

# **ETUC Position for a European directive on mandatory Human Rights due diligence and responsible business conduct**

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## **Key Messages**

- **The ETUC calls for a European directive on mandatory human rights due diligence and responsible business conduct.**
- **It should establish mandatory and effective due diligence mechanisms covering companies' activities and their business relationships, including their supply and subcontracting chains.**
- **The directive would constitute an important step forward to ensure the respect and enforcement of human rights. Human rights should include trade unions' and workers' rights as main components.**
- **A directive should empower workers to fight against violations of human rights. It should ensure the full involvement of trade unions and workers' representatives in the whole due diligence process.**
- **Effective remedies and access to justice should be available for victims, including trade unions.**
- **Companies should be accountable for the impacts of their operations. Liability must be introduced for cases where companies fail to respect their due diligence obligations, without prejudice to joint and several liability frameworks.**

## **Introduction**

Violations of human rights, including workers' and trade union rights, continue to take place in companies' operations, comprising multinationals, their supply and subcontracting chains. The freedom of association, the right to bargain collectively, the right to information, consultation and participation and to take collective actions are at the core of such violations. This is also the case for violations of the right to fair remuneration, decent working conditions and health and safety in the workplace. From the XPO case in the US and Spain to the Rana Plaza case, such intolerable situations must change. The EU must act. It must act now: there is a clear and concrete political responsibility to live up to the EU objectives, its attachment to the principles of liberty, democracy and respect for human rights as anchored in the EC Treaties and Charter of Fundamental Rights.

Today, corporations operate across borders. Complex corporate structures and supply and subcontracting chains enable parent companies to avoid responsibility for human rights and violations of social and environmental standards. It is furthermore difficult to trace the negative social and environmental impacts of their global operations.

The main international tools, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises include the responsibility for

companies to carry out due diligence within their value chain when doing business abroad. However, there are no specific requirements that these responsibilities should be implemented by companies.

Currently there are no general, overarching and binding obligations at EU level for companies to comply with due diligence mechanisms for their activities and their supply and subcontracting chains (and other business relationships). Only very limited instruments encourage them to do so. As it stands, the current legal framework does not prevent violations of human rights.

The reliance on a voluntary framework to promote business respect for human rights has furthermore proven insufficient and ineffective for workers, society and businesses. National action plans on business and human rights for responsible business conduct which implement OECD guidelines on multinationals and OECD guidance for business conducts reveal the limits of the voluntary approach. This leads to a patchwork of measures that do not provide for legal certainty and legal predictability. It prevents Member States and public institutions, citizens and workers, and businesses to rely on a robust due diligence framework. The unbalanced and piecemeal take-up of voluntary schemes creates unfair competition at European and global level. The current framework leads to a race to the bottom in terms of human rights and environmental and social standards. It raises public expectation without providing the enabling framework for proper enforcement. Furthermore, it provides no stable grounds for investors to evaluate and to compare companies' sustainability and due diligence processes. There is a clear need to remedy the absence of legally binding obligations upon businesses to comply with human rights and to overcome the lack of effective oversight and means to properly enforce measures to be implemented by companies in this area.

As a result, a large range of Member States in the EU have started to legislate. This is a clear signal to the European Commission to act and to act now to provide for a level playing field for workers and businesses in the EU. A European directive would fill this gap and establish a set of minimum standards across the EU through which companies would fulfil their obligations under the UN Guiding Principles.

This initiative should go hand in hand with the efforts to ensure more transparency of business activities, including through a European business register and public country-by-country reporting. It should provide for consistency with European industrial policy, eco-design legislation and environment and climate policies. Sustainable corporate governance should include fair taxation principles, making multinational companies pay taxes where profits are generated, with the view to prevent the implementation of global supply chains based on tax avoidance and aggressive tax planning.

Therefore, it is necessary to introduce mandatory measures to ensure the full respect and enforcement of human rights, including workers and trade union rights, in companies' activities as well as throughout their subcontracting and supply chains and franchise systems, at national and cross borders level, and to provide for better enforcement. It is also necessary to guarantee that companies' operations respect social and environmental standards and contribute to positive social and environmental impacts. Such a step would pave the way to the achievement of the environmental and social objectives defined at European and global level. Finally, an ambitious European regulatory framework on these issues would contribute to promote a more inclusive, sustainable and stakeholder oriented corporate governance model, which recognises the primary role of workers' contribution and interest and gives a voice to other stakeholders.

