

# Towards EU Mandatory Due Diligence Legislation

Perspectives from Business, Public Sector,  
Academia and Civil Society



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# Foreword

## **Dr Gerd Müller, Federal Ministry for Economic Cooperation and Development**

The COVID-19 pandemic is presenting us all with unprecedented challenges. The pandemic has now reached about 190 countries. It has a particularly severe impact on global supply chains – through the closing of factories, the disruption of shipments from suppliers, and the temporary closure of stores.

In times of crisis, it is more important than ever for Europe and the world that the European Union stands united. European Commission President Ursula von der Leyen pointed out in her State of the Union address that at this time in particular, we have to lobby for open and fair trade around the world. Justice in globalisation requires a level playing field.

As part of its EU Council Presidency, the German Government has committed itself to the goal of working for corporate social responsibility in these times of COVID-19. A new strategy based on voluntary and compulsory governmental measures is needed, as envisaged in the UN Guiding Principles on Business and Human Rights.

Voluntary measures introduced so far – such as the German Partnership for Sustainable Textiles and the Green Button, which is the first government-run meta label for sustainable textiles – have shown that enterprises are capable of meeting their due diligence obligations along global supply chains. Certain challenges, such as the introduction of living wages and effective complaints mechanisms, can best be addressed through multi-stakeholder partnerships. However, we have found that voluntary action is reaching its limits. Now that the UN Guiding Principles on Business and Human Rights are nearing their tenth anniversary, the time has come to introduce a binding framework of generally applicable minimum requirements for corporate due diligence obligations.

The European Commission has included an initiative on corporate social responsibility in its work programme. Among other things, this includes European due diligence legislation. As part of Germany's EU Council presidency, we would like to use the present Compendium to contribute to the consultation process and to present voices from various stakeholder groups around the world.

We have to ensure that potential due diligence legislation will have an impact along global supply chains and contribute to better human rights, labour and social standards on the ground. I therefore consider it important that account be taken, in particular, of the perspectives of stakeholders in producer countries.

I would thus like to thank the various authors from civil society, the private sector and politics for their contributions, and I would like to thank the Business & Human Rights Resource Centre for putting together this Compendium. It presents a broad range of perspectives, which reflect the positions of the respective institutions and authors.

In my view, the current pandemic offers a chance for us to launch and implement fundamental improvements. The pandemic has made many challenges in global supply chains even more evident. We are at a crossroads – do we want to continue with business as usual after the crisis, or will we create a new normality in which people around the world are able to work under fair conditions and the environment is protected? Together with the German Government and the European Union, I am working to make the second option a reality.



**Dr Gerd Müller** is the German Federal Minister for Economic Cooperation and Development.

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# Introduction and Summary

## Business & Human Rights Resource Centre ([BHRRC](#))

The COVID-19 crisis has exposed once more the vulnerabilities in value chains and precarity of global business operations – and the weakness of voluntary corporate action in addressing these issues. The devastating consequences are felt most by millions of workers and communities around the world. However, there are signs this could change.

There has been growing momentum worldwide among governments, [companies, investors](#) and civil society, for mandatory human rights and environmental due diligence (HREDD). Cross-sectoral regulation is already in place or under discussion in a [number of European countries](#), including France, the Netherlands, Switzerland, Finland, Sweden and Germany, paving the way towards regional harmonisation.

Earlier this year, [the European Commission committed to introducing such legislation](#) within the European Union (EU), and has just launched a [public online consultation](#) on ‘sustainable corporate governance’, including mandatory HREDD. ‘Legislation on sustainable corporate governance’ is also part of the Commission's [work programme](#) for 2021.

Support for mandatory due diligence and corporate accountability echoes strongly throughout this Compendium. It seeks to explore what meaningful EU due diligence legislation should look like, taking into account the fact that tangible improvements for rightsholders, especially in the global South, will be the key measure of success. The Compendium was compiled in cooperation with, and with support from, the German Federal Ministry for Economic Cooperation and Development (BMZ) and Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH for the German Presidency of the EU Council. The 20 contributions represent diverse voices from business, public sector, civil society and academia, from the global South and North. Below we draw out some of the key themes and messages we believe are worth highlighting.

### 1. Voluntary implementation is insufficient

The United Nations Guiding Principles on Business and Human Rights ([UNGPs](#)) and the [OECD Guidelines](#) for Multinational Enterprises both make clear that businesses have a responsibility to respect human rights and the environment and should undertake effective due diligence. However, as many contributions emphasise, voluntary implementation of HREDD so far has

been insufficient, thus ultimately failing workers and communities in global value chains, and, as **VAUDE** also notes, putting companies that are taking steps to fulfil their responsibility at an unfair competitive disadvantage. **MEP Lara Wolters** further points out that businesses can currently be fully compliant with company law, and yet have significant adverse impacts.

This reflects what recent research has consistently shown: According to the 2019 [Corporate Human Rights Benchmark](#), almost half the companies assessed (49%) scored zero across all indicators related to human rights due diligence, as introduced by the UNGPs. We see similar poor performance across other benchmarks, including [KnowTheChain](#), our [snapshot](#) of the 20 largest German companies, and even our [human rights benchmark for renewable energy](#). A seminal [study](#) conducted for the EU Commission found only a third of business respondents indicated they undertake due diligence which takes into account all human and environmental impacts.

Several contributors, including **Christine Kaufmann, Chair of the OECD Working Party on Responsible Business Conduct**, also address the devastating impacts of COVID-19. With millions of workers in the garment industry alone laid off or facing wage loss after mass cancellations by brands amid reports of union busting, many still are not doing enough to end this abuse. 11 of the 26 European apparel companies [monitored](#) by Business & Human Rights Resource Centre during the pandemic have failed to provide evidence that they have paid for all orders during the pandemic – actions which determine whether their supply chain workers are paid.

The good news is that some companies are taking responsibility: in July for example, after months of struggle, the Rui-Ning factory union in Myanmar won the reinstatement of 298 members dismissed under the pretext of COVID-19. According to [civil society](#), brand engagement was vital to reaching the agreement.

As we recover and rebuild, mandatory HREDD will be critical, as **amfori** and others also highlight, to creating a level playing field, which in turn helps achieve, build on and scale impact.

## 2. Stake- and rightsholder involvement in process, legal text and implementation

With the right provisions, EU-wide mandatory HREDD can promote a shift in companies' conduct and have a positive impact for workers, communities, and the environment around the world. For this to happen, the importance of meaningful participation of stake- and rightsholders from the global South is highlighted by many, including the **Civil Society Focal Group on Business & Human Rights in Mexico**. This includes early involvement both in the process of developing the legislative initiative and reflecting their concerns in the legal text itself. The law should ensure rightsholder involvement at all stages in the due diligence process and remediation. Several contributions address the need to include a dedicated gender perspective, and a coalition of Southern **Indigenous Peoples' Organisations and allied human rights NGOs** also calls for robust safeguards for human rights defenders and whistle-blowers that speak out against business-related abuse.

Reflecting on lessons learnt from the French Duty of Vigilance Law so far, **Odile Roussel from the French Ministry for Europe and Foreign Affairs** discusses an assessment report that suggests dialogue with trade unions and particularly NGOs still needs to be strengthened. **Alva Bruun and Kent Wilska from the Ministry for Foreign Affairs of Finland** also reiterate the importance of legislation being developed in consultation with all key stakeholders and from a victim-centred point of view.

## 3. Beyond tick-box

To be effective, it is imperative that legislation goes beyond a mechanical or superficial tick-box approach to due diligence, a sentiment put forward and echoed by many, including the **British Institute for International and Comparative Law**. Several contributors, such as **Shift** in a piece on small and medium-sized enterprises (SMEs), speak to the need to cater to the context-sensitive and scalable due diligence concept of the UNGPs. Following this approach, to then *a priori* limit the scope of a due diligence obligation to only large businesses, or the supply chain tiers to be covered by it, becomes unnecessary, if not counterproductive.

Others emphasise that due diligence according to the UNGPs requires proactive meaningful engagement with suppliers, and concrete efforts to increase one's leverage if necessary. They caution against relying on "policing" suppliers through social audits – private auditing and certification must not become a synonym for HREDD. **Fair Trade Advocacy Office** and **Coordinadora Latinoamericana y del Caribe de Pequeños Productores y Trabajadores de Comercio Justo** further flag the need for a mandatory HREDD framework to address purchasing practices of lead firms.

Above all, as the **UN Special Rapporteur on extreme poverty and human rights** and the **International Trade Union Confederation** caution, 'due diligence should not degrade into a box-ticking exercise, shielding companies from any form of liability provided they follow the standard list of "do's" and "do not's".'

#### 4. Central importance of liability and access to remedy

Without liability provisions, there will be no real level-playing field as requirements can all too easily be evaded in practice. Increasingly, businesses acknowledge this too. **Théo Jaekel of Ericsson** writes that 'while transparency and disclosure are integral steps in any proper due diligence, mandatory due diligence legislation should rather focus on ensuring transparent business practices through effective liability provisions.' **Anna Gedda of H&M Group** too argues that, based on the UNGPs, companies can anticipate liability if they cause or contribute to harm.<sup>1</sup>

Access to adequate remedy for victims of abuse was highlighted as a key component of any upcoming legislation by all stakeholder groups represented in this Compendium. Many contributors such as the **European Coalition for Corporate Justice**, the **European Center for Constitutional and Human Rights**, and the German **Initiative Lieferkettengesetz** stress the importance of liability as an avenue to judicial remedy for victims of abuse, as well as in providing strong disincentives against abusive business practices and lack of due care.

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<sup>1</sup> According to the UNGPs, due diligence should cover adverse impacts that a business 'may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships' (UNGP 17). The UNGPs and [Interpretive Guide](#) specify for the second scenario, **contribution**, that this can happen 'either directly or through some outside entity (Government, business or other)', and that **activities** include both actions and omissions.

Effective judicial procedures are also a prerequisite for non-judicial and non-state-based remedy systems to really work for victims.

The liability mechanisms of the French Duty of Vigilance law are currently being tested in practice – and **Sherpa** and **Notre Affaire à Tous** discuss two recent environmental cases filed under the law. They emphasise the need for EU legislation to address environmental harms, including those that are diffuse and cumulative, irrespective of any direct or immediate impact on human rights.

### **HREDD to be seen in context of other policies**

Future HREDD legislation should explicitly cover financial institutions – recognising this, **David M. Schilling from the Investor Alliance for Human Rights** sees additional synergies with existing EU regulation on investors' due diligence disclosure.

Finally, many authors touch upon the wider economic and political context of upcoming EU legislation. **Joseph Kibugu**, who represents **Business & Human Rights Resource Centre** in East Africa, refutes “divestment” claims – it is highly unlikely, he says, that companies would steer clear from business in a particular country as a result of stronger EU legislation. **Andi Talleting Salahudin from the Indonesian Ministry of Law and Human Rights** sees EU regulation as providing stimulus to business and human rights efforts across the globe. Some such as the **President of Bangladesh Garment Manufacturers & Exporters Association** address the question of trade policy, along with the responsibility of buyers to act responsibly. **MEPs Anna Cavazzini and Heidi Hautala**, reflecting on what the legislation should look like, also point to the need to review EU trade and investment policy. ‘Old status quo thinking’, as they say, risks undermining the enormous potential of the mandatory due diligence initiative.

**We sincerely thank all authors and organisations for sharing their diverse perspectives and enriching this debate. While suggested approaches differ in some instances, we believe the contributions to this Compendium pave a clear path: towards respect for human rights and the environment as the future license for European and global businesses to operate.**

Phil Bloomer, Executive Director

Johannes Blankenbach, EU/Western Europe Researcher & Representative

Saskia Wilks, EU/Western Europe Researcher



**Business & Human Rights  
Resource Centre**

# Finland's Call to Action on Business and Human Rights Echoes Loud and Clear

**Alva Bruun & Dr Kent Wilska, [Ministry for Foreign Affairs of Finland](#)**

Alva Bruun and Kent Wilska highlight the need for EU due diligence regulation and stress the importance of developing legislation in consultation with all key stakeholders, and of a victim-centric point of view.

Business and human rights is no longer a marginal topic. It has paved its way globally to trade and human rights fora and policy, with an unexpected speed and weight. When the attention to responsible business practices was gaining momentum, Finland took a critical step forward in 2019 by adopting a new ambitious [government programme](#) with the objective of becoming a leader in social responsibility issues.

The government committed to carry out a study exploring the possibilities for national mandatory human rights due diligence legislation. This [study](#) is now finalised, shedding light on a number of details that need to be addressed as part of a plausible legislative process. Political decisions on the way forward will follow.

As part of their analysis, assessment and research activities, the government [commissioned](#) another pertinent study on Finnish companies' human rights performance using the Corporate Human Rights Benchmark methodology. This is expected to come out in late December.

In addition to these national efforts, government has committed to advance this agenda at EU level. It is clear that the fragmented landscape of regulatory measures governing responsible management of supply chains and due diligence has led to a need for further harmonisation efforts at EU level. Finland's aim is also to push this agenda in other international fora such as the OECD and the UN, given the increasingly global character of business.

## Building a roadmap

In December 2019, the Finnish Presidency of the Council of the European Union organised a Business and Human Rights Conference with the aim of moving this agenda forward at EU level with high-level officials from Finland.

Finland's strategy was to engage a wide array of stakeholders from EU institutions, various government entities, private sector, civil society and academia alike, and create meaningful content through inclusive discussions. With more than 200 people gathered in Brussels this

provided an opportune moment. The message of the keynote speech delivered by Prof. John G. Ruggie was clear: Europe must act urgently. Through various panel discussions, a number of timely and much debated topics were covered. All of this resulted in an 'Agenda for Action', published by Finland as the Chair. In the [Agenda for Action](#), Finland stressed the need for a more effective, coherent and strategic direction for the EU and proposed the adoption of an EU Action Plan on business and human rights.

### **Everyone's business**

The published Agenda for Action calls for the famous 'smart mix' of voluntary and mandatory measures to advance human rights due diligence. Regrettably, legislation alone cannot solve all the problems relating to unethical business. A number of efforts are needed at different levels and must be sustained over time to achieve lasting results.

The Agenda for Action highlights actions such as the creation of multi-stakeholder initiatives on a sectoral or commodity basis; review of public procurement procedures; integration of UNGPs into export credit, development finance and other public financial support; supporting business by providing issue and country-specific capacity building and guidance; identification of leading examples of cooperation involving governments, international organisations, civil society and trade unions and stepping-up such cooperation in third countries; elaboration of joint programmes supporting implementation of trade and sustainable development chapters of the EU's free trade agreements and supporting the work of human rights defenders.

This shows the wide array of measures that are essential to consider in order to achieve more impact. We are happy that the agenda and its elements are being referred to frequently, especially through the German EU Council presidency and by a number of other stakeholders.



## Effective regulation is key

Finland stressed that possible EU-level mandatory measures on human rights due diligence should be aimed at improving human rights outcomes, and be developed in full consultation with all key stakeholders. It is critical that any potential new EU legislation in the field of business and human rights is effective and considers the potential situations that can arise from a victim-centric point of view. The EU needs to show the way in terms of developing tools that can ensure the protection of the most vulnerable groups and especially victims of human rights abuse.

