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DUE TIME FOR DUE DILIGENCE?

Resilience and vulnerability in European supply chains amid the Covid-19 pandemic.

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EXECUTIVE SUMMARY

In April 2020, European Commissioner for Justice, Didier Reynders announced his intention to include legislation on mandatory human rights due diligence (mHREDD) in the Commission's 2021 work programme. The aim of this paper is to consider this anticipated legislation. It addresses the following questions: what is mHREDD? Why is it needed? And what provisions should be included within the legislation? As the paper touches on these questions, it reflects on the international context. First, this paper describes the problems of malpractice in European supply chains and posits that due diligence could serve as a tool for remedying these practices, as was envisioned by the UN Guiding Principle on Business and Human Rights. Second, the paper considers how the fallout from the Covid-19 pandemic contributes to our understanding of international supply chains and the EU's role therein. Third and finally, the paper presents some key recommendations for the anticipated legislation.

Short bio

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The author used the Oxford Standard for Citation of Legal Authorities (OSCOLA) in this paper.



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Introduction

Increasingly, the European Union (EU) purports to promote human rights and environmental sustainability beyond its own borders and it undoubtedly does significant work in these areas. However the reputation of the EU is tarnished when EU based companies violate human rights and damage the environment through their operations in third countries. Accusations of hypocrisy follow.

In April 2020, European Commissioner for Justice, Didier Reynders announced the Commission's intention to introduce mandatory human rights and environmental due diligence (mHREDD) at an EU level.¹ Because of the reach of EU based companies, an initiative such as this could positively affect business operations globally. However, this kind of initiative also runs the risk of white-washing over the problems that do exist. To work, legislation must be strong and create enforceable obligations. To understand what shape the anticipated legislative proposal should take, it is first necessary to set out the context from which it emerged. To this end, this paper follows three lines of inquiry.

- First, the paper describes corporate malpractice in global supply chains, and the obstacles to holding businesses accountable. It introduces the concept of due diligence as a means of identifying, mitigating, and preventing harms, as well as an avenue for access to justice.
- Second, this paper questions what impact the Covid-19 pandemic has on our understanding of international trade. It concludes that the pandemic exposed the vulnerability of supply chains and therefore re-emphasised the need for business entities to carry out effective human rights and environmental due diligence.
- Finally, the paper considers ongoing debates as regards the elements to be included in a new law. Some key recommendations are put forward.

Corporate Malpractice in European Supply Chains

The crux of the issue is that businesses are incentivised by higher profits and low costs. Meanwhile, many businesses' decisions are not informed by the severe human rights violations and adverse environmental impacts occurring at primary production level.²

Common human rights violations in supply chains include forced labour and child labour, as well as hazardous working conditions.³ For over two decades, widespread child labour has been identified in cocoa supply chains. The Telegraph⁴ and the New York Times⁵ reported on this as far back as 1999/2000 and yet it still continues. Child labour is also present in the cotton sector⁶

¹ Didier Reynders, 'Speech By Commissioner Reynders In RBC Webinar On Due Diligence' (European Parliament Working Group on Responsible Business Conduct, 2020)

² European Parliament Committee on Foreign Affairs, 'Draft Opinion of the Committee on Foreign Affairs for the Committee on Legal Affairs with Recommendations to the Commission on Corporate Due Diligence and Corporate Accountability' (2020) P 3

³ European Parliament Committee on Foreign Affairs, 'Draft Opinion of the Committee on Foreign Affairs for the Committee on Legal Affairs with Recommendations to the Commission on Corporate Due Diligence and Corporate Accountability' (2020) P 3

⁴ Christina Lamb 'The child slaves of the Ivory Coast and sold for as little as 40' The Telegraph, 22 April 2001

⁵ Norimitsu Onishi, 'The Bondage of Poverty That Produces Chocolate' The New York Times, 29 July 2001

⁶ Fair Labour Association, 'Child Labour in Cotton Supply Chains: Action-based Collaborative Project to Address Human Rights Issues in Turkey' (June 2017).



and the mica mining sector.⁷ Other typical harms found in European supply chains include the emission of greenhouse gases by energy companies, mass deforestation, the disposal of industrial waste in developing countries, the assassination of human rights and environmental defenders and the forced removal of indigenous people from their own land.⁸

Business entities that perpetrate human rights violations or cause adverse environmental impacts are often left unaccountable for their actions, notwithstanding occasional damage to their public image. In response to accusations, many businesses argue that they are unable to oversee increasingly complex and non-transparent global supply chains.