For your information, Annex I (the updated discussion paper presented at the September 2019 ETUC Executive Committee) includes a comprehensive overview of the status quo, of the international, European and national instruments and frameworks relevant for these matters, as well as of the political discussions at European level.

## What the ETUC calls for

The ETUC calls for a European directive on mandatory human rights, including workers and trade union rights, due diligence and responsible business conduct. It should establish mandatory and effective due diligence mechanisms covering companies' activities and their business relationships, their supply and subcontracting chains.

A European directive on due diligence would constitute an important step in ensuring that companies' activities are more sustainable and in establishing accountability, including effective remedies, for the impacts of their operations. It would constitute an important step forward to ensure the respect and enforcement of human rights. It would empower workers to fight against violations of human rights. It would furthermore ensure a clearer environment for all actors of society, based on common minimum requirements, legal certainty and fair competition.

## Main ETUC demands

For the European Trade Union Confederation, such a directive should include at least the following elements:

**Aim.** The directive<sup>i</sup> should establish ambitious due diligence obligations for companies in line with the high social and environmental standards and objectives of the European Union, as well as with the aim to promote and ensure sustainable development and social dialogue. It should focus on effective prevention of human rights violations and negative impacts of business operations, including global operations of companies established or operating in the EU, and on effective controls, sanctions and remedies. The directive should build upon and include the most ambitious elements of the different international instruments and standards, as well as effective solutions developed in EU legislative instruments and national frameworks.<sup>ii</sup> The duty of the company to carry out due diligence should include all its operations and the activities it is linked with through its business relationships, including its subcontracting and supply chains (e.g. franchising, providers, subcontractors, distributors...).

**Legal basis.** A combination of different legal bases should be considered for the directive, which should include Article 153(1)(e) TFEU (information and consultation of workers).<sup>iii</sup> Social partners should be fully involved in the preparation of the initiative, in accordance with Article 154 TFEU.

**To whom should the directive apply?** The personal scope of the directive should be based on a large range of relevant international instruments. It includes the *United Nations Guiding Principles on Business and Human Rights* (UNGP), the *OECD Guidelines for Multinational Enterprises* (OECD Guidelines), as well as the *ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* (ILO Tripartite Declaration) and the *Council of Europe Committee of Ministers Recommendation on Human Rights and Business*.<sup>iv</sup> They all apply to businesses including multinationals, independently of their sizes, active in any sector. Limitations in the scope of the EU directive could, if they were implemented, exclude from the application of the directive many companies whose operations have significant actual or potential impacts in the areas covered by due diligence obligations. For these reasons, the personal scope of the directive should cover all companies, including SMEs, as well as public sector organisations, which are established (seat, headquarters or principal place of business) or active in the European Union, regardless of their legal forms<sup>v</sup>.

## What should due diligence cover?

- a) The material scope of the directive should guarantee a broad coverage of the human rights definition including workers' and trade union rights. It should build on international instruments such as the *International Bill of Human Rights* and *ILO Conventions*, as well as the *European Convention on Human Rights* and *European Social Charter*. It should further build on the *EU Treaties* and the *Charter of Fundamental Rights of the EU* as well as national instruments and legislation in the area of human rights.<sup>vi</sup> This includes, amongst others, freedom of association and the right to collective bargaining and collective action, information, consultation and board-level representation rights, decent working conditions, occupational health and safety, fair wages, social security coverage...
- b) In any event, the level of protection of human rights should by no means be lower than the one provided for by international and European primary and secondary law, higher national standards and norms and collective agreements. The due diligence obligations should cover actual and potential impacts in this area. They should also cover social and environmental impacts, including on the basis of the UN development goals and the Paris environmental agreement, as well as anti-corruption, corporate governance and tax matters.<sup>vii</sup> The added value of a EU due diligence act would constitute in an anticipative approach to prevent the occurrence of any harm. It would further bring trade unions and workers in the forefront to shape a cultural and behavioural change in business activities based on sustainability, stakeholder involvement, proactive ex-ante assessments and preventive actions.