The challenge will be to determine the different elements of due diligence obligations at a detailed level, defining the scope of legislation from both a trade and a human rights point of view: how far down the supply chain due diligence obligations reach and what the concrete civil and criminal liabilities are. There are number of complex legal questions involved that warrant answers. The requirements of future regulatory measures should also be workable at company level taking into account different sizes of enterprises. There is a need to enhance the predictability and legal certainty for business, and promote a level playing field, both within the EU and in global markets.

## The way forward

Finland's approach during our EU presidency was to build on the work of EU institutions and previous Council presidencies (such as the Netherlands in 2016) and pave the way for future efforts by Croatia and Germany. Cooperation is essential to achieve transformation and change established practices at EU level.

In February 2020, the EU Commission published its study on due diligence requirements in supply chains and later in April Commissioner Reynders announced that the Commission would prepare a legislative initiative on the matter. One of the key questions in the future will be the interplay between existing and envisaged national regulatory initiatives and possible EU-wide proposals.

Currently the world is facing the manifold challenges caused by COVID-19. Amid a fear that the business and human rights agenda would get less attention, Germany has, by taking this work forward strategically and with determination, shown commitment to achieving lasting change in policy and practice. The EU and its Member States now need to use their leverage, which depends on political will and readiness of our leaders to step up for human rights as fundamental values of a society and enterprise. The COVID-19 pandemic has indeed increased the need for action on the business and human rights front. It has shown that we are entering a new era, which demands transformation of global supply chains, and respect for the workers therein.



**Alva Bruun** co-authored this piece in her former capacity as Senior Adviser (Human Rights) at the Ministry for Foreign Affairs of Finland.

**Dr Kent Wilska** is a Commercial Counsellor at the Ministry for Foreign Affairs of Finland.



# Evidence-Based Law-Making: What Lessons Have We Learnt for an Effective Due Diligence Law?

**European Coalition for Corporate Justice (ECCJ), European Center for Constitutional and Human Rights (ECCHR), *Initiative Lieferkettengesetz*<sup>1</sup>**

ECCJ, ECCHR and Initiative Lieferkettengesetz discuss key insights drawn from past efforts to advance responsible business conduct, including the pitfalls of social auditing as well as the need for judicial enforcement through civil liability.

European civil society welcomes the German Government's initiative to bring forth national human rights and environmental due diligence legislation, whilst at the same time promoting EU legislative harmonisation. These due diligence legislative developments, combined with improvements in access to judicial remedy, should indeed take place at all levels: national, regional and international, in order to incorporate lessons-learnt in the process toward upward harmonisation.

After close to a decade, voluntary measures are now a proven failure. The price paid for this finding has been high, overwhelmingly borne by our global economy's most vulnerable. Monitoring results revealing a lack of corporate due diligence uptake correlate to ongoing and increasing adverse human rights and environmental impacts (a common corollary of which is [illicit profit-making](#)). In the past ten years, thousands of textile workers have died or been seriously injured in preventable factory fires and collapses; rates of deforestation and local community eviction have continued to rise; as has the number of human rights and environmental defenders [murdered](#) protecting their lands from corporate exploitation. Generally, such impacts have disproportionately impacted groups such as [women and girls](#), migrant workers, refugees and indigenous peoples.

**Whilst human rights and environmental due diligence legislation is no silver bullet, it is a crucial opportunity to buck some deeply worrying global trends and to ensure respect for human rights and the environment by business. However, in order to guarantee regulatory impact that is both positive and real, it is incumbent on us to now heed certain lessons from previous efforts on responsible business conduct which have not been sufficiently delivered.**

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<sup>1</sup> German "Supply Chain Law Initiative"

### Caution: audits and MSIs ahead

Private auditing and certification must not become a surrogate for the human rights and environmental due diligence of companies. Auditing and certification failures are widespread, ranging from garment factory collapses and fires ([Rana Plaza](#), [Ali Enterprise](#), [Tazreen](#)) to [dam collapses](#), resulting in thousands of avoidable deaths and injuries. We now know these mechanisms under-identify and under-document risks and impacts, and can serve as a [‘fig leaf’ disguising actual negative impacts](#). Currently this multi-billion euro compliance industry goes about unchecked and unregulated with various inherent conflicts of interest. If private auditing and certification is to have any role in future legislative design, specific measures must be taken to ensure that auditors and certifiers not only do their own human rights and environmental due diligence, but meet stringently enforced minimum standards of quality, integrity and governance; and are held legally liable for their professional failures.

Multi-stakeholder Initiatives (MSIs) have become highly overestimated tools in their capacity to help companies implement responsible business conduct. [Evidence shows](#) that MSIs fail to sufficiently oversee compliance with standards, evaluate human rights and environmental due diligence processes, or hold member companies to account for non-adherence. They also fail to ensure access to remedy for victims of corporate misconduct. If MSIs are to have any role in future human rights and environmental due diligence legislation, they must be subject to specific oversight and regulation mandating high standards of transparency, outcomes and accountability. Whilst MSIs may help companies implement their obligations, they cannot assume individual company responsibilities or liabilities.



## “A regulation without sanctions is not a regulation”

Access to remedy will not be effective without robust enforcement, especially through civil liability. For their efficacy, non-judicial and non-state based systems for access to remedy depend on the extent to which they operate “in the shadow” of effective judicial procedures (typically as last resort) so that victims’ rights be taken seriously. In the absence of a real and enhanced possibility of judicial enforcement, power imbalances in non-judicial and non-state mechanisms will persist, as will their continuing [failure to provide effective remedy](#) for victims.

Prevention is the best cure. Therefore, company law and existing civil liability rules must be updated to reflect the contemporary reality of the globalised economy. Companies must be held liable for harm caused by a breach of their duty of care. It must finally be possible to hold parent or lead companies liable for the harm caused by the subsidiaries and suppliers they control, or who economically depend upon them. Such developments would greatly incentivise the necessary behavioral change and encourage uptake of preventative measures to reduce harms occurring in their value chains.

Administrative enforcement is crucial, but must be embedded in a broader liability framework which includes the above-mentioned civil liability. State authorities should play their role to protect human rights, and be empowered to start investigations ex officio or by complaint. They must be given the powers to compel evidence, documents and testimony; publicly publish findings of investigations; as well as order specific performances and impose proportionate and dissuasive fines. Such authorities should not impede, but rather empower, victims to seek and obtain access to remedy. It cannot be the case that European governments gain revenue from fines for corporate human rights and environmental violations, whilst victims continue to be left to cover the costs of their own remedy. Such an outcome would be contrary to the spirit of the UNGPs.

The cost of waiting has been high. It is now imperative that the painful yet valuable lessons learnt over the past ten years be taken into consideration in the design of upcoming regulation to protect, respect and remedy.



## Views from the European Parliament

Lara Wolters, Anna Cavazzini and Heidi Hautala, Members of the European Parliament and its [Working Group on Responsible Business Conduct](#), discuss why mandatory due diligence at EU level is needed and what this should look like.

### **Lara Wolters, Member of the European Parliament (S&D)**

In our world today, business undertakings can be fully compliant with company law. They can be competitive, efficient and economically viable by all textbook definitions. And yet, they can have a significant adverse impact on workers, local communities and the planet. In times of health and climate crises, the failure to address risks in our economy and the short-termism of companies that, on paper, play by all the rules, should be urgently addressed.

Standards do exist: the UNGPs on Business and Human Rights; OECD Due Diligence guidelines and ILO conventions. But these standards are currently voluntary and hard to enforce. We must do better.

How? Via European legislation on “due diligence” – perhaps best summarised as corporate human rights, environmental and governance responsibility for businesses. Such legislation would create an obligation for companies to manage adverse risks in their entire supply chain, and it would make international standards enforceable under EU law. This, in turn, would improve the accountability of Western companies – including those doing business abroad. It would also give affected communities and their representatives access to remedy in the Union, even if the damage took place abroad. In doing so, the EU would set a global standard in legal protection and responsible business conduct.

Many companies are already trying to do the right thing. But current standards are mainly “good for the good guys”. We need an obligation that is also “bad for the bad guys”.



**Lara Wolters** is a Dutch member of the Progressive Alliance of Socialists and Democrats (S&D) in the European Parliament, serving as the Legal Affairs (JURI) Committee's Rapporteur for the Corporate Due Diligence and Accountability file.

## **Anna Cavazzini & Heidi Hautala, Members of the European Parliament (Greens/EFA)**

Over the summer, the European Commission published a [roadmap](#) for its upcoming 'sustainable corporate governance' initiative – which is a landmark plan to curb short-termism in corporate decisions and ensure better respect for human rights and environment throughout European companies' supply chains.

Most notably, the initiative foresees new legislation on corporate due diligence. The much awaited draft law will be presented in early 2021, but already many of us in the European Parliament are working on concrete reports that will show the European Commission what we think the legislation should look like.

The rules should clearly set out what is expected of companies with regards to their duty to undertake due diligence, and should require companies to address not only human rights, but also environmental issues. Reporting is not enough – obligations for concretely addressing risks as well as clear liability provisions are important to make the new legislation effective. All the measures undertaken should be gender-responsive, taking into account the differentiated impacts of a company's activities on women and girls. And the due diligence process should be inclusive, developed through consultations with rightsholders.



**Anna Cavazzini** is a German member of the Greens/European Free Alliance (EFA) in the European Parliament, where she chairs the Committee on the Internal Market and Consumer Protection (IMCO). She is also active in the Committee on International Trade (INTA).

**Heidi Hautala** from Finland is the Vice President of the European Parliament and a member of the Greens/European Free Alliance (EFA), and the Committee on International Trade (INTA).



From our perspective, it is essential that the new requirements be accompanied with the possibility to hold companies liable before European courts for human rights and environmental harm that they have caused or contributed to in partner countries – so that victims have better access to justice and remedy.

The new EU due diligence obligations should be a condition for access to the EU market, requiring operators to establish and provide evidence, through the exercise of due diligence, that the products they place on the EU market are in conformity with environmental and human rights criteria. And we must look into complementary trade measures such as import bans on products related to severe human rights violations like forced labour or child labour.

Crucially, it should be clear to us all that due diligence rules alone won't be enough to change business as usual. At the moment, our trade agreements encourage the externalisation of environmental and social costs to other parts of the world, and investors are given too many privileges that workers, consumers and affected communities simply lack. We therefore also need to urgently review EU trade and investment policy as a whole, to make sure that the framework within which investors and businesses operate is such that respect for human rights and our planet can be guaranteed.

From the destructive trade agreement with Mercosur, to the modernisation of the controversial Energy Charter Treaty – the Council and the Commission must not let the old status quo thinking in trade and investment undermine the enormous potential that the **'sustainable corporate governance'** initiative could bring about. The time to act boldly and determinedly is now.



Parlamentum Europaeum

# Sustainable and Future-Oriented Economic Policy with a European Supply Chain Law

**Dr Antje von Dewitz & Lisa Fiedler, [VAUDE](#)**

Antje von Dewitz and Lisa Fiedler see state regulation as a key way to ensure all companies act responsibly and to correct competitive disadvantages for those that already do so.

The COVID-19 pandemic has wreaked havoc on our social lives and had a profound impact on the economy. The crisis has acted as a negative catalyst for companies with volatile supply chains and environmentally harmful business models, giving rise to supply shortages and financial difficulties. VAUDE was also hit by the lockdown when retail stores were closed for weeks. But we are recovering well. Our supply chain remains stable and we do not need any government aid. We attribute this to the fact that our sustainable orientation has helped make us crisis-proof.

More than a decade ago, we decided to take responsibility for our business practices, both at our headquarters in southern Germany and in our global supply chain. We have made sustainability our core competency and fully integrated it into our corporate strategy.

What does this mean in concrete terms? Here's an example: To date, there has been no universally valid standard, no ready-made evaluation system, no certificate for sustainable outdoor products, and certainly no uniform sustainability standard that is applicable internationally and for all VAUDE product groups. So we developed Green Shape in 2011. Green Shape products meet a strict catalogue of criteria that covers product design, material selection, production, use and care, recycling and the disposal of products. Strict external standards like the bluesign® system and Fair Wear, which focuses on fair working conditions at production sites, are part of the criteria. We focus on long-term, partner-based business relationships with our production facilities. We plan our collections early and in detail to give them planning security. We have employees who live and work in China and Vietnam and speak the local languages, support our producers and suppliers in the implementation of social standards and assist our partners with their knowledge and experience. They also conduct regular follow-up visits to monitor the status of the corrective action plan. Environmentally harmful technologies and processes such as fluorocarbon-based surface treatments are strictly and consistently prohibited. We support development throughout the entire [supply chain](#) on issues such as detox, science based targets and social dialogue. This is accomplished via targeted training through our experts on site or the VAUDE Vendor Clubs. In the 2020 Summer Collection, 97% of VAUDE apparel meets the Green Shape criteria as well as the criteria of the *Grüner Knopf* (Green Button), a textile seal of the German Government.

Why have we taken this route? Because we are convinced that environmentally friendly and fair business practices are the right way to go. For us, it is a matter of common sense to take on corporate responsibility and not let society or the planet pay the price for the problems a business creates. This approach also makes us fit for the future: Our ongoing work on corporate responses to global challenges such as the climate crisis strengthens our problem-solving competency. It also means that we are very closely aligned with people's needs and expectations. An ever-increasing number of people want to shop with a clear conscience – this was already the case before COVID-19 and has only become more so in recent months.

The crux however is that our economic system makes implementing this business approach very difficult. Companies are currently evaluated solely on the basis of their financial performance when it comes to awarding financial services or calculating taxation. How environmentally friendly and fair a company may be is not taken into account. This means that businesses are generally focused on short-term profit maximisation. In many cases this comes at the expense of the planet's people and its ecosystem.

On the other hand, this also means that there are structural competitive disadvantages for sustainable companies. After all, companies that focus on sustainable materials and environmentally friendly production, that look after fair wages and working conditions in their production facilities, have to bear significantly higher costs than companies that do not act on these aspects.

A clear example are our panniers. The PVC-free primary material for these panniers is up to 80% more expensive than standard PVC materials that are controversial and considered hazardous waste. We incur further costs for sophisticated chemical management systems and environmental certificates that focus on

the preservation of resources and the greatest possible freedom from harmful substances in material manufacturing and production processes. In addition, there are costs for environmental management training for our suppliers and, of course, for fair working conditions in production plants, compliance with which is regularly monitored.

Of the total additional costs incurred for all of these measures, only a small proportion can be passed on to customers, as the willingness in retail and of customers to pay for higher prices has its limits. We have made a conscious decision to reduce profits in this case. We can only afford this because we work very efficiently and plan precisely with regards to purchasing and goods management. This leads to a low stock of old goods compared with the industry. Old goods are usually sold to retail at a high discount at the end of the season. Thus, this low stock of old goods means less margin losses and leads to a normal market profitability despite lower initial profit margin on the individual product.

Companies that neglect these sustainability aspects save considerably on costs by passing them on to others. If rivers are contaminated with chemicals from textile dyes because there aren't any sewage processing systems in place or if companies disregard occupational health and safety measures or social benefits, it is ruthlessly accepted that workers will have to live under degrading conditions and that the planet will be ravaged. The real costs are therefore not borne by the companies that cause the damage, but by uninvolved parties, the general public and future generations.