Victims face hurdles in holding business entities accountable. The rule of law may not be strong in the country where the harm took place and courts may be plagued by corruption. Evidentiary obstacles are also significant. The burden of proof typically rests with the complainant to demonstrate not only the harm but also the causal link between business operations and that harm. This is a difficult threshold to meet. Moreover, the documentation and evidence necessary to show this link are often held by the defendant business entity. These barriers are exacerbated by the economic imbalance between the victim and the defendant.⁹

Where victims are unable to access a remedy in the state where the violation took place, they may seek remedy in the home state of the business entity. In this context too, victims face hurdles. The European Fundamental Rights Agency's (FRA) 2020 report on access to remedy provides case studies illustrating these hurdles: one example is a case in the German courts against the German textile retailer KiK Textilien und Non-Food GmbH.¹⁰ This case was brought by the families of victims and survivors of a factory fire that killed 280 people. Kik had sourced over 70% of the factory's product during the five years leading up to the fire. Therefore, it could be argued that it had influence over the conditions there. The claim was rejected on the grounds that the period of limitations in Pakistani law had elapsed. This example shines a light on the issue of hazardous working conditions in supply chains, and the significant barriers faced by victims who try to hold business entities accountable.

Mandatory Human Rights and Environmental Due Diligence (mHREDD)

What is human rights and environmental due diligence? In layman's terms, diligence implies a level of care and attentiveness. What is due is what is owed, what is in order or what is expected. In short, due diligence therefore refers to the scrutiny that is due to a situation. Of course, in law due diligence is a term of art loaded with a rich precedence, according to which the onus of blame can be attributed not on the basis of what one did or didn't do, but what one should have known to do. The difference between due diligence and human rights and environmental due diligence is marked, as the United Nations High Commissioner for Human Rights explained:

⁷ Kate Hodal, 'Children as young as five make up most of Madagascar's mica mining workforce.' The Guardian, 21 November 2019

⁸ British Institute of International and Comparative Law, Civic Consulting, The London School of Economics and Political Science, 'Study On Due Diligence Requirements Through The Supply Chain Final Report' (European Commission Directorate-General for Justice and Consumers 2020) PP 214 - 216

⁹ European Union Agency for Fundamental Rights, 'Improving Access To Remedy In The Area Of Business And Human Rights At The EU Level' (Publication Office of the European Union 2017) P 25

¹⁰ European Union Agency for Fundamental Rights, 'Business And Human Rights - Access To Remedy' (Publication Office of the European Union 2020) P 34



“Human rights due diligence should not be confused with other forms of legal due diligence activities, such as those carried out in preparation for corporate mergers and acquisitions, or those required for compliance monitoring purposes in areas such as banking or anti-corruption. The key difference between these concepts is that the latter group is generally concerned with identifying, preventing, and mitigating risks to business; whereas human rights due diligence is concerned with risks to people.”¹¹

Notably, the process of human rights due diligence is recommended by the United Nations Guiding Principles on Business and Human Rights (UNGPs).¹² The UN Human Council endorsed the UNGPs in 2011 and they became the cornerstone of the emerging field of business and human rights.¹³ The UNGPs rest on three pillars; the State duty to *protect* human rights, the corporate responsibility to *respect* human rights and access to *remedy* for victims of business-related abuses.

The aim of due diligence is that business entities will continuously work to ensure that they are getting better at spotting and preventing abuses.¹⁴ Principle 17 of the UNGPs sets out that “in order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence.”¹⁵ Principle 18 – 22 elaborate on essential components of due diligence; including gauging risks; identifying the actual or potential adverse impacts involved in, or brought about as a result of business operations; integrating findings from the impact assessment into internal processes; tracking the effectiveness of responses; communicating externally or reporting formally; and providing for access to remedy through legitimate processes.¹⁶ While the UNGPs relate to human rights due diligence, the same bases could be extended to environmental due diligence.