**Due diligence process.** According to the UNGP, OECD Guidelines and ILO Tripartite Declaration definitions, companies should carry out due diligence to 'identify, prevent, mitigate and account for how they address their actual or potential adverse impacts. Building upon those instruments, mandatory due diligence should include assessing and identifying actual and potential [...] adverse impacts, acting upon the findings in order to cease and prevent negative impacts, tracking the implementation and the results, and communicating how impacts have been addressed'.<sup>viii</sup> Building on these instruments, the ETUC is of the opinion that a EU mandatory framework should include a set of obligations, in particular:<sup>ix</sup>

- a) Companies should map, identify and assess actual and potential adverse impacts of their operations – including both their activities and their business relationships, their purchasing practices (in particular along the whole supply and subcontracting chains) – on the above-mentioned areas. The assessment should take into consideration the protection of workers as well as all the areas of business activities and be based on an evaluation of at least the sectoral, geographic, product, service and enterprise-based risk factors.
- b) Companies should act upon the findings. They should cease any operations, including in their business relationships, which are causing or contributing to adverse impacts that cannot be prevented. Companies should develop, publish and implement a due diligence plan to prevent any potential risks and the materialisation of negative impacts or violation of human rights in their activities and business relationships (in their whole supply and subcontracting chains) but also to ensure proper monitoring and control. The plan should include concrete actions and follow-ups with specific objectives and timetables. It should provide for procedures to regularly assess the situation of companies whose operations are linked with the main company because of its business relationship. The directive should contain provisions that encourages high-level corporate responsibility, including directors' liability, for addressing the identified actual and potential violations and negative impacts through the due diligence plan. Companies should ensure adequate budget allocations and oversight to guarantee the implementation of the plan and the respect and enforcement of their obligations.

- c) The directive should require companies to verify effective and transparent tracking and monitoring of the implementation of their due diligence plans. Such verification should be based on qualitative and quantitative indicators and internal and external feedbacks. Companies should provide an assessment of the effectiveness of the due diligence plans, including their implementation, the actions undertaken and any negative impacts which have materialised, and periodically review them based on the findings. This assessment should be provided to the public authority responsible for monitoring the respect of the directive's obligations for an objective oversight of the quality of the assessment.
- d) Due diligence plans should include the establishment of an early alert mechanism to collect reporting of existing and potential human rights and social and environmental standards violations and negative impacts about the abovementioned matters, as well as for any violation of the due diligence obligations and plan.<sup>x</sup>
- e) The directive should require companies to publish an annual, specific and comprehensive public report on the verifiable progress of their due diligence plans and obligations, on the actions undertaken about both their operations and business relationships and on any violations or negative impacts which have materialised. The reports should provide enough information to evaluate the adequacy of the companies' plans and actions compared to the actual and potential negative impacts of their operations. The extent of reporting should be proportionate to companies' activities' potential and actual risks and impacts and corresponding due diligence processes. In designing the reporting framework, the directive should pay due consideration to the existing legal framework for the reporting of non-financial information, which should be revised – according to long-standing trade union demands.
- f) The directive should also require companies to embed responsible and sustainable business conduct principles and considerations into their management systems and their business models, including in their business relationships (e.g. in their purchasing practices).<sup>xi</sup>

**Workers' and trade unions' involvement.** The international instruments mentioned above recognise the necessary role that trade unions, workers and their legitimate representatives, should play in the definition and implementation of companies' due diligence initiatives.<sup>xii</sup> The directive should fully recognise the role of workers as the most central actors in companies.<sup>xiii</sup> Without prejudice to existing information, consultation and participation legislation, but building on strong collective rights of workers, the directive should include the following elements:

- a) The right for trade unions at the relevant level, as defined by trade unions, to negotiate with the company the due diligence process that should be introduced.
- b) Mandatory involvement of trade unions and workers' representatives should be guaranteed in an effective manner and at an early stage in the identification of the actual and potential adverse impacts, as well as in the elaboration of the due diligence plan, in its implementation and enforcement, its periodic assessment and review.
- c) An early alert mechanism should be developed and managed in partnership with the trade union organisations in the companies concerned.
- d) Mandatory workers' information and consultation rights should be fully respected regarding the definition of the due diligence plan and its implementation, at national, European and global level, including through the involvement of the European

Works Councils. The information should be timely and sufficient to support the active and efficient involvement in the process. Workers' representatives in company boards should be fully involved as well in the different steps of the due diligence process.