We simply cannot comprehend why there are still no state regulations requiring companies to take responsibility for their actions throughout the entire supply chain and to reduce the competitive disadvantage of sustainable companies. Voluntary commitment is not enough and puts too much responsibility on the consumer. Thus, we welcome the legislative initiative by the European Commission on mandatory human rights and environmental due diligence.

In order for the law to be effective, compliance should be monitored by a state authority and sanctions imposed in the event of non-compliance. As a member of *UnternehmensGrün*, a business association, we support their [position paper](#) on mandatory due diligence and liability.

We see the initiative for a German supply chain law by Labour Minister Hubertus Heil and Development Minister Gerd Müller as a trailblazer for a European law.

At VAUDE, we can conclude that our clear attitude and our commitment to sustainable business have noticeable positive effects on economic added value and sales despite the systemic competitive disadvantage for sustainable companies.

The [Meaningful Brands® study](#) by Havas Worldwide in 2019 confirms this conclusion. The study surveyed more than 350,000 consumers from 31 countries. 75% of consumers expect companies to actively work to solve social and ecological problems and to show a clear commitment. 77% of consumers prefer to buy products from companies whose values they can identify with.

Thus, we also see a European mandatory due diligence law as a chance to make European products more attractive to consumers and to position the EU as a leader in sustainable and future-oriented economic policy.

Especially now, with a goal of using economic stimulus packages to strengthen the economy after the recent COVID-19 lockdown, we consider it absolutely essential to finally eliminate the structural competitive disadvantages for sustainable companies and to make our economic system fit for the future.



**Dr Antje von Dewitz** is the CEO of VAUDE.

**Lisa Fiedler** is Head of the VAUDE Academy for sustainable business.



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**VAUDE**  
*The Spirit of Mountain Sports*

# Perspectives from Southern Organisations and Allied Human Rights NGOs: Ensuring a Legal Corporate Duty in the EU Includes Meaningful Provisions on the Rights of Indigenous Peoples and Local Communities

- Lawyers' Association for Human Rights of Nepalese Indigenous Peoples ([LAHURNIP](#)), Nepal
- Indigenous Movement for Peace Advancement and Conflict Transformation ([IMPACT](#)), Kenya
- Project on organising, Development, Education, and Research ([PODER](#)), Mexico/Latin America
- Federación por la Autodeterminación de los Pueblos Indígenas ([FAPI](#)), Paraguay
- Palenke Alto Cauca (PAC), Proceso de Comunidades Negras ([PCN](#)), Colombia
- Indigenous Peoples Partnership ([IPP](#)), Myanmar
- Promotion of Indigenous and Nature Together ([POINT](#)), Myanmar
- Asia Indigenous Peoples Pact ([AIPP](#)), Thailand
- Indigenous Peoples' International Centre for Policy Research and Education ([Tebtebba](#)), Philippines
- International organisations: [Forest Peoples Programme](#), Netherlands
- International Work Group for International Affairs ([IWGIA](#)), Denmark

The organisations call for an early inclusion of rightsholders in the legislative process, a law that ensures access to justice and the right to an effective remedy, as well as robust safeguards for human rights defenders and whistle-blowers.

Unsustainable and illegal practices among global investors and companies, including European businesses, are undeniably contributing to human rights abuses in countries producing commodities for international markets and consumers. Where communities speak out against harmful business operations and investments, they are often the targets of intimidation and repression. Indigenous peoples and local, rural and Afro-descendent communities not only face severe threats to their territories, livelihoods, cultural survival and self-determination, they are also threatened, de-legitimised, criminalised and killed at disproportionate rates for protecting their rights and defending their lands and environment. In many cases, the underlying causes of intimidation and violence are [linked to the failure of businesses](#) to respect community land and resource rights, including the right to free, prior and informed consent (FPIC), which in turn leads to land conflicts, forced evictions and physical and economic displacement.

Voluntary measures adopted by companies to promote responsible and sustainable production and sourcing, including the protection of communal tenure and resource rights, have failed



rights-holders the world over. They have been ineffective in shifting businesses, in all sectors and of all sizes, towards meaningful respect of all human rights outlined in international human rights instruments. For decades, rights-holders and social organisations have been calling on governments to protect, respect, and advance their rights by regulating businesses through legal provisions. The [Zero Tolerance Initiative \(ZTi\)](#), a coalition of indigenous peoples, rural and Afro-descendent communities and organisations and their civil society partners, is working in solidarity to push for reforms of global trade, business and supply chains to eliminate violence, killings and abuse against human rights defenders linked to global supply chains. In its [Geneva Declaration](#), the ZTi calls for governments to implement the UNGPs on Business and Human Rights through a corporate duty that meaningfully upholds human rights, including community land rights.

With the right provisions, an EU-wide corporate duty to protect human rights could be key to promoting the reform of corporate conduct to help end attacks, criminalisation, intimidation, threats and killings against defenders and communities, which in 2020 continued to [increase worldwide](#), whilst simultaneously offering protection of the wider set of human rights. In order to do so, we believe that the legislation adopted must be broad in scope and at the same time offer specific provisions and mechanisms to ensure the protection of human rights, land and environmental defenders. Its provisions must regulate companies and their supply and value chains inside and outside of the EU. Legal provisions must also apply to investors and financial institutions across different commodities and sectors; and to instigate real corporate behaviour change, legislative measures must include civil and criminal penalties.

Effective EU legislation must include norms and requirements fully aligned with international human rights law and standards, including in relation to the customary land and territorial rights of indigenous peoples and communities. Provisions should require respect for the right to FPIC in line with the UN Declaration on the Rights of Indigenous Peoples and related human rights instruments. It also needs to contain robust safeguards and requirements for solid corporate actions to improve safety and protection for human rights defenders and whistleblowers who lodge complaints against a specific company or investor. Companies should be required by law to conduct independent human rights and environmental impact assessments (HREIAs). Clear guidance should be set out to ensure HREIAs are undertaken in a culturally appropriate manner determined by the rightsholders and require an analysis of the root causes of past and present impacts and unresolved community grievances. Requirements must also stipulate that relevant documents and information are shared in languages and via means that are understandable to communities. Businesses must be obliged to ensure that any plans or agreements made in relation to remediation for harmful human rights and environmental impacts are inclusive of the priorities and perspectives of affected rightsholders and subject to FPIC.

The undersigned organisations emphasise that in addition to identifying, mitigating and preventing risks to human rights, effective corporate due diligence requires actions to address and remediate adverse impacts in ways that are meaningful to affected rightsholders. Any new EU legal instrument regulating corporate conduct needs to ensure that it requires businesses to address past and present harms identified as associated with their existing operations and investments, and include requirements for remedial actions. It is vitally important that the instrument is backed up by a dedicated EU enforcement framework to ensure compliance. The legislation must also enable access to justice and the right to an effective remedy, including through redress mechanisms accessible to affected communities and rightsholders, with due attention paid to the particular challenges that arise from ensuring communities in remote areas are not left behind.

The EU proposals come at an important moment in history. Despite the ongoing COVID-19 pandemic, the expansion of the agribusiness and extractive industry and the increased land grabbing, repression, criminalisation and shrinking of civic space for human rights, land and environmental defenders have intensified the world over. Reports of death, suffering, food shortages and increasing insecurity serve as a wake-up call for policy makers and businesses to fulfil their roles and responsibilities and act to ensure compliance with the corporate duty to respect, protect and further human rights. Alongside mandatory legal rules on corporate conduct, there is a need to rethink public policies on global trade, production and consumption of commodities to enable a transition towards sustainable economies respectful of human rights and the environment. A return to business as usual is not an option.

In order for the EU legal framework on corporate conduct and mandatory human rights and environmental due diligence to be effective, it will be essential that European legislators and decision-makers hear the voices of indigenous peoples, local communities, human rights and environmental defenders and organisations that promote corporate justice. We recommend that the EU makes every effort to ensure the inclusion of indigenous peoples and local community voices in the process of developing this important legislation. Our organisations are willing to engage further in these policy discussions as the EU develops its laws and policies on corporate conduct and sustainable trade.



# Paving the Way: The Pioneering Role of the French Duty of Vigilance Law and its Relevance for EU-Level Mandatory Due Diligence

**Odile Roussel, [French Ministry for Europe and Foreign Affairs](#)**

Odile Roussel reflects on lessons learnt from the French experience, among others that creating a legal obligation can prove more effective than incentives or voluntary measures, while reinforcing those companies already engaged in efforts to conduct business responsibly.

Considering responsible business conduct (RBC) an economic, social and environmental issue of global governance, stemming from the impact of business activities on the environment and on societies, France initiated a pioneer RBC policy in this area, building on activities to promote corporate social responsibility from the early 2000s onwards.

## 1. The pioneering role of the French Duty of Vigilance Law and lessons learnt

France has adopted a 'smart-mix' policy, combining both voluntary measures (such as the status of 'company with a mission' under the French Action Plan for Business Growth and Transformation (PACTE) Law) and mandatory measures. In particular, the adoption in 2017 of **the Duty of Vigilance Law** covering parent companies and affiliated entities, and in 2019 of **the PACTE Law** which states inter alia that the management of companies shall take into account social and environmental challenges. These two measures, which build on a robust set of tools (National Action Plan on Business and Human Rights, OECD National Contact Point, etc.) represented a major breakthrough which initiated a shift from 'soft' CSR to hard law.

**The Duty of Vigilance Law establishes a general and binding duty of vigilance**, aimed at preventing serious infringements of, or harm to human rights and fundamental freedoms, personal health and safety and the environment arising from the activities of a company and those subcontractors or suppliers it maintains an established business relationship with. It covers all sectors, for companies that meet certain thresholds, measured by number of employees (at least 5,000 in France or 10,000 worldwide). Every fiscal-year, the company must elaborate a vigilance plan which should identify the risks created by and the adverse impacts of the activities of the company, its subsidiaries and its subcontractors and suppliers, the due diligence measures taken by the company to mitigate risks and prevent serious infringements or harm, as well as a system to monitor the measures implemented and assess their effectiveness. The law also provides for access to remedy, through a process of formal notice by stakeholders

(‘any person with a legitimate interest’) and legal action before a court with jurisdiction over the potential absence or inadequacy of the vigilance plan, and a civil liability responsibility regime with legal action before the court with jurisdiction.

Due to the globalisation and complexity of supply chains, the law has an extra-territorial dimension and indirectly affects companies below the threshold, via the supply chain due diligence of those companies above the threshold.

It is still a little early to take stock of the **impact of the law**. An [assessment report](#) on its implementation, published at the beginning of this year, states in particular: ‘the strengths of the law are reflected notably in the higher governance of the Duty of Vigilance, (..), but also in efforts to use relevant standards (those of the ILO, OECD and UN), adapt existing tools or create new ones for its application’ (p. 7). ‘It reinforces principles from the “soft law” rules which everyone can agree to, giving them the “force of law” in France and, by extension, in all the countries where the subsidiaries and subcontractors of the largest groups are located’ (p. 8).

The weaknesses of the law lie in a perimeter that is difficult to verify,

*‘the still vague and unevenly shared understanding of the Duty of Vigilance, its insufficient readability and visibility [in terms of the vigilance plan] in the already dense Management Report, the relevant level of detail, an alert mechanism that is still being explored, and a dialogue to be strengthened with trade unions and even more so with NGOs. (...) In the interests of a level playing field, it would be desirable to extend the Duty of Vigilance to a European level’ (p. 8).*

With regard to access to remedy, seven formal notices have been sent to companies and three cases are subject to legal action, still under investigation. Some

improvements in the vigilance plans of companies have been noted in 2019: more companies have gone beyond formal compliance with the law and worked to improve their internal processes on risk identification and due diligence measures, broadening consultation with stakeholders. There is however still room for improvement, particularly in consultation and transparency. It should be recalled that the law itself, which is very brief, does not provide a template or specifications for the development of the vigilance plan.

**One lesson can be drawn from this experience:** an obligation can be more effective than incentives or voluntary measures, particularly with regard to companies that have not integrated RBC into the heart of their strategy, as there is greater reputational and legal risk, even though the threat of a legal sanction remains potential. Such an obligation also reinforces companies already engaged in a business and human rights approach and leads them to promote and strengthen their business and human rights strategy. It also encourages them to participate in collective initiatives (EpE, ICS, Fashion Pact, Global Deal, etc.)

An EU binding legislation on due diligence would bring similar benefits and provide a level playing field within the internal market.

## **2. France is supportive of a European RBC action plan, including mandatory legislation on due diligence**

France has been committed to the adoption of the European directive on non-financial reporting, the inclusion of social, environmental and governance standards in trade agreements as well as more active participation by the EU in the discussion process on a legally binding instrument on business and human rights at the UN.

In addition, **France supports the development of a “smart-mix” policy at the EU level**, which would apply uniformly to European companies and would be consistent with international commitments and standards. It supports **in particular the adoption of a legally binding and cross-sectoral legislation on due diligence, as a part of a broader and ambitious RBC strategy for the EU.**

The mobilisation of economic actors, first and foremost companies, must be at the heart of this strategy and RBC should be one of the cornerstones of the post-COVID-19 recovery strategy, in conjunction with the Green Deal agenda. The health crisis caused by COVID-19 has highlighted the weaknesses of our supply chains, Europe’s dependence on third countries for essential products and the insufficient resilience of our economies. This makes the development of a sustainable, inclusive and resilient economic model even more essential, where RBC, including due diligence, is a key element.

In conjunction with other elements of a broader RBC strategy, such as corporate governance and non-financial reporting, an EU legislation on due diligence should address the following issues:

- The nature of obligation for companies (reporting obligations, development of due diligence plans and risk mapping, preventive/corrective measures)
- The scope, both in terms of businesses (general and sector-specific thresholds) and impacts/risks covered
- The “remedy piece”, i.e. the legal liability regime and the “sanctions” to be put in place
- The enforcement mechanisms

France looks forward to the proposal by the Commission in 2021 and will actively contribute to the preparation of this future legislation, drawing in particular on its experience in implementing its national law.



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# On Mandatory Due Diligence, SMEs Don't Need a Free Pass; They Need Flexibility

Francis West, [Shift](#)

Francis West highlights five key considerations to take into account when examining how best to incorporate small and medium-sized enterprises (SMEs) within the scope of any due diligence legislation.

As the [debate on mandatory HRDD](#) at the EU-level starts to move from the **if** to the **what** and the **how**, a key concern that policymakers must grapple with is the size of businesses covered by any incoming legislation.

[While our work with some forward thinking SMEs](#) suggests that they boast some [significant advantages over their larger counterparts](#) when it comes to realising their responsibility to respect human rights, legislators will need to act with care not to disadvantage them. The first step would be to anchor mandatory HRDD in the [UNGPs'](#) understanding that while the responsibility to respect human rights applies to all businesses, the means through which a company meets that standard will vary according to its size.

Here are five key considerations to support such an approach being reflected in new legislative developments:

## 1. Half of the world's population works for a small or medium business

First, let's look at the numbers: SMEs account for about [90% of all businesses and contribute up to 50% of total employment in the world](#). That is why, if legislation aims to drive positive outcomes for people in the context of business activity, it must reach the businesses people work for and interact with. What's more, we see that the support amongst larger businesses for mandatory HRDD increasingly hinges on the inclusion of SMEs in any such regimes, given [the interest of multi-nationals in the level-playing field](#) and the increased leverage with resistant suppliers that mHRDD promises.