Overall, it is important to stress that due diligence does not merely entail reporting requirements. While reporting requirements create transparency which allows engagement (and critique) from civil society,¹⁷ a recent assessment of current corporate practice set out that common human rights due diligence practices include *inter alia* responsible contractual provisions, supplier codes and training, audits, investigations, and grievance mechanisms.¹⁸ Due diligence may also involve engagement with sector specific standards such as those set by sectoral multi-stakeholder initiatives (MSIs) or the OECD Guidelines for Multinational Enterprises.

¹¹ UN Human Rights Council, “Improving accountability and access to remedy for victims of business-related human rights abuse: The relevance of human rights due diligence to determinations of corporate liability”, A/HRC/38/20/Add.2 (1 June 2018) at para 8, as cited in British Institute of International and Comparative Law, Civic Consulting, The London School of Economics and Political Science, 'Study On Due Diligence Requirements Through The Supply Chain Final Report' (European Commission Directorate-General for Justice and Consumers 2020) P 222

¹² OHCHR, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” (2011)

¹³ OHCHR, Res 69 (20 April 2005) UN Doc E/CN.4/RES/2005/69

¹⁴ OHCHR, ‘Improving Accountability and Access to Remedy for Business and Human Rights Abuses: A submission from the Office of the United Nations High Commissioner for Human Rights (OHCHR) on the Revised Draft of the legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises,’ (8 October 2019) PP 23 - 34

¹⁵ OHCHR, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” (2011), P 17

¹⁶ OHCHR, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” (2011), PP 18 – 25

¹⁷ ‘UN Guiding Principles Reporting Framework’ (UNGP reporting, 2020).

¹⁸ Lise Smit and others, 'Human Rights Due Diligence In Global Supply Chains: Evidence Of Corporate Practices To Inform A Legal Standard' [2020] The International Journal of Human Rights P 23



Many business entities now engage with human rights and environmental due diligence on a voluntary basis. In October 2020, Fyffes announced their first Human Rights Mitigation Action Plan which will include “thorough due diligence.”¹⁹ However, without casting aspersions on the quality of Fyffe’s plan, voluntary action among business entities has thus far been inconsistent, as is illustrated in the work of the Corporate Human Rights Benchmark (CHRB). The CHRB is a ranking based on how well 200 publicly traded business entities prevent human rights violations in their activities. The 2019 CHRB report found that business entities scored an average of 21% under human rights due diligence assessment, with 49% of business entities scoring 0 on every human rights due diligence indicator.²⁰ In February 2020, the European Commission published a 572-page long study on due diligence requirements through supply chains. This study determined that voluntary human rights and environment due diligence measures are not implemented.²¹

Mandatory due diligence is when business entities are mandated by law to carry out due diligence to a defined standard. As far back as 2015, a report from the Economist Intelligence Unit found that senior corporate executives, ranked *making human rights due diligence a legal requirement* within the top three measures for enabling business entities to fulfil their responsibility to respect human rights.²² Since then, there have been calls from the business community²³ and investors for mandatory due diligence to be introduced by the EU.²⁴ The Business and Human Rights Resource Center explain that mandatory measures at the EU level would bring about legal certainty for business entities.²⁵ Legislation from the EU would provide for consistency instead of a mosaic of different sectoral and national measures.²⁶ It would ensure that there is a level playing field among business entities,²⁷ and that no business is put at a competitive disadvantage for introducing ethical and sustainable practices in their supply chain.

Another reason why businesses support mandatory due diligence is that due diligence can be an effective defence in a dispute. It can demonstrate that a business entity took all reasonable steps to avoid human rights violations and environmental damage.

¹⁹ Fyffes Announces Its Human Rights Mitigation Action Plan - Fyff (Fyffes, 2020)

<<https://www.fyffes.com/news/article/fyffes-announces-its-human-rights-mitigation-action-plan>> accessed 12 November 2020.