- e) The directive should ensure that trade unions and workers' representatives of companies in the supply and subcontracting chains are also involved in the identification and assessment of the actual and potential negative impacts, in the definition and implementation of the due diligence plan and in the early alert mechanism. It is imperative that the directive provides trade unions with the resources and capacity to intervene and act on all stages of the process.
- f) Social dialogue practices, and trade union rights, notably the right to organise, to bargain collectively and the right to strike, must be protected and enforced also in the supply chain or subcontracting chains, including for non-standard employment relations.

**Business relationships, including supply and subcontracting chains.** Companies' operations may be linked with negative impacts or violations of human rights and social and environmental standards. This can be the result of the company's own activities, of the activities of the company's subsidiaries or controlled undertakings, as well as of the company's business relationships, in particular its supply and subcontracting chain. For this reason, *the UNGDP, the OECD Guidelines and the ILO Tripartite Declaration* recognise that due diligence should also cover companies' business relationships, including supply and subcontracting chains.<sup>xiv</sup> Due diligence requirements should therefore cover all companies' operations, independently of their size, including their own activities, the operations of their subsidiaries and controlled undertakings, and their business relationships, including their whole supply and subcontracting chains, franchise and contract management. They should cover operations, actual and potential impacts and violations both within and outside the EU. Limiting the application of the due diligence to the operations of entities with which companies have an established business relationship or over which they have a certain degree of control, would be counterproductive and incentive companies not to engage with and to distance themselves from their business partners and suppliers, in order to avoid due diligence obligations. It would also further encourage short term precarious business relationship, with very negative consequences on workers.

**Public monitoring.** Member states should ensure that one or more national public authorities (including for example labour inspectorate or health and safety inspectorate) have the responsibility to monitor the respect of companies' obligations included in the directive. The authority shall have the necessary resources and expertise to carry out controls, also ex officio and checks based on risk assessments, information received from whistle-blowers and complaints. It should work in close cooperation with and ensure the active participation of social partners. The European Labour Authority shall facilitate and enhance cooperation between the member states when it comes to the enforcement of due diligence. OECD contact points should play a role as well in case companies do not respect their obligations.

In addition, in sectors of high human risk violation, industry-specific solutions could be developed in cooperation with trade unions.

**Sanctions.** The directive should establish proportionate, effective and dissuasive sanctions for any violations by companies of their obligations. Sanctions should include exclusion from public procurement and public funding, as well as financial sanctions in proportion with companies' turnover and remediation. This should incentivise companies to comply with the obligations and to prevent negative impacts of their activities. This should further contribute to the upwards convergence of the approach towards human rights, including workers' and trade unions' rights, in the EU. Member States should

introduce positive incentives to promote an ambitious approach by companies towards sustainable economic operations, including in their supply and subcontracting chains.

**Access to justice and liability.** In case of violations of human rights and social and environmental standards violations as well as of negative impacts of companies' operations, effective remedies should be available for victims, including trade unions and other interested third parties. Considering the challenges and obstacles that victims often face in the access to justice in third countries where European companies' operations take place,<sup>xv</sup> the possibility of access to justice in the Member State where the company is established (or where it is conducts business activities) should be ensured. It should therefore be possible to submit claims against companies which are established or conduct activities or have otherwise a link with a Member State in that Member State' jurisdiction. This possibility is already foreseen by the French corporate duty of vigilance law of 27 March 2017.<sup>xvi</sup> A specific liability framework, including – where appropriate depending on the legal system and the violation – criminal liability, must be introduced for cases where companies fail to respect their due diligence obligations to their fullest extent and human rights, social and environmental standards violations or adverse impacts of companies' operations occur, including in their supply and subcontracting chains. The burden of proof regarding the full respect of companies' obligations and the link with the damages occurred shall rest with the company and not with the victims. <sup>xvii</sup> Measures to facilitate access to justice for victims should include appropriate support schemes. Interim proceedings should allow the halting of operations violating human rights, social and environmental standards.

**Relationship with other instruments regulating business liability.** In any case the directive shall not impact on other subcontracting and supply chain liability frameworks established at national, European and international level (e.g. joint and several liability in subcontracting chains). This is a redline. As recognised by the UNGP, “enterprises conducting [...] due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses” [and other impacts].<sup>xviii</sup> Due diligence and companies' duty of care are two separate and complementary duties. The directive shall carefully maintain this distinction and clarify that companies shall not be able to escape liability established in other legal instruments by arguing that they have respected the due diligence obligations defined in the directive. In addition, the efforts to establish a directive on due diligence should not undermine trade union initiatives to strengthen the liability of main companies in subcontracting chains and should be accompanied by renewed initiatives in this area, including by deleting the due diligence exception from the subcontracting liability framework in the Enforcement Directive.

