or slavery; 2) audits its suppliers to evaluate compliance with company standards; 3) requires certifications from direct suppliers confirming materials comply with local laws; 4) maintains internal accountability for employees and contractors; 5) trains employees and management with direct responsibility for supply chain management on HTS.<br><br>Disclosure via conspicuous and easily understood website or by timely email response. | Reporting entities required to produce annual Slavery and Human Trafficking Statement and publish on their own homepage; report to be signed by a Director and approved by Board. | Reporting entities must file annual MSA statement within six months of end of reporting period. | Reporting entities must file annual MSA statement; method of reporting and prescribed reporting content to be defined in statutory regulations. |

| Disclosure-based regimes | | | | | |
|---|---|---|---|---|---|
| **Monitoring approach** | **Dodd Frank Act Final Rule 1502 (2012)** | **CTSCA 2012** | **UK MSA 2015** | **Aus MSA 2018** | **NSW MSA 2018** |
| | them, country of origin of minerals and efforts to determine origin [15]. | | | | |
| Rights-holder or third party involvement in monitoring /verification | For high risk: Independent private sector audit (i.e. certification) of Conflict Minerals Report and identify auditor. | Implication that supplier audits are performed by independent entities.<br>Act's requirements not extended to subcontractors. | | | |
| National monitoring of individual compliance (procedural) | | Office of the Attorney-General is responsible for determining whether companies (on list composed by Tax Board) are in compliance with Act's requirements. | | MSA statements published on free government-run online public register – but no central list published of companies required to report. | Free public electronic register listing companies disclosing risks of linkage to modern slavery.<br>Anti-Slavery Commissioner has mandate to monitor reporting concerning risks of modern slavery occurring in supply chains of government agencies and commercial organisations. |
| National monitoring<br>(Substantive) | Third party annual review (Responsible Sourcing Network's Mining the Disclosures — yearly evaluation of companies' activities to address conflict minerals, including risk management, human rights impact, and reporting quality). | | Civil society and academic review of reports (Repository held at the NGO Business, Human Rights Resource Centre). | Home Affairs Minister required to prepare annual report on compliance and non-compliance and table before Parliament<br>Operation of Act reviewed after three years.<br>No MSA Commissioner. | Anti-Slavery Commissioner required to monitor effectiveness of due diligence procedures to ensure that goods and services procured by government agencies are not produced with modern slavery. |

[15] National Association of Manufacturers, et al. v SEC 800 F.3d 518, final judgement No.13-CF-000635 (D.D.C. 3 April 2017) struck down requirement for chain of custody report (specifically requirement that business identify minerals in supply chain with the phrase 'have not been found to be 'DRC conflict free' under s1.01(a) of final rules as violation of First Amdt to Constitution.)

# Annex V: Human rights due diligence instruments – enforcement provisions

| | EU regulation | | |
|---|---|---|---|
| **Enforcement approach** | **EU NFR** | **EU Timber** | **EU Conflict minerals** |
| Competent authority for enforcement | Each EU MS to determine the consequences of non-compliance in national legislation.<br><br>The penalties provided for shall be effective, proportionate and dissuasive. | Each MS shall designate one or more Competent Authorities (CA) responsible for the application of this Regulation.<br><br>MS shall notify the provisions on penalties established to the Commission and shall notify it without delay of any subsequent amendments affecting them. | The implementation is based on a system of recognised due diligence schemes (art. 8): governments, industry associations and groupings of interested organisations having due diligence schemes in place ('scheme owners') may apply to the EC to have the supply chain due diligence schemes that are developed and overseen by them recognised by the Commission. Where the EC identifies a failure to comply with the Regulation or deficiencies in a recognised supply chain due diligence scheme, it may grant the scheme owner an appropriate period of time to take remedial action. Where the scheme owner fails or refuses to take the necessary remedial action, the EC may withdraw the recognition of the scheme (art. 8 and 15.2). |
| Administrative /procedural | | MS shall lay down the rules on penalties applicable to infringements of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented.<br><br>The penalties provided for must be effective, proportionate and dissuasive and may include, inter alia: (a) fines proportionate to the environmental damage, the value of the timber or timber products concerned and the tax losses and economic detriment resulting from the infringement, calculating the level of such fines in such way as to make sure that they effectively deprive those responsible of the economic benefits derived from their serious infringements, without prejudice to the legitimate right to exercise a profession, and gradually increasing the level of such fines for repeated serious infringements; (b) seizure of the timber and timber products concerned; (c) immediate suspension of authorisation to trade. | MS may issue a notice of remedial action to be taken by Union importer.<br><br>The regulation foresees its review in 2023, when the Commission will assess whether MS should have competence to impose penalties upon importers in the event of persistent failure to comply. |