²⁰ Corporate Human Rights Benchmark, '2019 Key Findings Across Sectors: Agricultural Products, Apparel, Extractives & ICT Manufacturing' (2020) P 9

²¹ British Institute of International and Comparative Law, Civic Consulting, The London School of Economics and Political Science, 'Study On Due Diligence Requirements Through The Supply Chain Final Report' (European Commission Directorate-General for Justice and Consumers 2020) P 281

²² The Economist Intelligence Unit, 'The road from principles to practice. Today’s challenges for business in respecting human rights' (2015)

²³ Julia Christian, 'Chocolate Companies And MEPS Call For EU Due Diligence Regulation' (*FERN*, 2019)

²⁴ Investor Alliance for Human Rights, 'The Investor Case For Mandatory Human Rights Due Diligence' (2020)

²⁵ Robert McCorquodale, 'Opinion: Exploring Core Elements Of An EU Regulation On Mandatory Human Rights And Environmental Due Diligence'

²⁶ British Institute of International and Comparative Law, Civic Consulting, The London School of Economics and Political Science, 'Study On Due Diligence Requirements Through The Supply Chain Final Report' (European Commission Directorate-General for Justice and Consumers 2020) P 142

²⁷ OEIGWG, 'Connecting the business and human rights and the anticorruption agendas Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises.' (2020) P 14



Lessons from the Covid-19 pandemic on resilience and sustainability in supply chains

The Covid-19 pandemic has had devastating consequences. According to the European Center for Disease Prevention and Control, as of 2 November 2020, there have been approximately 223 000 deaths in the EU/EEA and the UK as a result Covid-19.²⁸ This seismic event will impact EU policy going forward, in terms of how the EU regards health but also in how it approaches the environment and global supply chains.

While announcing the Commission's intention to introduce mHREDD, Commissioner Reynders reflected that the pandemic exposed vulnerabilities of unregulated global supply chains.²⁹ This includes economic vulnerabilities and health vulnerabilities. A reckless approach to human rights and the environment in supply chains can contribute to health hazards. The destruction of forests for agribusiness is forcing wild animals closer to human contact and can contribute to the emergence of new viruses and health risks.³⁰ This connection is increasingly recognised. At a meeting on supply chain due diligence on the 8th of June 2020, Mr Björn Böhning, State Secretary, German Ministry of Labour and Social Affairs, noted that poor health and safety at work and weak healthcare systems encourage uncontrolled outbreak of infection.³¹ On a similar note, a draft report produced by rapporteur Lara Wolters for the European Parliament's Committee on Legal Affairs stresses that the Covid-19 pandemic has underlined "not only the importance of safe and healthy working environments, but also that of undertakings ensuring they do not cause or contribute to health risks in their value chains."³²

In economic terms, it has been argued that business entities with better social and environmental performance have a better ability to weather crises. Salil Tripathi explains that it is especially important for a business entity to know their supply chain amid a pandemic as it helps them to anticipate operational issues as well as to take proactive steps with suppliers to manage the crisis.³³ This view is corroborated by new research published since the outbreak of the pandemic.³⁴ A meta-study of 2000 studies produced by National Bureau of Economic Research³⁵ found that business entities performing well on sustainability factors outperform their peers and are more competitive.³⁶

In summary, while the stated aim of mHREDD will be to protect the environment and human rights in supply chains, it should also result in more resilient supply chains. It appears therefore that the EU, as an actor with an interest in promoting sustainability, human rights and resilient supply chains, has much to benefit from introducing legislation on mHREDD.

²⁸ 'COVID-19 Pandemic' (*European Centre for Disease Prevention and Control*, 2020)

²⁹ Didier Reynders, 'Speech By Commissioner Reynders In RBC Webinar On Due Diligence' (European Parliament Working Group on Responsible Business Conduct, 2020)

³⁰ Jeff McMahon, 'How Deforestation Drives The Emergence Of Novel Coronaviruses.' *Forbes*, 21 March 2020

³¹ International Federation for Human Rights, 'Towards Effective EU Mandatory Human Rights & Environmental Due Diligence' (2020).

³² European Parliament Committee on Legal Affairs, 'Draft Report With Recommendations To The Commission On Corporate Due Diligence And Corporate Accountability' (2020) P 13

³³ Salil Tripathi, 'Companies, COVID-19 And Respect For Human Rights' (2020) 5 *Business and Human Rights Journal*. P 256

³⁴ European Commission, 'Inception Impact Assessment: Sustainable Corporate Governance' (2020) P 2

³⁵ Wenzhi Ding and others, 'Corporate Immunity To The COVID-19 Pandemic Working Paper' (2020) National Bureau of Economic Research Working Paper Series SSRN Electronic Journal.