**Important clauses.** The directive should include a non-regression clause, a most favourable clause as well as a review clause. The requirements of a new EU directive should also apply to existing voluntary due diligence tools, which should be adapted where necessary.

**Trade.** Due diligence requirements together with the ratification of ILO conventions should act as a precondition to trade and investment agreements negotiated by the EU. Due diligence requirements should go in parallel with introducing binding and enforceable labour clauses in EU trade agreements.<sup>xix</sup> Enforceable labour clauses based on complaint and effective economic consequences mechanisms that can be triggered by trade unions in case of violation of ILO standards by states must be introduced in every trade deal and investment agreement negotiated by the EU. Furthermore, through enforceable labour clauses, trade unions and other stakeholders should have effective remedies to address violations, both by multinational companies and by the states. Multinationals should only be able to benefit from the coverage of trade and investment agreements, if they demonstrate an effective commitment to the respect of workers' and trade union rights. Public procurement and public funding in the EU should be available to companies from third countries only in case they apply due diligence requirements comparable to those

established in a directive. This should lead to guaranteeing labour protections with a zero-tolerance approach to violation of workers and trade unions rights<sup>xx</sup>.

Due diligence should not be considered as an alternative to stronger social clauses. The efforts to ensure the respect by states of ratified ILO Conventions in law and practice must be renewed and based on stronger enforcement mechanisms in trade treaties.

**UN Treaty on Business and Human Rights.** The ETUC reiterates its strong commitment to engage, in cooperation with the International Trade Union Confederation (ITUC), to push for the adoption and the ratification of the UN Treaty on Business and Human Rights.

### **Trade union initiatives - next steps**

1. European and national developments have opened a window of opportunity for a European directive on mandatory human rights due diligence and responsible business conduct. This should incentivize the European Commission to act.<sup>xxi</sup> The resistance seems however significant.
2. The ETUC will inform and work with the European institutions to call for a directive including the abovementioned characteristics. In particular:
3. The ETUC will liaise with the European Commission to push for a proposal for a directive and to ensure the appropriate involvement and consultation of social partners in its definition, requesting for our objectives to be included in such a proposal;
4. The ETUC will work with the European Parliament in order to ensure support for our demands;
5. The ETUC will also contact Member States, addressing the Permanent Representations, and the EU Council Presidencies, with the active involvement and support of affiliates.
6. While maintaining our approach and objective, as well as our specific role in the EU legislative process, some joint initiatives with NGOs and other organisations might also be organised – where useful – to push for a legislative proposal.<sup>xxii</sup>
7. Affiliated unions are requested to support the achievement of the objectives by actively promoting them among their members and by supporting the actions of the ETUC. National trade unions are requested to engage and put the case for a directive on due diligence before their governments, parliaments and all institutional instances which can play a role in promoting the initiative.



## ANNEX

### Updated and revised ETUC discussion paper on Due diligence, focusing on Human Rights and responsible business conduct

This **discussion paper** aims at highlighting the importance of the introduction of European binding legislation on due diligence, focussing on human rights and responsible business conduct covering also the supply chain. It provides *inter alia* the background and reasons for the discussion and gives an overview of the current insufficient *status quo*, which does not guarantee the protection of human rights and sustainable economic activities. It also puts forward some of the key elements that a binding legislative initiative should address as well as the main issues which should be further discussed internally.

This discussion paper will be the basis of in-depth discussions in the relevant ETUC permanent committees in the coming months. These discussions will lead to an ETUC position to be adopted by the Executive Committee possibly in December 2019. The ETUC position will come timely to participate to the forthcoming Commission initiative on due diligence and the related initiatives of the EU Council presidencies.