## 2. Prioritisation of salient issues

Most stakeholders recognize that companies – regardless of size – need to prioritize their [salient human rights issues](#). For small businesses with limited resources, prioritizing action on the most severe risks to people is even more crucial to get traction. For instance, we've spoken to businesses in the apparel, food, retail and cleaning sectors that have made progress by focusing

on addressing the problem of low wages, believing this will have knock-on effects on a host of other rights. The expectations hardwired into legislation ought to reflect the need to enable businesses to prioritize action on human rights impacts based on their severity and that the complexity of company processes for identifying and taking action on impacts will be affected by the size of the company in question.

### **3. A focus on the quality of relationships with business partners**

In comparison to larger businesses, SMEs tend to have fewer suppliers and customers, which can enable deeper and better-quality relationships. In work that we've done with forward thinking SMEs, we've seen how they often spend a lot more time selecting business partners that are the right fit and putting more up-front investment into finding those who share their values and tend to perform well on human rights. For small businesses that aim to respect people, partnership with suppliers is a necessity not a choice.

However, there is a risk that legislation on mHRDD incentivises an approach where a buyer "polices" its supply chain through a process of monitoring and social audits. This approach would [fail to encourage](#) the right behaviors for any business, but would particularly impact SMEs. As policymakers consider how best to articulate the standard of HRDD, they should encourage practices that focus on relationship-building, not policing, to work towards better outcomes for people.

### **4. Expectations on action need to move beyond commercial and legal leverage**

SMEs often lack the cold, hard commercial leverage of larger multi-nationals, and must think more creatively. For instance, we've seen how one medium-sized business has rolled out programmes on freedom of association and worker voice in the most challenging contexts, despite having less than 5% of the product buy from suppliers. This business achieved buy-in through explaining the benefits of the programme, and drawing on the trusted relationship it had developed, rather than requiring suppliers to participate.

Under any form of mandatory HRDD, the nature of a company's involvement with a human rights impact, and the strength of the action it has taken to prevent it from occurring, is likely to determine the assessment of the consequences the company faces. Such assessments must consider the wide spectrum of avenues to effectively influence business partners, rather than honing in narrowly on the extent to which a company has deployed legal or commercial leverage, which SMEs are unlikely to possess.

## 5. Respect for human rights is more than a mechanical due diligence process

One of the advantages that committed SMEs have over their larger counterparts when it comes to human rights is a greater facility to nurture a culture that supports people and their ability to speak up for themselves. For SMEs, people truly are their most important asset. The very lack of resources and stretch that skeptics cite as reasons why SMEs may find it difficult to respect human rights means that smaller businesses have to respect, trust, motivate and empower their employees to succeed. From talking to executives in SMEs, it is clear to us that committed leaders are able to instill values of empathy and empowerment through face-to-face interaction with employees, listening to them and modelling desirable behaviours.

Experience shows that even the most sophisticated human rights risk management processes will bear little fruit if they are not fully [embedded in company culture](#), lived by the business' leaders and supported by effective governance structures. Here, values-driven SMEs have an advantage and legislation should support that relative strength, setting the expectation not just for a mechanical due diligence process, but one that lives and breathes, informing company behaviour and decision-making.

Structuring legislation to encourage and compel companies to adopt and scale rights-respecting business practices and behaviors is no small task. But the legislation will have limited impact for the people that need it the most if it does not consider how best to incorporate SMEs within its scope. Doing so means ensuring an adaptable framework that sets a clear standard of conduct, but allows businesses of all sizes to reach that standard drawing on their unique strengths and expertise.



**Francis West** is Director of Business Engagement at Shift.

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**Shift**

# European Union Legislation on Corporate Human Rights and Environmental Due Diligence: Perspectives of Civil Society Organisations in Latin America

## Civil Society Focal Group on Business & Human Rights in Mexico<sup>1</sup>

- Business & Human Rights Resource Centre ([BHRRC](#))
- Red en Defensa de los Derechos Digitales ([R3D](#))
- Centro Mexicano de Derecho Ambiental ([CEMDA](#))
- Servicios y Asesoría para la Paz ([Serapaz](#))
- [Oxfam Mexico](#)
- [Peace Brigades International – Mexico](#)
- Project on Organization, Development, Education and Research ([PODER](#))
- Interamerican Association for Environmental Defense ([AIDA](#))
- Project of Economic, Social and Cultural Rights ([ProDESC](#))

The Civil Society Focal Group on Business and Human Rights discuss the key elements that should form part of an EU law from their point of view, including involvement of civil society organisations and communities when developing the legislative initiative, and reflecting their concerns in the legal text itself.

Last April, EU Justice Commissioner Didier Reynders announced an EU legislative initiative on mandatory corporate human rights and environmental due diligence (the initiative). This announcement led us to reflect once again on the central elements that cannot be ignored, both in terms of the process of drafting the initiative as well as its content. The initiative should:

### 1. Integrate international human rights standards

The COVID-19 pandemic has highlighted the laxity of companies, particularly transnational ones, in complying with national and international standards on human rights and the environment. This includes those related to the adoption of actions to prevent possible negative impacts of their activities on the environment and climate, as well as on the human rights of individuals, communities and indigenous peoples. It is therefore essential that the EU seeks to integrate obligations for EU governments and companies, effective sanctions for parent and subsidiary companies, as well as access to justice and remedy for workers, trade unions and affected communities.

<sup>1</sup> The Civil Society Focal Group on Business & Human Rights in Mexico, created in 2014, is comprised of BHRRC, CEMDA, Oxfam Mexico, PODER, ProDESC, R3D, Serapaz, and is accompanied by Peace Brigades International – Mexico and observed by AIDA.

## **2. Include extraterritorial obligations and mechanisms for justice, mitigation and reparation mechanisms for communities outside the EU**

Extraterritorial obligations of companies and their link to due diligence, remedy for abuses and access to justice are a key element that should be included to emphasise that parent companies, and not just their subsidiaries and the small and medium enterprises in the Global South that tend to be their suppliers, carry responsibility for human rights and the environment, including climate change. There is also a need to develop and implement a justice mechanism that is integrated into the structures of European countries so that it can be used from outside and facilitate access to justice for communities in other jurisdictions.

## **3. Include the voices of civil society and affected communities and a gender and intersectional perspective**

It is essential to include civil society organisations and communities from all regions of the world, and to ensure their participation and effective inclusion both in the process of developing the initiative and in the text itself.

In Latin America, there are expert civil society organisations that promote human rights and environmental due diligence mechanisms, as well as effective, comprehensive, gender-sensitive and intersectional reparations. Some accompany communities on their search for justice for the negative impacts of business operations on their human rights, including those of European companies. Therefore, based on their valuable experiences, they could provide input into the design and implementation of such mechanisms.

One such case is that of the indigenous Zapotec community of Unión Hidalgo in Oaxaca, who with the support and direction of the Mexican Project of Economic, Social and Cultural Rights ([ProDESC](#)) and the European Center for Constitutional and Human Rights ([ECCHR](#)), used the **mechanism established in the French law on the Duty of Vigilance** for the first time in the Americas, [urging the French company](#) Electricité de France (EDF) to comply with their legal obligation to establish measures to prevent and mitigate the risk of human rights abuse with regards to the Gunaa Sicarú wind park. Although the case is still ongoing, it shows the importance of these judicial mechanisms that are in reach for affected communities, particularly when there are no legal remedies for corporate accountability in their home country, and risks of corporate capture and impunity are present.

## **4. Link its development to other processes related to corporate due diligence and regulatory standards on business and human rights**

The initiative must be compatible with and complementary to another important process on the subject: the International Legally Binding Instrument on Transnational Corporations

and other companies with respect to Human Rights (“Binding Treaty”), as well as other binding instruments on the protection of human rights and the environment, like the “[Escazú Agreement](#)”. European regulation should not be less demanding or less progressive than the draft of a Binding Treaty, the elaboration of which has provided for the participation of civil society from all regions, and which includes a dedicated [gender perspective](#). It could also complement and incorporate even stricter standards appropriate to the position of EU countries and companies in global economic structures.

## Conclusion

The civil society organisations that constitute the Civil Society Focal Group on Business and Human Rights in Mexico have promoted various dialogue and follow-up actions for the development of mandatory human rights and environmental due diligence legislation at the global level, with the aim of having effective mechanisms that guarantee the integrity of human rights in relation to business activity, beyond the EU. European legislation could have a positive impact on other jurisdictions that adopt and implement similar mechanisms. We consider it essential that the meaningful participation of civil society and affected communities is considered. We offer our availability for a productive dialogue that can help generate real change from the EU.



# Key Considerations for Effective Mandatory Due Diligence Legislation

**Théo Jaekel, [Ericsson](#)**

Théo Jaekel highlights three key issues for further discussion from his point of view, namely the need for enforcement mechanisms; considering companies' individual circumstances; and a focus on ensuring transparent business practices through effective liability provisions.

At Ericsson we strongly welcome and support the need for mandatory human rights and environmental due diligence legislation. An effective legislation can create legal certainty, a level playing field and provide access to remedy for impacted stakeholders. The concept of a smart mix of measures referred to in the UNGPs on Business and Human Rights is clearly based on the notion that relying on voluntary measures alone is not sufficient. This approach has been tried for decades. Now is the time to truly implement a smart mix by introducing clear and effective legal standards.

A key success factor for an effective mandatory due diligence legislation is to base the provisions on existing and established standards, especially the UNGPs, and to ensure horizontal application for all companies. Respect for human rights should be a cornerstone of any business enterprise, regardless of size or sector. Moreover, in accordance with the UNGPs, it is important to stress the need for a full value chain approach, not limiting due diligence requirements to global supply chains only, but rather taking a risk-based approach, regardless of whether risks materialise upstream or downstream of a company in question. Only by applying these requirements to all business enterprises will we create a level playing field and ensure the standards of conduct are applied throughout the value chain.

Having established the clear need for mandatory due diligence legislation, I would like to highlight three key issues that need further discussion and close consideration.

Firstly, there is a strong need for enforcement mechanisms in order to make sure the legislation is effective. It will however be crucial to clearly define what companies are actually liable for. Such provisions need to be predictable. Here, I believe we also need to look to the UNGPs as a foundation, which differentiate between specific levels of responsibility in connection with adverse human rights impacts. A company can cause, contribute, or be directly linked to such impacts. Liability provisions introduced in the new mandatory due diligence legislation should reflect these levels of responsibility. This approach would clearly define that companies are liable in case they cause or contribute to an adverse human rights impact, but not if merely directly

linked. When making this distinction it is however important to remember that there is a continuum between contribution and linkage. Professor John Ruggie presents factors that can determine where on that continuum a particular instance may sit in his [Comments on Thun Group of Banks Discussion Paper on the Implications of UN Guiding Principles 13 & 17 In a Corporate and Investment Banking Context](#). The factors mentioned by Professor Ruggie are:

- the extent to which a business enabled, encouraged, or motivated human rights harm by another;
- the extent to which it could or should have known about such harm;
- and the quality of any mitigating steps it has taken to address it.

Therefore, to what extent a company has in fact embedded comprehensive and effective due diligence measures to prevent harm, should be taken into consideration when determining liability. Furthermore, what can be learnt from due diligence requirements and liability mechanisms in existing legislation, for example anti-bribery laws, should also be considered. Most importantly, any liability provisions need to ensure both effective deterrent for companies and adequate remedy for impacted stakeholders.

Secondly, in accordance with the UNGPs, the new legislation should be drafted in a way that ensures each company's individual circumstances, e.g. severity of risks, size of the company, position in the value chain etc., are considered when determining what constitutes reasonable due diligence measures. An overly prescriptive and rigid legislation risks becoming a tick-box exercise. The aim should not only be to ensure that business enterprises have formal policies and processes in place, but also to ensure that these are effective. This goes back to the previous point regarding the quality of

mitigating measures. What in the end is considered effective and reasonable must be assessed based on each company's unique operations. Here, appropriate sectoral guidance and industry standards and eventually legal precedence will play a supporting role in determining where lines are drawn.

Thirdly, while transparency and disclosure are integral steps in any proper due diligence, mandatory due diligence legislation should rather focus on ensuring transparent business practices through effective liability provisions. Separate or new reporting standards should not be created. Such requirements already exist, and it is crucial that the drafting of new legal requirements is aligned with parallel processes such as updating the EU Non-Financial Reporting Directive. Creating additional and separate reporting requirements will only create ineffective administrative burdens and in the end divert much needed resources within companies from focusing on embedding effective due diligence measures in practice.

These are some of the key issues that need to be closely evaluated, and different approaches carefully considered. An inclusive and robust consultation process is therefore a crucial next step.

To conclude, the key question to ask is what mandatory human rights and environmental due diligence legislation needs to achieve? And the answer to that question should be better outcomes for people. That should be what guides the drafting of this legislation. And that is what companies should ensure through their due diligence measures.

This is how we build back better, by raising the bar and rising to the challenge.



**Théo Jaekel** is Legal Counsel and Business and Human Rights Expert at Ericsson.

# Mandatory Human Rights Due Diligence in the EU: The Promise and the Risk

**Olivier De Schutter, [UN Special Rapporteur on extreme poverty and human rights](#) & Sharan Burrow, International Trade Union Confederation ([ITUC](#))**

Olivier de Schutter and Sharan Burrow highlight the important role EU legislation will play in strengthening the bargaining power of unions and social movements in the global South – if it incentivises companies to continuously improve their human rights record, on the one hand, and holds them legally accountable for the impact of their activities on the other.

At the end of April, based on a [study presented in early 2020](#), and following more than 10 years of advocacy from NGOs and unions, the European Commission announced that it would make a proposal for binding EU legislation on due diligence in supply chains to ensure human rights and environmental standards are complied with for all products sold on the EU market. This is also a priority for the European Parliament, and the German presidency of the Council itself has announced progress would be made on this issue before the end of 2020.

This is an important and welcome development. In effect, it shall make access to the EU market and its 450 million consumers, representing more than one fifth of the global GDP, conditional upon complying with certain core requirements defined in international human rights law – including the core ILO conventions protecting workers' rights — and in multilateral environmental agreements. This will significantly strengthen the bargaining power of unions and social movements in the global South, who are calling for a more human-centred and sustainable form of development. We currently face a vicious cycle in which companies are tempted to outsource their activities to jurisdictions where wages are low, labour legislation weak or under-enforced, or union activity discouraged, and where environmental standards are lax or undermined in practice – and in which, in turn, countries are tempted to further lower social and environmental standards to attract investment, seeking to achieve a competitive advantage by maintaining workers in poverty and by tolerating an extractive use of nature. It is this vicious cycle that the new legislation will break, thus constituting a strong bulwark against the risks of social and environmental dumping entailed in the current form of economic globalisation.

But the adoption of mandatory due diligence for companies operating in the EU is also good for business. Although corporations already are subject, to a certain extent, to uniform reporting requirements on non-financial matters under [directive 2014/95](#) – an important tool to encourage socially responsible investment –, they still face today a highly fragmented regulatory

environment, in which each Member State sets its own requirements concerning the extent to which companies should monitor suppliers, franchisees and subsidiary companies, with regard to compliance with human rights and environmental standards. This fragmentation makes it difficult for them to navigate across the internal market, in effect requiring they keep abreast of developments within 27 different jurisdictions. It is the source of legal uncertainty, since courts in a number of EU Member States are imposing duty of care obligations on companies based on general civil liability rules, even in the absence of explicit legislation on this, often leading to contradictory and unpredictable judicial decisions. It also leads to a distortion of competition within the internal market: whereas certain Member States (such as France with its 2017 Law on due diligence, the Netherlands with its 2019 Child Labour Due Diligence Law, or the United Kingdom with the adoption in 2015 of the Modern Slavery Act) have made progress on this issue, most countries are still lagging behind, adopting a wait-and-see approach, and perhaps secretly hoping that not-too-scrupulous companies shall re-organise their activities in order to minimise their liabilities under such legislation, perhaps by relocating certain activities where the regulatory framework is less burdensome – a mistaken calculation in the long run, but one that could be damaging in the short term, delaying progress across the European Union.