³⁶ Gunnar Friede, Timo Busch and Alexander Bassen, 'ESG And Financial Performance: Aggregated Evidence From More Than 2000 Empirical Studies' (2015) 5 *Journal of Sustainable Finance & Investment*.



Recommendations for legislation at the European Union level

Despite the growing consensus that legislation at the EU level is needed (as described above), the specifics of what should be included in mHREDD legislation are still disputed. What is clear is that the decisions made at an EU level will have ramifications for business operations globally. Through the vehicle of business entities, the EU will wield a degree of power. It has an opportunity to tangibly influence business practice in third countries. This power should not be taken lightly and rigorous consideration should be afforded to any provision included in mHREDD legislation.

This is a complex field and a thorough assessment of the anticipated legislation is beyond the scope of this paper. Important questions that should be grappled with by EU policy makers, but which will not be addressed in this paper, are:

- Should standards set in the new EU legislation also extend to public procurement?
- Should due diligence reporting always be carried out inhouse or can business entities commission consultants?
- What role will certification schemes play in human rights and environmental due diligence under the anticipated legislation?
- Will the legislation specifically refer to the effective mainstreaming of gender, as set out in a report on the gender dimensions of the Guiding Principles on Business and Human Rights by the working group on the issue of human rights and transnational corporations and other business enterprises?³⁷
- What provisions should be included in legislation to ensure engagement from civil society in human rights and environmental due diligence?
- How will this legislation ensure secure transparency from business entities through their due diligence processes?

The following section will address 1) the scope of mHREDD legislation 2) the types of obligations included in mHREDD legislation, and 3) enforcement and access to remedy. It will briefly discuss these themes and then present a list of recommendations. These recommendations are based on civil society expertise, studies, and the European Parliament's current proposals. The aim of these recommendations is to ensure that any initiative proposed serves the stated purpose of mHREDD, namely to prevent adverse impacts from EU-based companies' business operations and relations.

Before delving into these recommendations, it is useful to consider the commitments that have already been made. Commissioner Reynders committed to cross-sectoral mHREDD. He noted that the Commission's 2020 study on due diligence requirements through the supply chain found that a sector specific approach is limiting. However, he caveated that a broad framework does not prevent the implementation of sectoral specific guidelines in the future. The intention is for a range of possible sanctions to be included. The Commission is also considering an enforcement mechanism including administrative and/or criminal measures.³⁸

³⁷ OHCHR, 'Gender Dimensions Of The Guiding Principles On Business And Human Rights - Report Of The Working Group On The Issue Of Human Rights And Transnational Corporations And Other Business Enterprises' (Human Rights Council 2020)

³⁸ Didier Reynders, 'Speech By Commissioner Reynders In RBC Webinar On Due Diligence' (European Parliament Working Group on Responsible Business Conduct, 2020)



i. The Scope

An issue of contention is how wide a net the new legislation should cast i.e. how many business entities should be obliged to carry out HREDD. The European Coalition for Corporate Justice (ECCJ) produced a helpful model legislation in February 2020. It recommends that a regulatory framework should apply to “all undertakings, including financial institutions, domiciled in a Member State or placing products on or providing services in the internal market.”³⁹ Further, the 2020 Commission study found that the general stakeholder preference was for a duty that applies to all business entities.⁴⁰

Some argue that this wide approach is unfair and that due diligence obligations place an unnecessary burden on Small and Medium Sized Enterprises (SMEs). Indeed, the 2020 Commission study acknowledges that bigger business entities often have more resources and expertise at their disposal to complete due diligence. Be that as it may, depending on the risks associated with their work, some SMEs may have severe impacts on human rights and the environment. Therefore, a duty that applies to all business entities regardless of size is preferable.

A middle ground would consist of a graduated approach, with universal obligations for all business entities paired with additional obligations for business entities above a certain size or in a particular risk category. This would reflect the spirit of the UNGPs which call for tailored human rights due diligence. Principle 17(b) posits that human rights due diligence should “vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations.”⁴¹

ii. Types of Obligations

Another question to be addressed is which human rights and environmental obligations should be integrated into a business entity’s due diligence. Principle 12 of the UNGPs states that business enterprises have a responsibility to respect internationally recognized human rights, which can be understood, at a minimum, as those in the International Bill of Human Rights and in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.⁴² Existing legal standards on human rights can also be integrated into mHREDD (See Annex 1).