#### Introduction

In its **Action Programme 2019-2023**, the ETUC has stated that it will push for the adoption of an EU directive on human rights (including labour rights) due diligence. According to the *Action Programme* the directive should oblige parent corporations to identify and act upon actual and potential human rights risks or violation, including workers and trade union rights and environment standards in their operations, subsidiaries and chain of subcontractors, including outside the European Union.<sup>(1)</sup> The *Action Programme* also included full support for the legally binding treaty on multinational companies and human rights currently under negotiation within the UN.<sup>(2)</sup>

In 2019, the **European Commission** (Directorate General Justice and Consumers) commissioned the British Institute of International and Comparative Law (BIICL) to carry out an external **study on due diligence requirements through the supply chain**.<sup>(3)</sup> The ETUC was not invited to provide inputs in the framework of this study but has requested and obtained to be interviewed, providing comments along the lines defined in the *Action Programme*. The study commissioned by the European Commission could be the basis for a proposal by the European Commission for a (non) legislative initiative on due diligence in supply chains. For this reason, it is important to start a discussion within the European trade union movement to define the position of the ETUC on the different aspects of a possible initiative. Such a discussion should also include contacts and exchanges of views with the ITUC and TUAC.

In the meantime, the European Commission (DG FISMA) is also carrying out a Fitness Check on the EU framework for public reporting by companies.<sup>(4)</sup> The Commission will report on the overall assessment in a Commission Staff Working Document in 2019. Discussions connected with sustainable finance and the promotion of ESG consideration are ongoing also in the framework of the legislative initiatives connected with the *Action Plan on Sustainable Finance*.<sup>(5)</sup>

## **The need for a European binding legislative initiative on due diligence**

### **Why we need to act – The *status quo* does not deliver**

Today, corporations operate across borders with few obstacles. Complex corporate structures and supply and subcontracting chains make it difficult to attribute responsibility to parent companies for human rights violations as well as for negative social and environmental impacts in their global operations.

Despite the *UN Guiding Principles on Business and Human Rights*, currently there are no obligations at EU level for companies to apply due diligence mechanisms for their supply chains – except for very particular sectorial situations (e.g. conflict minerals). The current situation is characterized by a patchwork of different and diverging (voluntary) frameworks and by the absence of judicial or quasi-judicial bodies that can interpret and monitor the relevant international instruments in this area.

This means that, where there are no legal requirements at national level (i.e. in most cases), companies can choose whether to introduce due diligence instruments and processes or not.<sup>(6)</sup> The reliance on a voluntary approach to promote business respect for human rights has proven insufficient. The current situation without a binding regulatory framework does not incentivize multinationals to adopt a due diligence approach: the establishment of effective preventative mechanisms by companies to avoid human rights violations and negative impacts in their operations (including in their supply chain) is not widespread nor based on effective and comparable processes. There is no real culture of compliance and the voluntary nature of CSR initiatives leaves too much freedom to MNs to choose what suits them best independently of what society, workers and the environment require. Furthermore, companies take advantage of different legislation within the EU Member States by forum shopping.

The absence of clear legal standards establishing companies' duties (together with the relevant sanctions) and liability and ensuring access to justice for victims of corporate malpractice has furthermore produced accountability gaps. Victims of human right violations or of negative impacts of companies' activities are too often left without adequate remedies and companies are not made accountable for human rights violations and negative impacts in their activities.

The current situation is insufficient and unacceptable, since violations of human rights and workers' rights, including with regard to social dialogue, the right to bargain collectively and information, consultation and participation rights, continue to take place in multinationals' activities and in their supply and subcontracting chains (just to mention few recent cases: child labour in mobile phone companies' supply chains<sup>(7)</sup>, anti-trade union campaign by Volkswagen<sup>(8)</sup>, Total in Uganda destroying land and livelihood when building a pipeline,<sup>(9)</sup> supermarkets denounced by Oxfam for their inaction in terms of the rights of workers, women or small suppliers in their supply chains)<sup>(10)</sup>.

The current situation is also negative for businesses and for investors. The absence of legal certainty and clarity is a first significant disadvantage. Furthermore, the diverging rules and frameworks create a fragmented situation in the internal market which makes compliance for companies more complex and difficult. The *status quo* is characterized by unfair competition between companies (especially to the detriment of SMEs) without the necessary level playing field. Finally, companies with a business strategy based on sustainability and a fair and transparent relationship with their stakeholders have better results in the long term: an ambitious regulatory framework at European level on due diligence would contribute to more sustainable business activities and better long-term economic performances. Also, for investors the absence of comparable due diligence processes (and of reporting on such processes and their implementation) is highly problematic. In addition to the same

problems other businesses face, it is difficult for them to evaluate and to compare companies' sustainability and due diligence processes, which is essential to make investment decisions. For these reasons, despite the position of the employers' associations at EU and national levels (generally against legally binding measures), a growing number of companies and investors support the establishment of a due diligence regulatory framework at European level.<sup>(11)</sup>