There are therefore a number of reasons to support this new important step forward, which is now supported by a broad alliance going far beyond unions and NGOs. However, as the debate shifts from the principle of adopting mandatory due diligence legislation at EU level to the precise content of such legislation, it is important to ensure that corporate actors remain encouraged to permanently improve their track record in complying with human rights and environmental standards. This is the warning from a [study commissioned by ITUC](#) on how mandatory due diligence should be established: Due diligence should not degrade into a box-ticking exercise, shielding companies from any form of liability provided they follow the standard list of “do’s” and “do not’s”. This is why HRDD and potential civil liability for violations occurring in the supply chain should be treated as two separate, albeit complementary, duties. The former is a duty to prevent the risk of human or environmental rights violations occurring within the supply chain or the corporate group. It is forward-looking and essentially imposes on companies that they seek information from their business partners or affiliates and that they act on the basis of such information to minimise the negative human rights or environmental impacts of their activities. The latter is backward-looking: it is a duty to accept liability where such preventative measures have failed, but where it can be shown that, should the company have done more, it could have avoided the harm from occurring.

[In our view](#), even if HRDD duties (as may be prescribed under the future EU framework) are fully complied with, this should not result in a guarantee of legal immunity from civil liability claims, where it appears that the preventative measures have failed to stop the harm from occurring: once the victim has proven that the harm was inflicted and that it is in connection with the company’s activities, it should be for the company to rebut the presumption that it could have done more to prevent such harm from materialising. Unless we keep the two separate, HRDD, for

the imposition of which so many actors have fought for so many years, shall become a formalistic exercise, leading companies to adopt a minimalistic approach simply to shield themselves from the risk of liability – in effect, buying legal immunity by ticking the boxes. We need the opposite: we need to incentivise corporate actors to permanently improve and adopt a “hands-on” and proactive approach to ensure human and environmental rights are fully complied with in the supply chain or the corporate group.

HRDD is essential to ensure that the EU contributes to a form of economic globalisation that contributes to human development. It should not become a substitute for ensuring a right to remedy for victims of corporate negligence.



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# The Investor Case for Mandatory Human Rights Due Diligence

**David M. Schilling, [Investor Alliance for Human Rights](#)**

David Schilling outlines three key reasons investors support regulation: namely, it is good for business, investors and the economy; it helps build a level playing field; and it enables investors to fulfil their own responsibility and potential legal duty to respect human rights and conduct due diligence.

The case for mandatory HRDD is vividly made daily as the global economy is in severe crisis with most sectors and supply chains connected to European and U.S. consumer markets in deep distress. COVID-19 has revealed the flaws in voluntary corporate initiatives that fail to address the negative human rights impacts on workers and communities, with millions of workers losing their livelihoods, unable to provide for themselves and their families. The lessons being learned are prompting governments, businesses and investors to rethink current approaches to building back the economy in equitable, resilient ways that address the human rights and environmental challenges facing people and the planet.

Investors have a crucial role to play in shaping the direction of mandatory HRDD. The [Investor Alliance for Human Rights](#) coordinated a statement publicly released in April 2020, '[Investor Case for Mandatory Human Rights Due Diligence](#)', signed by 105 investors representing US\$5 trillion in assets under management. The investors believe that all businesses have a responsibility to respect human rights and conduct ongoing HRDD as the core requirement to fulfil their responsibility. Investors also recognise governments' role in protecting against human rights abuses by business through effective regulatory measures, especially where there are significant gaps in human rights protections.

Investor signatories therefore call on all governments to develop, implement and enforce mandatory HRDD requirements for companies headquartered or operating within their own jurisdictions or, where appropriate, to further strengthen these regulatory regimes where they already exist.

The Investor Alliance statement articulates three basic reasons investors support robust mandatory HRDD, on which I will build in this piece: 1. It is good for business, investors and the economy; 2. It helps build a level playing field, making it easier to scale due diligence globally; and 3. It enables investors to fulfil their own responsibility to respect human rights and conduct robust due diligence, which may become a legal duty under upcoming legislation.

### 1. Good for business, investors and the economy.

Mandatory HRDD benefits companies and investors by increasing the thoroughness of corporate risk management processes, which provides increased confidence for investors to achieve higher risk-adjusted returns, as attention to human rights risks correlates with improved financial performance. Non-transparent supply and value chains plus a lack of long-term trusted supplier relationships have proven to make businesses less stable and resilient in times of crisis. Without serious HRDD, companies can be subject to reputational and financial costs, and so can investors.

A growing number of investors and businesses are supporting mandatory human rights due diligence initiatives.

- In June 2019, the National Council in Switzerland voted to support a bill introducing a broad mandatory HRDD regime that received backing from major Swiss business associations and a group of [27 investors](#) representing over US\$808 billion in assets under management.
- 70 companies have now signed a [joint statement](#), first released December 2019, calling for legislation in Germany which requires companies to conduct human rights and environmental due diligence.
- In September 2020, 26 large companies including adidas, Ericsson, H&M Group, Mondelez International, Tchibo and Unilever, [signed a statement](#) supporting an 'EU framework on mandatory human rights and environmental due diligence'. The statement said: 'Mandatory human rights and environmental due diligence is key to ensure that efforts by companies that respect people and the planet, both during and post COVID-19 recovery, are not undercut by the lack of a uniform standard of conduct applying to all business actors.'

## **2. Helps build a level playing field, making it easier to scale due diligence globally.**

Momentum is building for mandatory HRDD based on the [UN Guiding Principles on Business and Human Rights \(UNGPs\)](#). Countries in the European Union have taken steps toward regulatory approaches, led by France enacting the [Corporate Duty of Vigilance Law](#) and the Netherlands adopting a law focused on child labour risks as well as other countries, like Germany, that are taking important steps towards cross-sectoral, cross-issue due diligence laws. National legislation firmly rooted in the UNGPs and related guidance can increase momentum towards a strong EU-wide law.

On April 29 2020 the European Commissioner for Justice, Didier Reynders, announced that the Commission is committed to introducing rules for mandatory corporate environmental and HRDD. The European Commission (EC) will introduce a legislative proposal in 2021, a promising development. The [‘Study on due diligence requirements through the supply chain’](#) commissioned by the EC focuses on due diligence requirements to identify, prevent, mitigate and account for abuses of human rights, including the rights of the child and fundamental freedoms, serious bodily injury or health risks, and environmental damage, including with respect to climate.

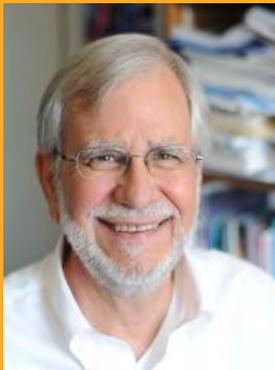
As part of the study, representatives of businesses, NGOs and governments were surveyed. The vast majority of business respondents (75.4%) indicated that any EU-level regulation would benefit business through providing a single, harmonised EU-level standard, which could create a level playing field that would benefit companies and investors alike, allowing for more efficient and predictable risk management in supply chains and investment portfolios.

**3. Mandating companies to perform human rights due diligence enables investors to fulfil their own responsibility to respect human rights and conduct robust due diligence.** Like all business actors, investors have a responsibility to respect human rights under the UNGPs and the [OECD Guidelines for Multinational Enterprises](#), as detailed e.g. in the OECD guide on [‘Responsible business conduct for institutional investors’](#), and would therefore be covered by mandatory due diligence legislation.

Investors can be implicated in adverse impacts, notably by funding companies or projects linked to human rights abuses. If companies are doing superficial due diligence or none at all, it makes it more challenging for investors to know what risks their portfolio companies are facing, and to conduct their own due diligence. The EC supply chain study referenced above found that only a third of the companies interviewed were doing any kind of human rights due diligence. Voluntary reporting and risk assessment processes not focused on risks to people leave companies and their investors and stakeholders in the dark about corporate-caused abuses to workers, communities and the environment. It is difficult for an asset manager to be able to tell their clients whether their money is being invested in line with their human rights policies.

In April 2019 the [EU adopted new rules](#) requiring a wide range of investors and financial advisors to integrate sustainability considerations into investments, and publish their due diligence policies that guide how they systematically identify, prevent, mitigate and disclose adverse impacts and actions they are taking to address them. This law requires investor due diligence reporting, and there will be synergies with future cross-sectoral EU legislation on due diligence practice, as the latter may cover [‘all undertakings governed by the law of a Member State or established in the territory of the Union, including those providing financial products and services’](#).<sup>1</sup>

The trend is moving toward mandatory human rights and environmental due diligence, which is good news for investors, companies and governments. With Germany holding the EU Presidency until the end of the year with a stated agenda that includes pressing for strong legislation to address human rights and environmental challenges, this momentum should continue which is welcome news to rights-holders who have waited too long for the root causes of human rights abuses and environmental damage to be addressed.



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<sup>1</sup> European Parliament, 'DRAFT REPORT with recommendations to the Commission on corporate due diligence and corporate accountability', p. 7.

# The European Union's Move Towards Mandatory Due Diligence: A Voice from East Africa

**Joseph Kibugu, Business & Human Rights Resource Centre ([BHRRC](#))**

Joseph Kibugu responds to the claim that mandatory due diligence laws may limit foreign investment in the global South – in fact, he argues, these would support sustainable development efforts.

A few years ago, I visited a community where a multinational mining company was exploring for minerals. The company had the necessary licenses from the national government, but the locals had not been informed about the exploration exercise. They woke up one day to find company officials surveying the land. One village elder protested: “We are not opposed to mining, but we want mining done in a way that does not compromise our livelihoods. We also want to know when these foreigners are invading our land, even when they have the approval of our national government.” I often recall this whenever the recent European Union (EU) commitment to introduce rules towards environmental and human rights due diligence (mandatory due diligence) for businesses based in the EU or active on the EU market is discussed. Mandatory due diligence has the potential to greatly benefit communities and individuals harmed by corporate-related human rights abuses in Africa, who often have no effective access to remedy.

There are several claims those opposed to mandatory due diligence have advanced. These include that voluntary due diligence implementation and corporate responsibility standards are sufficient; that mandatory due diligence would be a barrier to trade in developing countries; and that there is a multiplicity and duplication of voluntary and mandatory efforts to promote respect for human rights by businesses. I look at these claims and argue that they should not be a barrier to European mandatory human rights due diligence initiatives, but that quite in contrast, there are strong arguments in support of them.

First, voluntary implementation of due diligence has so far been insufficient, as [recent benchmarks of corporate human rights policies and processes](#) as well as [our digital record of business-related human rights allegations](#) across the globe show. Experts have also [demonstrated](#) that voluntary corporate social responsibility or sustainability standards, as well as the certification and social auditing models meant to verify and monitor them, have not been

successful as a labour and human rights due diligence mechanism.<sup>1</sup> Evidence from the database of the Business & Human Rights Resource Centre reveals growing instances where companies that have subscribed to corporate social responsibility standards have been accused of human rights violations. For example, Kakuzi, a company certified by the Rainforest Alliance, [has been sued](#) in the United Kingdom for alleged human rights violations in Kenya. In Lesotho, social audits failed to detect [widespread sexual harassment](#) of workers in garment factories supplying major global brands. In some cases, brands hide behind the corporate veil and deflect the blame to their business partners along their supply chains. Obviously, such an approach falls short of the standard required under the UN Guiding Principles on Business and Human Rights. It is a dereliction of a business' responsibility to leverage its influence to promote respect for human rights along the value chain. If one of the objectives of sustainability standards is to support realisation of human rights, then businesses and other stakeholders should embrace mandatory due diligence as a logical step to strengthen and achieve what corporate social responsibility standards have attempted to achieve without much success.

Secondly, there is the claim that mandatory due diligence legislation may limit foreign investment in the Global South by companies from those countries that are covered by such legislation. Proponents of this position argue that strong human rights protections could deter companies from investing or lead to divestment. However, it is unlikely that companies steer clear of or divest from business in a given country as a whole, even if cheap labour and unregulated working conditions have been the major attraction to foreign investment so far. Moreover, such labour does not end up improving the lot of the local population, or lead to sustainable developments outcomes, nor does it ensure long-term business viability. For instance, reports reveal a near 100 per cent staff turnover in industrial parks in Ethiopia, partly attributed to [poor working conditions](#), including poor pay. It is not inconceivable that instead of opposing EU-level mandatory due diligence, developing countries' governments and notably their populations may welcome European mandatory due diligence laws as these would support sustainable development efforts.

Thirdly, the multiplicity of standards signifies a growing demand to clarify the responsibility of businesses to respect human rights. From National Action Plans on Business and Human Rights to regional declarations, some countries like Kenya have moved to entrench not just a responsibility, but an obligation for businesses to respect human rights in their constitutions. The growing calls for a [binding treaty](#) are another example of the bending of the arch towards respect for human rights by corporations. In fact, EU countries that have largely shied away from engaging in this process should embrace it and express their views, if it is not too late.

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<sup>1</sup> Many certifiers openly support mandatory due diligence legislation, acknowledging that “[v]oluntary instruments for responsible business conduct have proven insufficient in addressing the structural causes of human rights violations” ([Fairtrade International](#)), and that “the full obligation for companies to implement due diligence in their supply chains always remains with the company itself” ([Rainforest Alliance](#)).

This multiplicity should be embraced – as long as it does not produce contrasting or regressive interpretations of the required standards.

Africa is a continent in need of investment. However, only investment that respects human rights will improve livelihoods. The fact that big oil companies continue to [dump plastics](#) that have been fought against for decades shows how fragile regulation is, and demonstrates the tendency by companies to spot where there is weak regulation and take advantage of it. A strong mandatory due diligence legislation by the EU is a powerful signal that European companies attach importance to human rights and expect the same standard from their suppliers and business relations. The regulation needs to have strong provisions on sanctions, liability and access to remedy, as well as effective mechanisms to ensure that companies do not hide behind the corporate veil to excuse errant supply and value chain actors. The rules should also include strong stakeholder engagement requirements for companies – this will help communities such as the one I encountered a few years ago.



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# Human Rights and Environmental Due Diligence as a Standard of Care

**Lise Smit & Dr Claire Bright, [British Institute of International and Comparative Law \(BIICL\)](#)**

Lise Smit and Claire Bright discuss the key findings of a study conducted for the EU Commission, including the need to go beyond a “tick-box” approach and for regulation to provide for access to remedy.

On 29th April 2020, European Commissioner for Justice Didier Reynders [presented](#) a study conducted for DG Justice and Consumers on due diligence requirements through the supply chain, which surveyed over 630 stakeholders across Europe (“[the study](#)”). Based on the findings of the study, he [announced](#) that the European Commission would put forward a legislative initiative on mandatory human rights and environmental due diligence as part of the EU's COVID-19 recovery package. As we approach the legislative consultation, it is helpful to draw out a few key findings of this study which could inform the formulation of the regulation.

