

## Mandatory Human Rights Due Diligence: An Overview of the Legislative Developments at the European Level



Benedita Sequeira



Claire Bright

September 2021

The increased acknowledgement of the role of businesses in relation to human rights, the environment and the realisation of the UN Sustainable Development Goals has led to a number of regulatory initiatives at the domestic, regional and international levels in recent years.

At the international level, one of the most significant developments was the unanimous approval by the UN Human Rights Council of the UN Guiding Principles on Business and Human Rights (UNGPs)<sup>1</sup> in 2011.

The UNGPs are organised around three pillars: (i) the State duty to protect human rights (ii) the corporate responsibility to respect human rights, and (iii) access to effective remedy for affected individuals.<sup>2</sup> The UNGPs introduced the concept of "**human rights due diligence**" which constitutes the means through which companies can fulfil their responsibility to respect human rights. Human rights due diligence refers to an **ongoing process** through which companies can "**identify, prevent, mitigate and account for**" the **actual and potential adverse human rights impacts** that they may cause or contribute to through their own activities, or which may be directly linked to their operations, products, or services by their business relationships.<sup>3</sup>

Human rights due diligence is comprised of four core components:

1. **Assessing** actual and potential adverse impacts
2. **Integrating and acting upon the findings** of those impact assessments; i.e. preventing or mitigating potential adverse impacts, and participating in the remediation of impacts that have already taken place
3. **Tracking the effectiveness** of its systems and responses
4. **Communicating** how impacts are addressed.

The UNGPs have been extremely influential, and the concept of human rights due diligence has been introduced in a number of other international and regional standards and instruments.<sup>4</sup> Like the UNGPs, these instruments are all soft law instruments, meaning that they are not legally

<sup>1</sup> United Nations. (2013). *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*. United Nations. [https://www.ohchr.org/documents/publications/guidingprinciplesbusinessshr\\_en.pdf](https://www.ohchr.org/documents/publications/guidingprinciplesbusinessshr_en.pdf)

<sup>2</sup> United Nations. (2011). *Guiding Principles on Business and Human rights (...)*. General Principles.

<sup>3</sup> United Nations. (2011), *Guiding Principles on Business and Human rights (...)*. GP 17.

<sup>4</sup> Smit, L [et.al]. (2020). *Study on Due Diligence Requirements Through the Supply Chain. FINAL REPORT*. 10.2838/39830. <https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en>

binding. However, they have “intrinsic persuasive power”<sup>5</sup>, and, the need for companies to undertake due diligence has become a “global norm reflecting social expectations” for all business enterprises, wherever they operate.”<sup>6</sup>

In recent years, a growing number of jurisdictions have started to implement the human rights due diligence requirements set out in the UNGPs through the adoption of legally binding legislation at the domestic level. These include France<sup>7</sup> the Netherlands<sup>8</sup>, Switzerland<sup>9</sup> Norway<sup>10</sup> and Germany<sup>11</sup> where laws making it mandatory for companies to exercise human rights (and in some cases also environmental) due diligence have been adopted. In many other countries in Europe and beyond, active campaign for the introduction of such laws are also taking place. At the international level, discussions are also taking place around the introduction of a legally binding instrument on business and human rights.<sup>12</sup>

At the EU level, mandatory human rights due diligence frameworks have already been implemented in relation to specific sectors of commodities. Examples include:

<sup>5</sup> Ruggie, J. G., Rees, C., & Davis, R. (2021). Ten Years After: From UN Guiding Principles to Multi-Fiduciary Obligations. *Business and Human Rights Journal*, 6(2), 179–197.

<sup>6</sup> United Nations Human Rights Council. (2008). Review of the Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Professor John Ruggie to the United Nations Human Rights Council, Protect, Respect and Remedy: A Framework for Business and Human Rights Ah/Hrc/8/5, 7 April 2008. [https://www.ohchr.org/documents/issues/business/a-hrc-17-31\\_aev.pdf](https://www.ohchr.org/documents/issues/business/a-hrc-17-31_aev.pdf)

<sup>7</sup> The French Duty of Vigilance Law, 27 March 2017 (Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre), Article 1. Available at: <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000034290626/>. It was adopted in 2017, requiring large French companies to undertake human rights due diligence and implement a “vigilance plan”. Read more on: Cossart, S., Chaplier, J., & Beau De Lomenie, T. (2017). The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All. *Business and Human Rights Journal*, 2(2), 317–323. also: Nasse, L. (2021) The French Duty of Vigilance Law in Comparison with the Proposed German Due Diligence Act – Similarities and Differences. *Nova Centre on Business, Human Rights and the Environment Blog*, 26th May 2021. <https://novabhre.novalaw.unl.pt/french-duty-vigilance-law-german-due-diligence-act/>