### **A European binding legislative initiative**

Against this negative *status quo*, a European legally binding instrument would provide for the necessary upwards convergence of respect of human rights and social and environmental standards, leading to sustainable business conduct and strengthening compliance culture. A European legislative initiative establishing mandatory due diligence mechanisms for companies' operations and their supply chains is necessary to ensure that comparable and effective processes are introduced. Companies' activities should be based on a responsible and sustainable approach in the areas of human rights, environmental and social impacts, anti-corruption, tax and corporate governance matters. A European legislative initiative on due diligence would constitute an important step in ensuring that companies' activities are more sustainable and in establishing accountability for the impact of their operations. It would furthermore ensure a better environment for businesses and investors, based on harmonised rules, legal certainty and fair competition.

Effective prevention should be key to an EU initiative on due diligence. Building upon the UN Guiding Principles and the OECD Guidelines, due diligence should be defined as the process "to identify, prevent and mitigate actual and potential adverse impacts [...] and account for how these impacts are addressed".<sup>(12)</sup> The actual and potential negative impacts refer to the impacts with which companies "may be involved either through their own activities or as a result of their business relationships" (i.e. including subsidiaries, controlled undertakings, supply and subcontracting chains).<sup>(13)</sup>

A European legally binding instrument on due diligence would furthermore contribute to promote a corporate governance model which does not focus on shareholders' interests only but is based on the interests of all stakeholders and on the sustainability of economic activities.

Such a binding instrument could furthermore have a positive impact on EU trade policy. Due diligence requirements should then be incorporated in every trade deal negotiated by the EU, to ensure that trade partners commit to the respect of workers' rights and that trade unions and other stakeholders have effective remedies to address violations, both by multinational companies and by the states (through trade sanctions for instance). This would represent an important step forward towards a more socially oriented trade agenda.

### **Setting the scene**

A possible EU binding legislative initiative on human rights due diligence through the supply chain would build upon international instruments and standards, other EU legislative instruments and national (legal) frameworks.

Several **international instruments** deal with the framing of companies' supply chains and provide for definition of due diligence obligations and mechanisms.

The **UN** are dealing with this problem at different levels. In interpreting the legally binding International Covenant on Economic, Social and Cultural Rights the respective Committee on Economic, Social and Cultural Rights has adopted its most recent '*General comment No. 24 (2017) on State obligations* under the International

Covenant on Economic, Social and Cultural Rights *in the context of business activities*'.<sup>(14)</sup>

In relation to non-binding instruments the *UN Guiding Principles on Business and Human Rights* of 2011 constitute a first important instrument in this area. *Inter alia*, it clarifies that the responsibility to respect human rights requires that business enterprises seek to prevent adverse human rights impacts also in the context of their business relationships. Companies should *inter alia* implement “a human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights” and “processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute”.<sup>(15)</sup> The *UN Global Compact* defines ten principles which responsible companies should comply with (*inter alia* “businesses should support and respect the protection of internationally proclaimed human rights; and make sure that they are not complicit in human rights abuses”).<sup>(16)</sup>

The **ILO** has engaged with labour issues in supply chains through a number of initiatives. The 2011 *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* is particularly important. The MNE Declaration is the only global instrument in this area that was elaborated and adopted by governments, employers and workers from around the world. With regard to due diligence, it refers to the UN Guiding Principles and states that “enterprises, including multinational enterprises, should carry out due diligence to identify, prevent, mitigate and account for how they address their actual and potential adverse impacts that relate to internationally recognized human rights, understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the ILO Declaration on Fundamental Principles and Rights at Work”.<sup>(17)</sup> The MNE Declaration is *inter alia* based on the Declaration of Philadelphia (1944)<sup>(18)</sup> and backed by the Declaration on Social Justice for a Fair Globalization (2008)<sup>(19)</sup> and most recently by ILO Centenary Declaration (2019)<sup>(20)</sup> referring to globalization.