**A “do no harm” standard of care rather than a tick-box list:** The study found that due diligence as a standard of care is 'based on the basic tort law or negligence principle – phrased differently but similar in nature across civil and common law jurisdictions – being that a person should take reasonable care not to cause harm to another persons' (p. 260). Stakeholders across the board emphasised the need to follow the context-sensitive concept of human rights due diligence (HRDD) set out in the [UN Guiding Principles on Business and Human Rights](#) (UNGPs), which expects a company to identify and address human rights risks relevant to rights-holders on an ongoing basis, whilst allowing for prioritisation based on the severity of the risk or the irremediability of delaying a response. In contrast, it was highlighted that a superficial “tick-box” approach, whereby a company ticks off certain issues or steps off a pre-defined list, does not benefit anyone, is overly cumbersome and inefficient, and draws away resources and attention from real-life issues.

It is accordingly important that the regulation itself does not create such a checklist. Hence the need expressed by the majority of survey respondents for **a general cross-sectoral legal duty** which requires courts and enforcement bodies to take into account the specificities of each particular case, including the sector, size of the company, and operating context. The [study](#) explained:

*‘Regulators cannot realistically list every single circumstance, or combination of circumstances, which could possibly apply to companies on a daily basis in different parts of their global*



*operations. Instead, regulators use due diligence as a legal standard of care to expect the company to assess its own risks and address them in accordance with the standard of care. If the company exercises reasonable or adequate due diligence, it meets the standard. If it does not, for example because it overlooked certain risk factors which it should have taken into account, then it does not meet the standard.’ (p. 261-2)*

To complement this general standard of care, the study recommends that the regulation be accompanied by **non-binding guidance** to inform the understanding of what HRDD looks like in relation to a specific sector or issue.

A due diligence standard of care understood in this way could be **distinguished** from a **duty which triggers a strict or absolute liability** (which would follow automatically once a harm occurs, regardless of whether the company acted with fault or negligence in relation to the steps it took or absence thereof), and is also different from **due diligence for legal compliance**. The fact that a human rights harm occurred (or is about to occur) in the company’s operations or supply chain will not automatically result in liability, nor will tick-box compliance with a due diligence obligation automatically exclude it. The question will be **what proactive steps did the company take on the facts to find out about this harm, to prevent and address it, and whether these steps were reasonable in the particular circumstances** (p. 264-5). The fact that local law prohibits or allows the conduct is not decisive, as the UNGPs provide that the corporate responsibility to respect human rights ‘exists over and above compliance with national laws and regulations protecting human rights’. The study states that: ‘In this way, the due diligence standard incentivises effective, high quality and practical due diligence processes which target real risks and priorities’ (p. 262).

Human rights due diligence as described in the **UNGPs does not encourage or require divestment**. On the contrary, in order to meet the standard of care the company would need to show **proactive meaningful engagement**, and concrete attempts to increase leverage where such engagement is not leading to improvements. The UNGPs are clear that termination of the relationship should only be considered as a last resort, and if so only when the human rights impacts of ending the relationship has been taken into account. The study states:

*‘Due diligence expressly does not automatically expect companies operating in high risk contexts to leave, and does not intend to penalise those companies which operate in certain countries or sectors. Indeed, it has been well-demonstrated that there are no countries or sectors which pose no risks at all to people, the environment or the planet.’ (p. 262)*

A corporate duty to exercise due diligence as a standard of care for human rights and environmental harms in the company’s operations and value chain is also different from corporate governance rules and fiduciary duties of directors. Despite a recent trend to extend the understanding of “materiality” to include “environmental and social materiality”, this focus still relates to the risks to the company, rather than the risks to the rights-holders. The [study](#) states that:

*‘[T]he question as to whether an external harm will, in the long or short run, affect the company’s performance is irrelevant for the purposes of due diligence as a legal standard. Due diligence as a legal standard or duty of care requires companies to exercise the care required to prevent and address external harms, regardless of whether these are harms beneficial, detrimental or neutral to the company’s performance in the long or short run.’ (p. 268)*

Stakeholders in the study, especially those from civil society, emphasised the need for the regulation to provide for **access to remedy**.

The UNGPs [provide](#) that effective grievance mechanisms play an important role as part of both the state duty to protect and the corporate responsibility to respect. However, non-State-based grievance mechanisms can only complement and not replace State-based judicial remedies. Indeed, the duty to provide remedy, as set out in international human rights law as well as Pillar III of the UNGPs, is that of States. The obligation to undertake due diligence would be a corporate duty, and will not (in all Member States) automatically lead to access to judicial remedies unless it is expressly provided for in the legislation. The regulation would therefore need to require Member States to ensure that any statutory due diligence duty is accompanied by access to judicial remedies for victims who are affected by a breach of the duty. Depending on the legal system of the jurisdiction, an express judicial remedy might need to be provided for in the implementing statute.



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**British Institute of  
International and  
Comparative Law**

# Support for Mandatory Due Diligence: an H&M Group Perspective

**Anna Gedda, H&M Group**

Anna Gedda reflects on the frame, content and process of and around due diligence legislation, including environmental and gender aspects, and also touches on the question of liability for harms.

The COVID-19 pandemic caused an unprecedented situation both internally within our company and externally for our suppliers and their factory workers in production countries. Looking back, I believe that H&M Group, because of our longstanding focus on sustainability, collective action and close supplier relationships, managed to get through the height of the crisis, even though I am acutely aware that we have not seen the full effects of the pandemic yet. Globally however, work carried out on ethical business conduct by the general business community is still largely driven by voluntary action which is subject to interpretation, and hence efforts vary. Over the past years, evidence has been gathered through research and studies highlighting that voluntary measures by the private sector to identify, address, follow up and report on human rights risks and grievances are not enough. There is now momentum to implement mandatory due diligence legislation and explore the additional value this could have on business conduct and accountability globally.

## **The Frame**

It is no little task to put together such a piece of legislation. It needs to combine the many experiences over many years from different industries and sectors and include the many perspectives of human rights work and global development. A mandatory framework should be cross-industry and apply to both large businesses and small and medium-sized enterprises (SMEs) based or active in European countries. In addition, a very complex global environment, which also seems to grow in complexity quickly, means that we are all facing the same circumstances and often share similar challenges. Here we can continue to learn from each other, but a way to level the playing field is to keep businesses from all industries accountable to the same legislative framework. As there is no such thing as one-size-fits-all, this demands a pragmatic framework and content that have some flexibility in order to be applicable to different industries and business sizes.

Here one might reflect on the current trend, where legislative processes are taking place on several fronts simultaneously. H&M Group has engaged extensively with representatives at EU level as well as on national levels, and here we see a common trend: more and more national

authorities are planning to create or have already created a due diligence framework that is intended as a “blueprint” for all others. This highlights the urgency within the European countries regarding the process itself, and even though I sympathise with that reasoning, it is preferable to be synchronised on the matter. Hence, we believe that a coherent legislation at the EU level is preferable over the more scattered alternative which could prove less efficient.

## Content

There is no need to start from zero as we already have good, reliable tools that exist to guide companies on what it specifically means to respect human rights and have a rights-based approach fully integrated within one's business operations. Such as:

- The UN Guiding Principles for Business and Human Rights (UNGPs) created by Professor John Ruggie and unanimously adopted in 2011.
- The OECD Guidelines for Multinational Enterprises provide non-binding standards and principles for responsible business conduct, and the OECD has continued to produce due diligence guidance and sector-specific tools addressing ethical conduct.
- Numerous ILO Conventions, such as the [Eight Fundamental Conventions](#), which are also part of the foundation of our Human Rights Policy and Sustainability Commitment.
- The textile industry has developed tools to implement and track progress with the above international standards through the [Social & Labor Convergence Project](#), as well as the [Higg Brand & Retail Module](#). Both industry tools went through an OECD alignment assessment against the OECD Due Diligence Guidance for Responsible Supply Chains in the Garment & Footwear Sector.



In addition, extensive advice and guidance on topics related to the UN Sustainable Development Goals and ethical sourcing have been produced over the years. The Children's Rights and Business Principles, created through a collaboration between UNICEF, Save the Children and the UN Global Compact, provide advice for businesses on their impact on our future generation, namely children. Legislation would also benefit from the inclusion of a gender-lens, especially relevant to our industry as most of those employed in our supply chain are women. Inspiration can be found in the Women's Empowerment Principles (WEPs) created by UN Women which we have also signed.

We can look to these standards for guidance on perhaps the thorniest issue in this debate so far: the role of liability. A close inspection shows that the UNGPs signal that companies should anticipate liability where they cause or contribute to harm. In fact, there is a pretty obvious relationship between the acceptance of full liability and a detrimental impact you have directly caused in your own operations, for instance. However, to accept liability for impacts that businesses are linked to by a business relationship contains a very different complexity. These are often systemic issues, deeply embedded in supply chains. Applying liability to address them could encourage early divestment over engagement that ultimately won't deliver better outcomes for people. It is less likely to empower local voices and undermine knowledge-transfer or important integration of good practices.

The real skill legislators will need to master is to balance strong consequences for a failure to take action in certain relationships with the right incentives that will lead to creativity, partnership and innovative thinking in addressing systemic and more distant supply chain issues.

There has been continuous development in the mandatory human rights due diligence discussion, to also include a consideration as to whether include environmental issues. We welcome this discussion as to whether the scope should be broadened as there are relevant interdependencies and linkages between human rights and the environment.

## **The Process**

We have many years of experience in production countries with local presence through our H&M Group local offices, and we have gathered many important learnings. Some very complex issues, such as the extensive work we carry out on wages, will not be solved overnight simply because a legislation is put in place. However, it can clarify roles and responsibilities and bring more actors (governments, companies, global unions and other stakeholders) together, making it possible to work more effectively towards shared and defined goals. Change cannot be driven solely by brands or companies. Governments still need to take their responsibility to protect human rights in their jurisdictions, and brands must respect those and be part of the solution to complex challenges alongside unions, employees and business partners locally and globally.

We can be supportive of policy reforms and strengthening institutionalisation while helping accelerate economic growth through our operations.

A legislation also demands that companies are held accountable by a quality-assuring institution or body that understands the many complexities of contexts, issues and business operations and that one issue can seldom be assessed in isolation from other human rights aspects. It needs to ensure a diverse group of representatives from various sectors that together have the necessary expertise on the many topics and contexts and can make the relevant judgement as to whether a proper due diligence process has been followed.

I firmly believe that efforts to identify, address, act on, report on and follow up on human rights and environmental impacts through business operations make companies more attractive to work for, to buy from and to collaborate with. I hope a legislation such as this one on mandatory due diligence will prove me right.



**Anna Gedda** is Head of Sustainability at H&M Group.

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# H&M Group

# Towards EU Legislation on Corporate Accountability: the Need to Address Environmental Harms

Lucie Chatelain, [Sherpa](#) & Paul Mougeolle, [Notre Affaire à Tous](#)

Lucie Chatelain and Paul Mougeolle emphasise the need for EU legislation to address environmental harms, including those that are diffuse and cumulative, irrespective of any direct or immediate impact on human rights, and discuss two recent environmental cases filed under the French Duty of Vigilance law.

As the debate on a European legislation on mandatory human rights due diligence (HRDD) moves forward, the question arises as to whether and how to address companies' obligations and liability with respect to environmental harms occurring in their international value chains.

In January 2020, French NGOs Notre Affaire à Tous and Sherpa, alongside 14 local public authorities and three other NGOs, initiated [climate change litigation](#) to compel Total to reduce its direct and indirect greenhouse gases on the basis of the 2017 French Duty of Vigilance Law – the first legislation worldwide that allows companies to be held accountable for human rights and environmental abuses in their value chains.

Similarly, in the face of reports revealing that French supermarket [Casino](#) was selling beef sourced from illegally deforested areas in the Amazon, a coalition of NGOs including Sherpa and Notre Affaire à Tous [put](#) the French company on [formal notice](#) to respect its duty of vigilance to avoid deforestation in its global food supply chains.

As these two examples show, integrating environmental protection into future European legislation could be crucial to mitigating companies' global ecological footprint. In addition, science and environmental objectives have become sufficiently precise to give guidance on the required conduct, thus informing the content of an environmental due diligence standard.

It follows that the European lawmaker should not, in our view, restrict the upcoming legislation to human rights. The inclusion of environmental considerations will also be critical to the realisation of imperative environmental goals, such as the European Green Deal.

## The need to include both human rights and the environment in a legislation on corporate accountability

The interrelation between human rights and environmental protection has been widely recognised. As put by [John Knox](#), former UN Special Rapporteur on human rights and the environment, ‘a healthy environment is necessary for the full enjoyment of human rights and, conversely, the exercise of rights (including rights to information, participation and remedy) is critical to environmental protection.’

In line with this approach, the European Court of Human Rights has steadily developed a body of case law relating to the environment, derived mainly both from the right to life and the right to respect for private and family life.

However, framing environmental protection as a human rights issue, either by mobilising existing human rights or by promoting the recognition of the human right to a healthy environment, may be limiting. It tends to ignore the intrinsic value of the environment itself. In our view, a corporate duty of vigilance should encompass the risk of environmental harms, such as biodiversity loss, irrespective of any direct or immediate impact on human rights. This is important since cumulative environmental degradation might lead to irreparable harm to our human societies: indeed, deforestation, extinctions, climate disruptions and other forms of diffuse pollution make pandemics such as the COVID-19 crisis more likely, according to numerous scientists.

The French Law on the Duty of Vigilance addresses this by requiring parent companies to take adequate and effective vigilance measures to prevent both serious human rights violations and serious environmental harm. In so doing, it implicitly recognises the interdependence between both, while avoiding an anthropocentric approach.

This meant that the claims mentioned above were able to rely on the obligation for companies to take measures to prevent human rights **and** adverse environmental impacts resulting from their climate change contribution (in the case of Total) and the deforestation linked to their beef supply chain (in the case of Casino).

### **An obligation for companies to take all necessary measures to prevent environmental harms**

The Law on the Duty of Vigilance requires these vigilance measures to be **reasonable, adequate and effectively implemented**. It provides for two judicial mechanisms – preventive judicial injunctions on the one hand and tort liability on the other hand – that enable judges to examine whether the measures taken by companies satisfy these requirements.

As such, it focuses not on defining due diligence procedures (such as respecting a list of environmental norms/standards or putting in place mandatory environmental management systems) but on creating a general standard of care for companies with respect to their value chain that can trigger liability if careless conduct is proven.

Careless conduct could for instance involve clear disregard of environmental objectives. This would be the case if the business enterprise contributes directly or indirectly to excessive emissions without taking appropriate countervailing measures to contribute to the climate objective of net-zero emissions by 2050. Companies shall not conduct activities or release products and services that massively pollute the air, the water or contribute to the overstepping of other planetary boundaries, such as biodiversity. In these domains, many international, European and domestic legal texts exist in addition to scientific guidance on environmental risks to specify the standard of care.<sup>1</sup>

### **Corporate liability for environmental harms caused in their value chains**

Crucially, a European legislation on corporate accountability should also clarify that companies may be held liable for environmental harms occurring within their value chains.