As regards environmental obligations, Human Rights Watch recommends that a new law should include provisions on climate change.⁴³ Integrating climate change into mHREDD legislation would be in line with the European Green Deal. The question of how to identify and quantify a business’s contribution to climate change is explored in the European Union Taxonomy on

³⁹ European Coalition for Corporate Justice, 'EU Model Legislation On Corporate Responsibility To Respect Human Rights And The Environment' (2020) P 2

⁴⁰ British Institute of International and Comparative Law, Civic Consulting, The London School of Economics and Political Science, 'Study On Due Diligence Requirements Through The Supply Chain Final Report' (European Commission Directorate-General for Justice and Consumers 2020) PP 286 - 287

⁴¹ United Nations, “Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" 2011

⁴² OHCHR, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” (2011) P 13

⁴³ Human Rights Watch, 'Annex - Recommendations For EU Legislation Governing Business Enterprises' Human Rights And Environmental Due Diligence, Including On Climate Change' (2020)



Sustainable Finance.⁴⁴ Therefore, to contribute to the coherence of European Union legislation and to provide legal certainty, any new law on mHREDD should draw on this Taxonomy.

iii. *Enforcement and access to remedy*

The question of how to enforce obligations is pivotal to the effectiveness of any future legislation. There are various ways enforcement can be carried out. The 2020 Commission study considered a State-based oversight body, finding that the setting up of such a body could prove costly and would not necessarily provide access to remedy.⁴⁵ Advantages of such a body are that it could introduce penalties including fines, and thereby create a level playing field among business entities.⁴⁶ Contrastingly, mechanisms that provide for judicial remedies do not require the establishment of a separate body. However, courts involved in remediation could be burdened by new cases and access to justice may be impeded by high costs and evidentiary obstacles (as described at the beginning of this paper). Legislation should therefore support victims who pursue remedy through the courts. These approaches to enforcement and access to remedy are not mutually exclusive and a balance would be optimum.

Recommendations on the Scope	
1	Due diligence obligations should apply to all business entities based in or operating in the European Union, with potential exceptions for micro-enterprises. ⁴⁷
2	Due diligence obligations should apply to a business entity's entire value chain. ⁴⁸
3	The extent of obligations should be graduated based on the size of the business entity, their resources and the risks associated with the sector. An additional set of duties could be applied to large business entities, for example in relation to climate change. ⁴⁹
4	There should be additional supports for SMEs, including financial support and guidance. The European Commission should build on the template of the Due Diligence Ready! online portal that provides businesses with guidance on how to ensure that their metals and minerals sourcing respects human rights. ⁵⁰

⁴⁴ Regulation (EU) 2020/852 on the establishment of a framework to facilitate sustainable investment

⁴⁵ British Institute of International and Comparative Law, Civic Consulting, The London School of Economics and Political Science, 'Study On Due Diligence Requirements Through The Supply Chain Final Report' (European Commission Directorate-General for Justice and Consumers 2020) P 289

⁴⁶ Ibid. P 288

⁴⁷ European Parliament Committee on Legal Affairs, 'Draft Report With Recommendations To The Commission On Corporate Due Diligence And Corporate Accountability' (2020) P12

⁴⁸ European Coalition for Corporate Justice, 'EU Model Legislation On Corporate Responsibility To Respect Human Rights And The Environment' (2020) P 2

⁴⁹ British Institute of International and Comparative Law, Civic Consulting, The London School of Economics and Political Science, 'Study On Due Diligence Requirements Through The Supply Chain Final Report' (European Commission Directorate-General for Justice and Consumers 2020) P 287

⁵⁰ European Parliament Committee on Legal Affairs, 'Draft Report With Recommendations To The Commission On Corporate Due Diligence And Corporate Accountability' (2020) P 25