| National due diligence laws / initiatives | | | |
|---|---|---|---|
| **Enforcement approach** | **LDV France 2017** | **Dutch Child Labour Due Diligence Act) (2019)** | **Norway proposal** |
| Administrative /procedural | Formal notice to comply (*mise en demeure*), if company fails to establish, implement or publish a vigilance plan; company has three months to comply, whereafter judge can order publication of a plan; judge can also rule on whether VP is complete and appropriately fulfils obligations described in the law.<br><br>Periodic penalty payments (daily or event basis pending fulfilment of defendant's obligation) [*astreintes*].<br><br>Any person with standing/concerned parties (includes NGOs, victims and unions) can seek formal notice and injunction to comply. | Superintendent may issue binding instruction with time limit.<br><br>If binding instruction not complied with superintendent may impose an administrative fine for:<br>• violation of Art 4(2) (sending statement to Superintendent/trade register) to level set by Dutch Criminal Code,<br>• failure to comply with duty to conduct investigations or define an action plan under Arts 5(1) or 5(3),<br><br>Any natural person or legal entity whose interests are affected by the actions or omissions of a company relating to compliance [under this Act] may submit a complaint to the superintendent (Art 3(2)) on basis of a concrete indication of non-compliance (Art 3(3)) only after dealt with by company or if the latter has not responded within six months after submission (Art 3(4)). | The Consumer Authority and the Market Council conduct monitoring to ensure compliance with the provisions of this Act (s13).<br><br>Enforcement penalties may only be determined for contravention of disclosure requirements relating to:<br>- transparency about production sites,<br>- right to information requests,<br>- (for larger enterprises) annual due diligence reporting.<br><br>Any person can request information of any enterprise on its work, system, steps taken to prevent or reduce adverse impact on HR and working conditions and how enterprise manages specific risks or impacts: (s7). |
| Civil | Art 2/Art L.225-102-5 Ordinary civil action for tortious damage under Arts 1240/1241 French Civil Code (victim bears burden of proof) caused by default of obligations under Art 2 by parent, subsidiaries or suppliers/ subcontractors with established commercial relationship (i.e. lack of reasonable vigilance); notices to comply and alerts may be probative of lack of vigilance.<br><br>Victims include stakeholders (associations, NGOs as well as individuals, communities, unions whose rights and obligations are affected. | California Attorney-General has exclusive authority to lead civil action for injunctive relief to take specific action (S3(d). | |
| Criminal | Draft law provided for fine for non-compliance; found unconstitutional on grounds of legal certainty/Art 8 Declaration Rights of Man. | Criminal offence established under Economic Offences Act for repeat offending on grounds that same violation committed by order of or under the *de facto* leadership of the same manager within five years of the preceding violation (Art 9). | Infringement penalty may be established for repeated wilful or negligent infringement of sections 6, 7 and 10, to be paid by infringing person or entity (s13).<br><br>Ministry may be regulation lay down more detailed rules governing imposition of enforcement penalties and assessment of infringement penalties (s 13(4)). |

| Disclosure-based regimes | | | | | |
|---|---|---|---|---|---|
| **Enforcement approach** | **Dodd Frank Act Final Rule 1502 (2012)** | **California TSCA 2012** | **UK MSA 2015** | **Aus Fed MSA (2018)** | **NSW MSA (2018)** |
| Administrative /procedural | Reporting company is liable for misleading and false statements unless it can be shown that it acted in good faith and did not know the report is misleading or false (Securities Exchange Act of 1934 s13(p) 15 USC 78m.<br><br>(SEC Division of Corporation Finance held that it would not recommend enforcement against companies that only file reports on country of origin inquires and on whether conflict minerals may/originate from relevant country.) | No fines; Attorney General may file civil action for injunctive relief. | Secretary of State may seek injunction from High Court requiring production of annual slavery and human trafficking statement.<br><br>Failure to comply with injunction is contempt of court punishable by unlimited fine. | No penalty for failing to report. | Anti-Slavery Commissioner in the course of exercising her functions (which include monitoring company disclosure) may refer any information to law enforcement and government agencies.<br><br>Failure to prepare and publish annual MSA statement or giving false or misleading information leads to fines (the law does not specify the procedure).<br><br>Financial penalties up to AUD 1.1million. |

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