However, it is necessary to go well beyond the French Duty of Vigilance Law, which requires victims to demonstrate that the company has failed to respect its duty of vigilance and that the environmental harm was caused by this failure.

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<sup>1</sup> Reports from the International Panel on Climate Change (IPCC) and the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES), the New York Declaration and the Accountability Framework Initiative on Deforestation, or the concept of planetary boundaries, to name a few.

In particular, it should fall on the defendant company to prove that it took all measures to prevent an environmental harm that occurred within its value chain, failing which it should be held liable.

Finally, the upcoming European legislation could also draw inspiration from regimes of so-called extended responsibility, which already exist in different areas such as waste legislations. As long as companies do not cease their significant participation in diffuse global environmental damage, such as climate change or biodiversity loss, they should be compelled to contribute to European or international funds to compensate current and future victims.



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© Photos by Sherpa & Paul Mougeolle

**\*Sherpa**



# Human Rights Due Diligence's Journey: Are You Ready to Be on Board?

## [amfori](#)

amfori notes the advantages EU-wide legislation presents for business, including a level playing field, legal certainty, and increased company leverage, and calls on the EU to accompany regulation with a smart mix of policy measures.

Respect for human rights and decent working conditions along global value chains are, together with the protection of the environment and natural resources, central challenges of our time. Numerous companies in Germany and Europe are committed to more sustainability in their procurement processes.

Supporting our members in their journey towards advancing human rights due diligence (HRDD) is part of amfori's DNA. Our mission is to equip our members with the necessary tools to improve the sustainability of their global supply chain.

amfori member companies (more than 2,400 members representing EUR 1.6 trillion of combined turnover, across 46 countries) have significantly shaped the principle of voluntary self-commitment in Europe over the past 20 years.

We at amfori have been following the discussions about an EU due diligence law for some time already and as such we were invited to contribute to the Perspectives Paper on Human Rights Due Diligence put together by the Finnish Presidency in December 2019. As an advisory member of the European Parliament RBC Working Group, we continue to positively contribute to the debate by sharing our insights on due diligence in the supply chain.

amfori believes **the EU is best placed to work on a robust, coherent and predictable human rights due diligence framework** for businesses operating in the EU. A **level playing field** is needed to achieve impact and scale but also to avoid **unfair competition**.

Notwithstanding the positive momentum generated by the UN Guiding Principles on Business and Human Rights and their broad international support, human rights disclosure and due diligence laws have been framed differently over the years and across jurisdictions. While there are some clear trends and commonalities emerging among national laws that have been adopted or that are being considered for adoption, the **mushrooming of legal or voluntary initiatives** creates a complicated patchwork which companies have to navigate using their own resources.

amfori believes the current approach is not the most effective and practicable way of supporting companies' efforts in mapping potential and actual risks and in addressing adverse human rights impacts resulting from their operations and activities. An EU-wide HRDD regulation would not only level the playing field for businesses operating in the EU, but would also bring **legal certainty, harmonisation** and increase company **leverage**.

While all businesses bear a responsibility to respect human rights, it is essential that steps be reasonable and commensurate to the capacity, resources and leverage of a given business. This is particularly the case for small and medium-sized enterprises (SMEs). Any EU-wide legislative system would therefore need to be informed by the **principles of proportionality and leverage**, thus catering for instance for the nature of the business activities, the number of suppliers, the position in the supply chain, the number of products or product range, etc.

At the same time, the future legislative framework will also need to consider the **specific risks and differentiated impacts of business-related activities on vulnerable groups** such as women, migrant workers and children.

A proper **monitoring and enforcement mechanism** should be put in place so that those not abiding by the law are incentivised to play by the rules.

We also call for a **pragmatic approach** that takes the reality of global supply chains into account. It is vital that such a system is built on the premise of **continuous improvement**. If businesses are doing their job thoroughly and have due diligence systems and processes in place, it is likely they will find issues, gaps and shortcomings in their supply chain. This is part of the **due diligence journey** and the EU should be pragmatic about it.

In amfori's view, it then becomes crucial that any EU-wide legislative system supports and encourages continuous improvement by allowing companies to be transparent about how they conduct human rights due diligence without such transparency resulting in exposure to increased risk of litigation, consumer retaliation, or reputational damage where due diligence measures have been appropriate and effective. Legislation should not lead companies to cut and run from their suppliers, but rather to actively engage with them to improve the situation, and seek to increase leverage if necessary. This is in the spirit of sustainable development.

For such a regulation to be effective, solely introducing obligations will not suffice.

The EU will have to accompany the regulation with a **smart mix of policy measures** with the aim of creating an environment where businesses are helped to conduct HRDD properly and encouraged to go beyond compliance.

**Capacity building** and trainings are particularly needed for businesses with fewer resources, such as SMEs. Additionally, **incentives** such as VAT reductions and reduced trade tariffs for sustainable products can lead companies to flourish further when it comes to efforts to make supply chains more sustainable. The EU should pave the way by reforming **public procurement policies**, which would indirectly motivate companies to adopt responsible business practices. Last but not least, a coherent **trade preferences and investment policy** would ensure that sustainable businesses operating in the EU are not disadvantaged whilst also supporting European countries' efforts towards the Sustainable Development Goals.

Finally, to tackle the complexity of the issues at stake, we are convinced that voluntary and mandatory instruments advancing the respect for human rights can be mutually reinforcing. Therefore, it is important that **voluntary initiatives and commitments continue to be promoted and rewarded**.

Designing an ambitious and practical regulation with all these characteristics will surely be challenging. This is why it is important that the Commission develops this framework in an inclusive process with **input from both civil society organisations and the business community**.

If anything, the COVID-19 outbreak showed the fragilities of global supply chains and their workers. amfori is confident that advancing responsible business conduct will lead to more resilient supply chains, where human rights are respected globally, and the environment is not sacrificed for the sake of the economy. This is what we call "trade with purpose".

For more information, please check our [Position Paper on Human Rights Due Diligence](#).

# Why Purchasing Practices Must Be a Part of Upcoming Due Diligence Legislation

**Fair Trade Advocacy Office (FTAO) & *Coordinadora Latinoamericana y del Caribe de Pequeños Productores y Trabajadores de Comercio Justo (CLAC)*<sup>1</sup>**

FTAO and CLAC speak to the need for a mandatory due diligence framework to address the root causes of human rights and environmental abuses, including purchasing practices, and point to the importance of proper supplier engagement in this context.

International trade has the potential to stimulate significant economic development and contribute to poverty reduction. However, left unregulated, trade has massive potential for destruction – exacerbating inequalities, causing human rights violations and environmental destruction. Legislation on mandatory human rights and environmental due diligence (HREDD) will be a crucial tool in ensuring that companies address the risks that their production poses to people and the environment.

Human rights and environmental due diligence could create legal certainty and a level playing field for all – pioneering companies that already implement robust human rights due diligence would no longer be at a competitive disadvantage. Yet the form that HREDD takes is crucial and its effectiveness depends on its design.

As stated in the General Principles of the United Nations Guiding Principles on Business and Human Rights (UNGPs), the framework should be implemented ‘with particular attention to the rights and needs of, as well as the challenges faced by, individuals or populations that may be at heightened risk of becoming vulnerable or marginalised’ such as children, disadvantaged groups, migrant and seasonal workers, always including the perspective of women and girls.

To be effective and have a real positive impact on the most vulnerable people in the supply chains, the upcoming EU legislation will need to ensure that companies assess the impacts of their purchasing practices, and ensure that these do not represent an obstacle for their suppliers to respect human rights and the environment. Addressing purchasing practices is an effective approach, as companies have direct control over their own purchasing practices on the one hand and on the other, they are one of the key tools for companies to exercise their leverage over suppliers and partners.

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<sup>1</sup> Latin American and Caribbean Network of Fair Trade Small Producers and Workers

## 1. Why purchasing practices are important

In many instances, the root cause of human rights violations at factory or producer level is poverty, unequal power relations in the supply chain and lack of economic alternatives. A [survey](#) conducted by the ILO in 2017 found that more than a third of producers accepted orders worth less than the cost of production (see also [ETI Guide](#), p.8). Factory owners and producers operate on thin margins and sometimes with very limited resources, making it more difficult for them to comply with international labour standards and to provide sustainable protection or remediation to affected workers.

This lack of resources is exacerbated by strong competition and price pressure. In a competitive market economy, all actors are under pressure to reduce their costs. Without legislation setting up a level playing field, this pressure disproportionately affects upstream actors, resulting in an extremely unequal distribution of income along the supply chain. Huge concentrations of power at buyer level have long resulted in [buyers unilaterally imposing asymmetric terms and conditions](#) which demand that suppliers provide goods at very low cost, with frequent order changes and/or with very short lead times, poor payment terms and without long-term purchasing commitments.<sup>2</sup> Unfair purchasing practices, while not absolving supply chain actors from their own responsibility to respect human rights and the environment, lead to human rights violations as they burden and disable suppliers, factories and small farmers, meaning they cannot earn a living income, pay their workers and employees a living wage, or ensure worker safety and environmental protection. For example, a connection has been [found](#) between the low prices in coffee and sugar and increased debt bondage, forced overtime and illegal wage deduction; as well as between lower prices in garment and electronics and increases in labour violations. Conversely, the research provided ‘conclusive evidence’ of a correlation between good purchasing practices and an increase in hourly wages.

## 2. Existing HRDD frameworks fall short when it comes to purchasing practices

Currently, producers face the challenge that companies tend to blame and shame the individual farmer or producer organisation when human rights violations are identified; collaboration and co-investment in prevention, mitigation and remediation rarely happen on a voluntary basis.<sup>3</sup> Similar constraints are faced by factories and suppliers.

The [research report](#) ‘Making human rights due diligence frameworks work for small farmers and workers’, produced by University of Greenwich with support from Brot für die Welt and the

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2 [A survey by ILO in 2017](#) identified three common purchasing practices that adversely influence working conditions and wages (p. 86):  
1. Setting low prices (more than a third of the companies accepting orders that were ultimately below the costs of production)  
2. Short lead times for orders (suppliers push workers to work overtime, hire casual labour, outsource production (usually unofficial production sites) to meet deadlines)  
3. Lack of secure contracts

3 As reported by numerous members of the CLAC

Fair Trade Advocacy Office, identified the following shortcomings of existing voluntary HREDD schemes:

- Voluntary HREDD schemes often become a tick-box exercise where the focus is on reporting rather than on taking action to address human rights violations
- They tend to focus on those human rights violations that are the easiest to address, while neglecting more complex issues – child labour, living wages and incomes, and migrant labour, among others.
- There is a risk in certain contexts that when companies discover human rights violations in their supply chains, they “cut and run” to “less risky” suppliers or countries rather than working with their suppliers to address them, let alone support remediation.
- In many cases, companies tend to pass on the responsibility to comply with human rights and the environment, without changing their own practices<sup>4</sup>.

The urgently needed mandatory HREDD framework will reverse these trends by leading companies to bring about effective change in the way they trade. They need to be held responsible for ensuring that they provide adequate purchasing conditions and prices to their suppliers so that they are better able to ensure respect for human rights within their operations.

### **3. HREDD legislation must explicitly address purchasing practices**

A truly effective HREDD legislation should address purchasing practices at all steps in the HREDD process. Risk assessments should identify potential exploitative buying practices in the supply chain. As part of the obligation to cease, prevent and mitigate, companies would need to amend purchasing practices throughout the procurement cycle: from the early stages (sourcing and product development) to their interactions with suppliers (price negotiations, confirmation of technical standards, contractual terms, payment terms and lead times). Finally, companies should develop new mandates for purchasing teams which allow them to balance price and ethical considerations. Suppliers and workers, in turn, should be enabled to seek effective redress when buyers blatantly engage in unfair trading practices.

This needs to be explicitly mentioned in the law or in mandatory implementation guidelines to avoid narrow interpretation of the HREDD process. In addition, the HREDD legislation should be complemented by an EU instrument addressing Unfair Trading Practices across the economy, similar to the existing directive on unfair trading practices in business-to-business relationships in the agricultural and food supply chain<sup>5</sup>.

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<sup>4</sup> A survey by ETI found that 48% of suppliers get no support from their buyers at all and more than 80% of suppliers asked, reported that less than 10% of their buyers reward them for making improvements to fulfil the code of conduct, [ETI Guide](#), p. 7

<sup>5</sup> Directive (EU) 2019/633 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain

## Conclusion

The future EU corporate responsibility framework should ensure the root causes of human rights and environmental violations are addressed, leading to a real shift in companies' practices and bringing about positive change on the ground for small farmers and workers. For that, it needs to:

- Address root causes such as poverty, lack of living incomes and lack of resources;
- Explicitly cover purchasing practices as a key factor affecting human rights risks, recognising that unfair and exploitative practices will often lead to human rights abuses. Implementation guidelines should include reference to the importance of maintaining long-term sourcing relationships with suppliers;
- Require companies to make sure that the price they pay to their suppliers, and ultimately to producers, enables them to produce with respect for human rights and the environment, pay living wages to workers, and, for small farmers, to earn a living income;
- Recognise the need for companies to support their suppliers in respecting human rights as part of a continuous and meaningful engagement approach rather than simply disengaging. As per the UNGPs, disengagement should only be a last resort.

In this way, we can work towards shifting from a “race to the bottom” to a “race to the top” towards responsible business conduct and contribution to the Sustainable Development Goals.



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There is an opportunity to broaden the EU Directive on Unfair Trading practices in the agricultural sector to include other sectors where such practices are equally or even more present as for example the clothing and footwear sector. Additionally, the UTP directive should address the issue of downward price pressure.

# Developing Business and Human Rights Policy and Mechanisms in Indonesia: Implementation of Business and Human Rights Universal Principles and the UN Guiding Principles on Business and Human Rights

**Andi Taletting Salahuddin, [Indonesian Ministry of Law and Human Rights](#)**

Andi Talleting Salahudin describes the business and human rights policy process in Indonesia and how EU due diligence regulation could provide further stimulus to such developments worldwide.

Economic growth, human rights and sustainable development of global and national scope are connected to each other. Nowadays, awareness of the links between business, human rights and sustainable development is growing, and has increasingly become part of the current human rights discourse. Integration of human rights into global policy and international development programmes related to business and the economy has also started to be encouraged by the United Nations (UN).

The United Guiding Principles on Business and Human Rights (UNGPs) were adopted with United Nations General Assembly Resolution No. 174/4 in 2011. They provide an authoritative global standard to prevent and resolve adverse impacts on human rights related to business activity. Here, government or states must present and take an active role to protect citizens' rights and interests along with providing a framework for human rights-respecting responsible business. On the other hand, investors and businesses have a responsibility to respect human rights and the environment, including in their global value chains and business relationships.

The Business and Human Rights (BHR) agenda is an important and strategic plan, especially as numerous human rights complaints are linked to the business sector. Public Communication Services (*Pelayanan Komunikasi Masyarakat/Yankomas*) and the Directorate General of Human Rights at the Ministry of Law and Human Rights, as well as the Indonesian National Commission of Human Rights, recorded 7,188 human rights complaints, of which 15% were related to a company or corporation. Allegations of human rights abuses linked to business sectors concerned, in particular, (1.) land problems and the rights of indigenous peoples, with cases related to deforestation, forced evictions and displacement; and (2.) workers' rights, as the second-highest issue of human rights violations.