<sup>8</sup> The Dutch Child Labour Due Diligence Act, 14 May 2019 (“Wet Zorgplicht Kinderarbeid”). Available at: <https://zoek.officielebekendmakingen.nl/stb-2019-401.html>, which will enter into force in 2022 requires companies that supply goods or services to Dutch end-users to conduct human rights due diligence in relation to child labour. Read more at: Hoff, A. (2019). “Dutch child labour due diligence law: a step towards mandatory human rights due diligence”. *Business & Human Rights Resource Centre Blog*, 10<sup>th</sup> of June, 2019. <https://www.business-humanrights.org/fr/derni%C3%A8res-actualit%C3%A9s/dutch-child-labour-due-diligence-law-a-step-towards-mandatory-human-rights-due-diligence/>

More recently, in March 2021, the Bill for Responsible and Sustainable International Business Conduct was introduced for discussion in the Dutch parliament. This initiative aims to require large companies to conduct human rights due diligence. See: Unofficial translation of the Bill at <https://www.mvoplatfom.nl/en/wp-content/uploads/sites/6/2021/03/Bill--for-Responsible-and-Sustainable-International-Business-Conduct-unofficial-translation-MVO-Platform.pdf>. See also: Wilde-Ramsing, J., Wolfkamp M., Ollivier de Leth, D. (2021) The Next Step for Corporate Accountability in the Netherlands: The New Bill for Responsible and Sustainable International Business Conduct, *Nova Centre on Business, Human Rights and the Environment Blog*, 18 March 2021, available at: <https://novabhre.novalaw.unl.pt/new-bill-for-responsible-sustainable-international-business-conduct-netherlands/>

<sup>9</sup> See: McCorquodale, R. (2021). Some Concluding Remarks on Business and Human Rights in Switzerland. *Nova Centre on Business, Human Rights and the Environment Blog*, 1 March 2021, at <https://novabhre.novalaw.unl.pt/concludingremarks-bhr-switzerland/>; Bueno, N. (2021). Human Rights Due Diligence Legislation in Switzerland: The state-of-play after the Swiss Responsible Business Initiative, *Nova Centre on Business, Human Rights and the Environment Blog*, 1 February 2021, at <https://novabhre.novalaw.unl.pt/human-rights-due-diligence-switzerland/>

<sup>10</sup> See: Business & Human Rights Resource Centre. (2019). *Norway: Govt.-appointed committee proposes human rights transparency and due diligence regulation*, at <https://www.business-humanrights.org/en/latest-news/norway-govt-appointed-committee-proposes-human-rights-transparency--and-due-diligence-regulation/>

<sup>11</sup> See: Grabosch, R. (2021). The German Supply Chain Due Diligence Act in the Making – What to Expect, *Nova Centre on Business, Human Rights and the Environment Blog*, 15 February 2021, at <https://novabhre.novalaw.unl.pt/german-supply-chain-due--diligence-act-what-to-expect/>

<sup>12</sup> OEIGWG. (2021) 'Legally Binding Instrument to Regulate, in Internaitonal Law, the Activities of Transnational Corporations and Other Business Enterprises', at <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf>

- the **EU Timber Regulation**<sup>13</sup> which requires EU traders who place timber products on the EU market for the first time to exercise due diligence
- the **EU Conflict Minerals Regulation**<sup>14</sup> which requires EU importers of tin, tantalum, tungsten and gold to exercise due diligence to ensure that the minerals have not been produced in a way that funds conflict or other related illegal practices.

In addition, the **EU Non-Financial Reporting Directive**<sup>15</sup>, “imposes on some large undertakings the obligation to report on the policies they pursue in relation to environmental (ex: pollution prevention, energy use, etc.), social and employee matters (ex: health and safety work conditions, consumer relations, etc.), respect for human rights (ex: occurrence of severe human rights impacts, process of receiving and addressing complaints), anti-corruption and bribery matters.”<sup>16</sup> The reporting should include the company’s business model, the policies implemented, the due diligence process, the risks arising from non-financial matters in the company’s operations and non-financial key performance indicators.

In 2017, the European Commission issued [guidelines to help companies disclose environmental and social information](#), and, in 2019, [guidelines on reporting climate-related information](#), given that sufficient, reliable and comparable sustainability-related information is critical to effectively identify and manage risks. These are non-binding and serve as orientation for companies and financial institutions on how to report on their impacts on the environment.<sup>17</sup>

In April 2021, the Commission adopted a [proposal for a Corporate Sustainability Reporting Directive \(CSRD\)](#), in order to reform the Non-Financial Reporting Directive, the proposal sets some key changes, namely:

- extending the scope of application of the Directive “to all large companies and all companies listed on regulated markets (except listed micro-enterprises)”;<sup>18</sup>

---

<sup>13</sup> Regulation (EU) 995/2010 of the European Parliament and of the Council of 20 October 2010. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32010R0995&from=EN>.