Recommendations on types of obligation	
1	Legislation should build on international human rights due diligence standards, including the UNGPs and the OECD Guidance for Responsible Business Conduct. ⁵¹
2	Environmental due diligence should reflect scientific standards and correspond with international agreements including the Paris Climate Agreement. Legislation should also draw from the Taxonomy on Sustainable Finance while establishing environmental and climate risks. ⁵²
Recommendations on enforcement and access to remedy	
1	The new legislation should include robust enforcement measures, including a potential mixture of judicial and non-judicial measures. ⁵³
2	The legislation should foresee a European enforcement mechanism and include consequences for failure to comply, including penalties. ⁵⁴
3	The new legislation should support the principle of an equality of arms, recognising that victims of corporate malpractice are at a disadvantage in terms of time, access to evidence, and funding. The new legislation should therefore include a reversal of the burden of proof and a mandatory minimum period of limitations. ⁵⁵

Conclusion

The recommendations listed above are limited but do provide some indication of the debate currently underway. In order for the new law to effectively tackle the many problems in European supply chains, it must apply broadly and there must be real consequences for failing to comply. Otherwise, the same pattern of business entities failing to live up to their promises on human rights and the environment will continue.

Any law of this nature will have implications for the degree of power leveraged by the EU in third countries. Granted, this power is exercised through the medium of private business practice. Nonetheless it could be argued that, if introduced, mHREDD will mark a significant shift from soft measures to hard obligations in the EU's external human rights policy. However, unlike typical examples of hard power, where sanctions, penalties, or force are applied to interlocutor

⁵¹ European Parliament Committee on Foreign Affairs, 'Draft Opinion of the Committee on Foreign Affairs for the Committee on Legal Affairs with Recommendations to the Commission on Corporate Due Diligence and Corporate Accountability' (2020) P 4

⁵² European Parliament Committee on Legal Affairs, 'Draft Report With Recommendations To The Commission On Corporate Due Diligence And Corporate Accountability' (2020) P 13

⁵³ Action Aid, Amnesty International, Anti-Slavery, CIDSE, Clean Clothes Campaign, European Center for Constitutional and Human Rights, European Coalition for Corporate Justice, FIDH, Friends of the Earth Europe, Global Witness and Oxfam., 'An EU Mandatory Due Diligence Legislation To Promote Businesses' Respect For Human Rights And The Environment' (2020)

⁵⁴ Human Rights Watch, 'Annex - Recommendations For EU Legislation Governing Business Enterprises' Human Rights And Environmental Due Diligence, Including On Climate Change' (2020) P 5

⁵⁵ European Parliament Committee on Legal Affairs, 'Draft Report With Recommendations To The Commission On Corporate Due Diligence And Corporate Accountability' (2020) P 16



countries, in this instance, any sanctions introduced will fall on EU-based companies themselves. A benefit of this approach is that claims of the EU's hypocrisy may be allayed.

On 26 of October 2020, the Commission opened a public consultation on Sustainable Corporate Governance. It will remain open until 8 February 2021. These consultations build on two prior studies and will inform the drafting of the legislative proposal on mHREDD which is expected to appear in the 2021 work programme.



Annex 1

INTERNATIONAL INSTRUMENTS AND STANDARDS TO FEED INTO:

Human rights and environmental due diligence



- o The Universal Declaration of Human Rights
- o The International Covenant on Civil and Political Rights
- o The International Covenant on Economic, Social and Cultural Rights
- o The principles concerning fundamental rights in the eight ILO core conventions
- o The Declaration on Fundamental Principles and Rights at Work
- o The International Convention on the Elimination of All Forms of Racial Discrimination
- o The Convention on the Elimination of All Forms of Discrimination against Women
- o The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

- o The United Nations Convention on the Right of the Child
- o The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
- o The Convention on the Rights of Persons with Disabilities
- o The International Convention for the Protection of All Persons from Enforced Disappearance
- o The United Nations Declaration on the Rights of Indigenous People
- o The Convention for the Protection of Human Rights and
- o Fundamental Freedoms ("European Convention on Human Rights")





- o The Charter of Fundamental Human Rights of the European Union
- o The UN Guiding Principles on Business and Human Rights
- o The Paris Agreement on climate change
- o The UN 2030 Agenda for Sustainable Development of 2015
- o The ILO Tripartite declaration of principles concerning multinational enterprises and social policy ("MNE Declaration") of March 2017

List of conventions sourced from : British Institute of International and Comparative Law, Civic Consulting, The London School of Economics and Political Science, 'Study On Due Diligence Requirements Through The Supply Chain Final Report' (European Commission Directorate-General for Justice and Consumers 2020). P 222 - 223



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