Indonesia has recorded significant economic growth as the state has attracted more foreign investment continuously and increased capital expenditure, the private sector being the driving force of economic growth, lifting millions of people out of poverty.

Nevertheless, there are challenges in implementing BHR principles, such as:

- Overlapping human rights instruments;
- Lack of coordination between key players who conduct national BHR initiatives;
- Lack of awareness of BHR-related internal or external government bodies;
- Clear implementation of requirements for companies to identify and reduce human rights risks and conduct remedy is lacking.

Since 2013, numerous concrete steps have been conducted intensively by the government to promote business activity that aligns with human rights. This effort involves numerous civil society organisations, academics, as well as private sector and business representatives along with other stakeholders. This promotion is conducted in different formats and activities, especially seminars, symposiums and discussions in order to mainstream BHR principles.

With the mandate of Presidential Decree No. 75 in 2015 regarding the National Action Plan on Human Rights for 2015-2019 (which was revised with Presidential Decree No. 33 in 2018), the government has formulated numerous Human Rights Actions related to business activities. To follow up on the above steps, in 2017 the government appointed the Coordinating Ministry for Economic Affairs as the national focal point for BHR issues in Indonesia.

In addition, a Human Rights Action in Presidential Decree No. 33 of 2018 mandates the Ministry of Foreign Affairs to develop General Guidelines for BHR as a means of disseminating information to the wider Indonesian business community, and as a reference for conducting business activities that respect human rights.

The Ministry of Law and Human Rights' Directorate General of Human Rights, along with the Legal and Human Rights Research and Development Agencies of the Ministry of Law and Human Rights, have conducted a baseline study mapping the relation between business and human rights in the plantation, mining, and tourism sectors. These sectors are referred to in reports of the Public Communication Services of the Ministry of Law and Human Rights.

The Ministry of Law and Human Rights, in particular the Directorate General of Human Rights, is also conducting important measures to implement BHR by increasing the BHR awareness and capacity of stakeholders through trainings, workshops, dissemination and multi-stakeholder dialogues that are conducted by the government, civil society organisations, business associations, the private sector and academics.

The Ministry of Law and Human Rights has trained 20 civil servants to provide BHR dissemination through Training of Trainers facilitated by the UNDP Representative in Jakarta. In 2018, BHR dissemination to 60 civil servants from numerous related ministries/institutions was conducted. Moreover, the Ministry of Law and Human Rights formulated a Training of Trainers module for civil servants and businesses, in cooperation with relevant stakeholders such as the Institute for Policy Research and Advocacy (ELSAM), the Human Rights Working Group, the Indonesian Global Compact Network, researchers and academics.

As the next step in the BHR agenda, the Ministry of Law and Human Rights' Directorate General of Human Rights will try to resolve the above challenges towards policy commitment. This was formally integrated into the National Action Plan on Human Rights (*RANHAM*) 2020-2024. The formulation of this policy was conducted inclusively and participatively by bringing all the stakeholders together so that they could offer their input and oversee the formulation process of the fifth Indonesian National Action Plan on Human Rights.

*RANHAM* 2020-2024 is part of the government's agenda to empower domestic human rights development performance. *RANHAM* 2020-2024 contains four focus groups, namely children, women, *adat* communities (traditional communities in Indonesia) and persons with disabilities. This fifth *RANHAM* is expected to encourage related ministries/institutions to further advancement and protection of human rights, along with establishing remedy mechanisms for human rights abuses linked to business activities and also encouraging companies to build a human rights-respecting culture in the work environment. *RANHAM* 2020-2024 is also expected to improve protection of the human rights of every citizen through a complaint mechanism, especially for vulnerable groups that are affected by businesses' production, services and operations.

Moreover, the Ministry of Law and Human Rights' Directorate General of Human Rights will produce a tool to assess and improve the implementation of human rights standards in business, potentially to be adopted and customised with other business sectors through building a web-based application, namely *Penilaian Risiko Bisnis dan HAM* (PRISMA)/Business and Human Rights Risk Assessment as a due diligence tool for companies.

We can also see good practices of other ministries in formulating policy to support business practices that respect human rights. For example, the Ministry of Agriculture has regulation regarding sustainable palm oil; the Ministry of Environment and Forestry has a Timber Legality Assurance System (*Sistem Verifikasi Legalitas Kayu/SLVK*); the Ministry of State-Owned Enterprises also conducted dissemination and Focus Group Discussions (FGD) related to BHR with 100 state-owned enterprises; and the Financial Services Authority has published regulation concerning sustainable financing.

The election of Indonesia as a Member of the United Nations Human Rights Council for the period of 2020-2022, representing the Asia-Pacific States, is, as stated by the Minister of Foreign Affairs H.E. Retno Marsudi, a mandate for Indonesia to promote human rights at a national and global level. Therefore, the Ministry of Law and Human Rights cooperates with all relevant stakeholders to continue to work on policy development and UNGP implementation mechanisms in Indonesia. Ambitious legislation on this matter in European countries and at the level of the European Union would send an important signal for increased BHR efforts globally.



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# Sustainability in the Era of New Normal

## **Dr Rubana Huq, Bangladesh Garment Manufacturers & Exporters Association ([BGMEA](#))**

Rubana Huq, against the backdrop of COVID-19 repercussions in the apparel sector in Bangladesh, calls for responsible conduct and empathy from brands as well as a global level playing field in trade protected by due diligence policies and laws.

We woke up one morning to a changed world where distance and isolation had suddenly become the most critical elements of all. As expected, COVID-19 literally changed the global landscape, be it business, social, political, economic or even livelihoods of individuals. Most importantly, the catastrophic event has brought the disconnect between sustainability and sourcing to the fore.

Added to this has been the extreme vulnerability of contracts between buyers and sellers in trade across borders.

While the world was left at its wits' end following the peaks of the infection curve and death tolls, here in Bangladesh, with an economy that's totally dependent on the ready-made garment sector, we faced a new reality with the livelihoods of millions at risk. Our industry was completely swamped by buyers' requests for deferred payments, cancellations and discounts, followed by liquidity dry-out suffocating the industry. I recall with utmost gratitude the response that Honorable Minister Dr. Gerd Müller initiated in response to our appeal with regard to the misfortune that would hit – and actually hit – our workers in the event of the brands not paying up. Our Honourable Prime Minister then very kindly reacted to our needs and gave us a low interest loan to pay four months of salaries to workers starting from April 2020. Thus we were able to save ourselves from falling off the cliff. Alarming, more and more buyers are calling for bankruptcy, causing enormous difficulties and hassles to supplying factories.

We understand the scale of disruption such a pandemic can cause to an entity, be it buyer or supplier, but we certainly cannot remain unconscious about what our activities and behaviour could mean for the people who belong to the most vulnerable segment of the value chain. With more than four million workers directly dependent on the clothing sector in Bangladesh, we do not only need responsible conduct from buyers, but also the empathy to positively engage in solving the problems and assist the sector. In pursuit of sustainability in the global supply chain, it is the prerogative of the vulnerable partners downstream to demand apt diligence in global trading and transaction systems toward building greater financial resilience across the supply chain.

Needless to mention that on the journey toward sustainability, Bangladesh views compliance with sustainability and human rights requirements at manufacturing, sourcing and policy levels as an investment into the future. We now have our own safety monitoring regime, the Readymade Sustainability Council (RSC), that is constituted of the critical stakeholders and proudly takes care of the safety of millions at the workplace. Once again, the ready-made garment industry has set an example of resilience and discipline as we safely re-opened factories by following a strict protocol to contain infection. It's an ambitious job to continuously monitor and educate workers in such a labour-intensive industry, yet our priority is to keep this momentum of health and hygiene practices as a new norm. We are certain that Bangladesh can and will rise like a phoenix, through sheer will and resilience, and aided by the support from development partners. We have to be ready for the many new challenges that could potentially erupt.

Moreover, the EU has targeted to be climate-neutral by 2030 and climate-positive by 2050. As a part of the supply chain, we also want to pursue that. We have 125 LEED (Leadership in Energy and Environmental Design) green factories with over 500 more in the queue, which is a matter of huge pride for us. BGMEA has already pledged to the Green Button initiative of the German Government and would be ready to align if and when we are required to do so. As we have no second planet to resort to, we have no choice but to subscribe to fairness in terms of consumption, production and procurement.

We do also urge the attention of EU policy makers to have strong oversight on price trends, especially in a pandemic situation where market forces become unstable, bending the price curve down corresponding to demand slump, while there may be a different reality altogether at manufacturers' end to meet sustainability requirements. Neither brands nor manufacturers can afford to jeopardise what we have so far achieved.

Only setting stronger due diligence requirements may not suffice. If we fail to make the business resilient, it will jeopardise lives and livelihoods. As we talk about producers' responsibility, we need to perhaps also think of a framework of “Extended Consumers’ Responsibility” to impact lives better.

COVID-19 has been a big leveller, above all. With new lessons being learnt, there's renewed resilience in the industry. On top of this, amidst this catastrophe, we urge the EU to create a level playing field for all in global trade so that the disconnect between sustainability and sourcing can be bridged with empathy and a sense of justice. Trade should be determined by human consideration and protected by the due diligence policies and laws along the lines of what the EU has adopted and will potentially adopt.

To paraphrase Nietzsche, what hasn't destroyed us has made us stronger. But for us to grow from strength to strength we need help from the EU to guide businesses in the West to tread carefully as with even the slightest of tremor and a rude awakening, the entire supply chain could be disrupted beyond repair.

Let us prove to ourselves that we stand emboldened by the pandemic and not defeated at any cost.



**Dr Rubana Huq** is President of the Bangladesh Garment Manufacturers & Exporters Association (BGMEA).

© Photo by Rubana Huq



# Building on OECD Due Diligence Guidance to Promote Coherence

## Dr Christine Kaufmann, Chair of the [OECD Working Party on Responsible Business Conduct](#)

Christine Kaufmann sees mandatory due diligence as an opportunity for the EU to mainstream responsible business conduct across its member states while also sending a strong signal to global markets in the wake of COVID-19.

At its [special meeting in July 2020](#) the European Council adopted a wide-ranging recovery package to address the socio-economic damage resulting from the COVID-19 pandemic and to contribute to a sustainable and resilient recovery that works for all. While the outbreak of the pandemic was not a “black swan”, its impacts on people, the planet and society are of an unprecedented nature. The way global business is conducted is at the heart of these impacts: lockdowns led to steep declines in business activities and the mobility of workers and consumers with drastic consequences for the global labour market and the economy at large. With it came the realisation that globalisation is more fragile than previously thought as supply chains were disrupted, for example for essential medical material. The crisis has also brought to light unsafe working conditions in many sectors, for example in meat processing, and human rights abuses in textile or rubber glove manufacturing. Since – as [expressed by the European Council recently](#) – many countries are again facing rapidly rising numbers of cases, it is evident that without a proven vaccine or medication to control the disease, the effects of the crisis will continue. To make things worse, the pandemic coincides with a crisis of the international trade system and a crash in oil and commodity prices. Clearly, this is what [Carmen M. Reinhart](#), the new chief economist of the World Bank, calls a “whatever-it-takes” moment for sustainable and inclusive recovery policies. [Research by the OECD](#) indicates that including internationally-agreed Responsible Business Conduct (RBC) and RBC Due Diligence standards in government and business responses to the crisis will contribute to identifying, mitigating and addressing the adverse impacts of the crisis and thus contribute to a resilient recovery.

These insights correspond with the European Union’s efforts to strengthen RBC. As [Commissioner Reynders](#) recently stated, the [European Green Deal](#) highlights the role of corporate governance and RBC in the transition to a more sustainable economy that leaves no-one behind. With a few exceptions, all EU member states adhere to the [OECD Guidelines for Multinational Enterprises \(MNE Guidelines\)](#), the only comprehensive international standard on RBC that is equipped with a grievance mechanism, the [National Contact Points \(NCPs\)](#). The MNE Guidelines are fully aligned with the UN Guiding Principles on Business and Human Rights

(UNGPs). The [OECD Due Diligence Guidance](#) for RBC and a set of [sector-specific due diligence guidances](#) are practical tools for companies to apply due diligence in their operations and supply chains, in line with the expectations of the MNE Guidelines and UNGP.

The EU has been a frontrunner in aligning its legislation with the due diligence concept of the MNE Guidelines and the UNGPs, notably through the [Directive on the disclosure of non-financial and diversity information](#), the [Regulation on sustainability-related disclosure](#) and the new [Regulation on conflict minerals](#) which will enter into force in 2021. At the national level, several EU countries complemented the “smart mix” by introducing general and sectoral binding due diligence laws and some are in the process of discussing such legislation. Although due diligence legislation is on-trend, it is still relatively patchwork, covering select jurisdictions, sectors and RBC issues.

Global supply chains expanding beyond individual countries and jurisdictions call for a coherent legal framework. With its single market the EU provides a unique institutional forum for discussing whether levelling the playing field across the single market and implementing the international RBC standards that the EU and its members committed to requires a common, harmonised approach to mandatory due diligence. The recent [Study on due diligence requirements through the supply chain](#) shows both increasing support by business for mandatory due diligence as well as a variety of governmental approaches to introduce mandatory due diligence requirements.

In fact, non-binding policy tools alone are not sufficient for implementing human rights, labour and environmental standards through the whole supply chain. Sometimes companies do not sufficiently know these instruments, or some governments lack an adequate policy framework to promote the implementation of non-binding global standards such as

the MNE Guidelines or the UNGPs by business. Where binding rules exist, they vary from country to country which makes complying with them difficult for business and access to remedy even more challenging for those affected by negative impacts. As a result – and the COVID-19 crisis confirms this finding – serious human rights abuses and violations of environmental standards continue to be present across global supply chains.

Expectations that governments increase their efforts to implement international RBC standards with a “smart mix” of voluntary and binding measures are rising as millions of people are being affected by the impacts of COVID-19. As companies and governments try to enhance their resilience to supply disruption, supply chains have to be reconfigured with potential effects on productivity. These effects need to be considered in shaping governmental policy responses. In a post COVID-19 world, businesses need even clearer answers on what the rules of the game are and what is expected from them when it comes to implementing due diligence. By considering the introduction of mandatory due diligence requirements based on international standards such as the MNE Guidelines and the UNGPs, the EU can seize the opportunity to mainstream and leverage RBC not only across its member states but also give a strong signal to global markets where European companies operate. Aligning COVID-19 policy responses and related legislation with international RBC standards, for example by making government support conditional on businesses implementing RBC standards, is essential for levelling the playing field and making the recovery work for all.

Effectively implementing RBC and due diligence goes hand-in-hand with providing effective access to remedy. NCPs can play an important role for access to non-judicial remedy in this regard. When discussing the introduction of mandatory due diligence requirements EU governments should therefore ensure that their NCPs are all fully functioning and equipped to effectively provide secure avenues to raise complaints against irresponsible business practices and give those affected a voice. Yes, [this time truly is different](#) – not only because of the sheer magnitude of the crisis, but also because of its potential for policy-makers and the EU to make a real difference in implementing RBC and complement the Green Deal with a human dimension.



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## Business & Human Rights Resource Centre

Business & Human Rights Resource Centre is an international NGO that tracks the human rights impacts (positive and negative) of over 10,000 companies in over 180 countries, making information available on its nine language website. We seek responses from companies when concerns are raised by civil society. The response rate is 73% globally.

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