<sup>14</sup> Regulation (EU) 2917/821 of the European Parliament and of the Council of 17 May 2017. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R0821&from=DE>.

<sup>15</sup> Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0095&from=DE>.

<sup>16</sup> European Parliament, Committee on Legal Affairs. (2020). *Report with recommendations to the Commission on corporate due diligence and corporate accountability* (2020/2129(INL)). [https://www.europarl.europa.eu/doceo/document/A-9-2021-0018\\_EN.html#title2](https://www.europarl.europa.eu/doceo/document/A-9-2021-0018_EN.html#title2)

<sup>17</sup> European Commission. (2021). *Corporate sustainability reporting*. (n.d.). European Commission. Retrieved August 19, 2021, from [https://ec.europa.eu/info/business-economy-euro/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting\\_en](https://ec.europa.eu/info/business-economy-euro/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting_en)

<sup>18</sup> European Commission. (2021). *Corporate sustainability reporting*. (n.d.). European Commission. Retrieved August 19, 2021.

- introducing mandatory reporting standards, including disclosure requirements<sup>19</sup>, and a requirement to report according to mandatory EU sustainability reporting standards;<sup>20</sup>
- requiring the audit (assurance) of reported information.<sup>21</sup>

In 2020, a [Study for the European Commission on 'Due Diligence Requirements Through the Supply Chains'](#)<sup>22</sup> was published. The study - which relied in part on consultation with multistakeholders across Europe - highlighted the limitations of current corporate practices in Europe in relation to human rights and environmental due diligence. In particular, only **just over one-third of business respondents indicated that their companies undertake due diligence which takes into account all human rights and environmental impacts**, and for the majority of those, the due diligence exercise is limited to first tier suppliers. The majority of the stakeholders supported the introduction of a general requirement at EU level which would mandate companies to undertake human rights and environmental due diligence in their own operations and throughout their supply chains. In addition, nearly 70% of companies surveyed anticipated that mandatory human rights and environmental due diligence legislation would benefit business in that it would provide for a single, harmonised EU-level standard (rather than an array of fragmented approach at the national level), would provide legal certainty, would allow to level the playing field by holding EU competitors to the same standard and would facilitate leverage with business partners by setting a non-negotiable standard.

On the basis of the findings of this study, the European Commissioner for Justice Didier Reynders, announced, on the 29<sup>th</sup> of April 2020, that a [legislative initiative on mandatory human rights and environmental due diligence at the EU level would be introduced](#) in 2021. This initiative aims to set a “legal duty at the Union level” for companies to exercise human rights and environmental due diligence.<sup>23</sup>

On the 10<sup>th</sup> of March 2021, the European Parliament adopted, by a large majority, a resolution with recommendations to the Commission on corporate due diligence and corporate accountability,<sup>24</sup> containing the text of a draft directive in the annex. This draft Directive affirms that its aim is to ensure that “undertakings operating in the internal market fulfil their duty to respect human rights, the environment and good governance”.<sup>25</sup>

The **scope of application** of the draft Directive covers all large companies governed by the law of a Member State or established in the territory of the Union as well as publicly listed small

---

<sup>19</sup>Gregor, F. (2021). *Reform of the EU Non-financial Reporting Directive: A Push Towards Future-proof Reporting Obligations*. Alliance for Corporate Transparency in Collaboration with Germanwatch. [https://germanwatch.org/sites/default/files/Full%20Disclosure%202021-3\\_Reform%20of%20the%20EU%20Non-financial%20Reporting%20Directive.pdf](https://germanwatch.org/sites/default/files/Full%20Disclosure%202021-3_Reform%20of%20the%20EU%20Non-financial%20Reporting%20Directive.pdf)

<sup>20</sup> European Commission. (2021). *Corporate sustainability reporting*. (n.d.). European Commission. Retrieved August 19, 2021.

<sup>21</sup>*Ibid.*

<sup>22</sup> Smit, L [et.al]. (2020). *Study on Due Diligence Requirements Through the Supply Chain. FINAL REPORT*. 10.2838/39830.

<sup>23</sup> *Ibid.*, Article 1.

<sup>24</sup> European Parliament, Committee on Legal Affairs. (2021). *Resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability* (2020/2129(INL)). [https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2020/2129\(INL\)](https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2020/2129(INL))

<sup>25</sup> European Parliament, Committee on Legal Affairs. (2020). *Report with recommendations to the Commission on corporate due diligence and corporate accountability* (2020/2129(INL)).

and medium-sized companies, and high-risk small and medium-sized companies. It also covers those type of companies which are governed by the law of a third country and are not established in the territory of the Union when they operate in the internal market selling goods or providing services.

**Due diligence** is defined under the draft text as “the process put in place by an undertaking in order to identify, cease, prevent, mitigate, monitor, disclose, account for, address and remedy the risks posed to human rights, including social and labour rights, the environment, including climate change, and to governance.”<sup>26</sup> The due diligence exercise should cover all internationally and EU recognised human rights and environmental standards, including in relation to climate change. The draft Directive clarifies that this due diligence requirement, should not be a mere box-ticking exercise, but an ongoing assessment of risks<sup>27</sup>, and constitute a standard of expected conduct.<sup>28</sup> Therefore, it is in line with the UNGPs and the due diligence exercise be conducted in close dialogue with the relevant stakeholders, and take into account both the company’s activities and business relationships.<sup>29</sup> It involves:

- identifying and assessing whether their operations and business relationships cause or contribute to any human rights, environmental or governance risks;
- in case a risk is identified, the company shall establish a due diligence strategy, indicating the risks identified and the policies and measures that it intends to adopt with a view to ceasing, preventing or mitigating those risks;
- mapping of the value chain;
- making the due diligence strategy publicly available;
- evaluate the effectiveness and appropriateness of their due diligence strategy;
- establish a grievance mechanism, both as an early-warning risk-awareness and as a remediation system.<sup>30</sup>

In terms of enforcement mechanism, the draft Directive requests Member States to designate a national competent authority responsible for the supervision of the application of the law, and for the dissemination of due diligence best practices, with the power to impose sanctions in case of non-compliance. In addition, the draft Directive provides for a civil liability mechanism "for any harm arising out of potential or actual adverse impacts on human rights, the environment or good governance that they, or undertakings under their control, have caused or contributed to by acts or omissions".

---

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

<sup>28</sup> Ruggie, J. (2021). Transcript of the Keynote Speech delivered at the webinar on Corporate Due Diligence and Civil Liability, *Nova Centre on Business, Human Rights and the Environment Blog*, 23rd February 2021. <https://novabhre.novalaw.unl.pt/transcript-keynote-speech-john-ruggie/>

<sup>29</sup> U.N. General Assembly. (2018). *Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms - Working Group on the issue of human rights and transnational corporations and other business enterprises* (A/73/50). <https://undocs.org/pdf?symbol=en/A/73/163>

<sup>30</sup> European Parliament, Committee on Legal Affairs. (2020). *Report with recommendations to the Commission on corporate due diligence and corporate accountability* (2020/2129(INL)).

This draft Directive of the European Parliament is meant as recommendations to the European Commission, who has the legislative initiative. The actual text of the European Commission is expected to be published in the autumn.

In Portugal, the [first National Enquiry on Responsible Business Conduct and Human Rights in Portugal](#) conducted in 2018 revealed that **less than one in five companies have human rights due diligence processes in place**.<sup>31</sup> However, the developments presented in this brief constitute an opportunity for companies to get ahead of the regulatory wave and show leadership in terms of sustainable development through the implementation of human rights and environmental due diligence processes.

### About the research brief

#### **Authors:**

This practical brief was prepared by the NOVA BHRE with the support of the Portuguese Chamber of Commerce and Industry. The authors are Claire Bright and Benedita Sequeira. Claire Bright is the Founder and Director of the NOVA BHRE and an Associate Professor at NOVA School of Law. Benedita Sequeira is a Research Assistant at the NOVA BHRE and Invited Assistant Lecturer at the School of Law of the University of Porto.

#### **About the NOVA BHRE**

The NOVA BHRE is an academic centre within the NOVA School of Law which seeks to contribute to fostering responsible business conduct that upholds respect for human rights, decent work and environmental standards throughout their global value chains, thereby also advancing the UN Sustainable Development Goals.

#### **Contact**

NOVA Centre on Business, Human Rights and the Environment  
NOVA School of Law  
Campus de Campolide, 18  
1099-032 Lisbon, Portugal  
Email: [novabhre@novalaw.unl.pt](mailto:novabhre@novalaw.unl.pt)  
<https://novabhre.novalaw.unl.pt>

---

<sup>31</sup> ISCSP, CAPP, & DGAE. (2018). *1º Inquérito Nacional sobre Conduta Empresarial Responsável e Direitos Humanos*. [https://capp.iscsp.ulisboa.pt/images/Projetos/empresas\\_direitos/Brochura.pdf](https://capp.iscsp.ulisboa.pt/images/Projetos/empresas_direitos/Brochura.pdf)