Concerning more specifically supply chains, the 2016 ILO *Resolution concerning decent work in global supply chains* also refers to the obligation for companies to carry out human rights’ due diligence. It includes a focus on the role of governments in supporting (and requiring, where necessary) companies to implement due diligence processes within their supply chains.<sup>(21)</sup>

Also the **Council of Europe** has been active on the issue of due diligence requirements, in particular with the *Committee of Ministers Recommendation on Human Rights and Business* of 2016.<sup>(22)</sup> Building on the 2011 UN Guiding Principles, the Recommendation provides more specific guidance to assist member States in preventing and remedying human rights violations by business enterprises and also insists on measures to induce business to respect human rights (including particular additional measures to protect workers).<sup>(23) (24)</sup>

The **OECD Guidelines for Multinational Enterprises** include a definition of companies’ due diligence obligations and define several elements upon which due diligence process should be based. The Guidelines also require participating states to establish National Contact Points (“NCPs”), to which complaints may be submitted where a company is in breach of the Guidelines.<sup>(25)</sup> The OECD has been very active on due diligence, publishing several guidance manuals, including the 2018 *Due diligence Guidance for responsible business conduct*.<sup>(26)</sup>

At **European Union** level, the European non-financial reporting directive requires large public interest companies to report on their impacts and risks of their activities with regard to human rights, environmental, social, labour and anti-corruption matters, as well as their policies to reduce those risks, including due diligence processes.<sup>(27)</sup> This directive is being reviewed by the Commission in the framework

of the Fitness Check on Corporate Reporting. The ETUC has been calling for a revision of the directive to enlarge the scope, strengthen the reporting requirements, eliminating the comply or explain approach, and ensuring that the reporting is based on detailed and comparable international reporting systems developed with stakeholder participation. Sectoral European pieces of legislation have already established due diligence requirements in the supply chain with regard to specific sectors, for example the Timber Regulation and the Conflict Mineral Regulation.<sup>(28)</sup>

Initiatives have been developed and discussions have been ongoing at **national level** as well in recent years. The most important and ambitious one is the French corporate duty of vigilance law of 27 March 2017, which establishes an obligation for large companies (which employ at least 5.000 workers in France or 10.000 in France and abroad) to establish, implement and publish a vigilance plan to identify and prevent human rights and environmental impacts resulting from their activities, from the activities of the companies they control directly or indirectly and from the activities of subcontractors and suppliers with which they maintain an “established business relationship”. In case of a breach of the obligations, when harm occurs, companies can be held liable and will have to compensate for the harm that would have been avoided were the obligations properly fulfilled. The French legislation constitutes an important reference and source of inspiration. Similar legislation is currently considered in different European countries (including Denmark, Finland, Germany, Luxembourg, Switzerland...). In 2016, the UK adopted the Transparency in Supply Chain Clause of the Modern Slavery Act, which requires companies to report on the measures they undertake to prevent slavery or human rights trafficking in their supply chains. In the area of the fight against child labour, the Netherlands has adopted the Child Labour Due Diligence Bill in 2019. Also, the principle of equitable assessment contained in the Hungarian labour code constitutes an interesting example to enlarge the main companies’ liability.

### **Discussions at EU level**

Discussions at European level on the possibility to establish a European directive to introduce due diligence obligations for companies with regard to human rights and social and environmental impacts in their supply chains have been ongoing for quite some time.

The **European Parliament** adopted different resolutions calling for the adoption of mandatory due diligence requirements covering companies’ supply chains.<sup>(29)</sup> In the European Parliament an informal working group on Responsible Business Conduct was also formed in the last term. It promoted before the European elections a *Pledge on Business and Human Rights* which was signed by more than 50 EP candidates.<sup>(30)</sup> The working group has also developed a *Shadow EU Action Plan on Business and Human Rights*. This plan includes *inter alia* the objective of “adoption of legislation requiring corporations to carry out human rights due diligence regarding their operations, investments, business relationships and supply chains”.<sup>(31)</sup>

Also, the **Council of the European Union** has taken a position on the need to ensure respect of human rights in business operations and to strengthen the implementation of due diligence mechanisms. The *EU Council conclusions on Responsible Global Value Chains* of 2016 encourages the Commission “to enhance the implementation of due diligence and to foster dialogue and cooperation amongst all relevant public and private stakeholders, in order to achieve a global level playing field and to implement policy measures aimed at promoting e.g. human rights due diligence at company level”. The conclusions also stress that “doing business in a responsible way may ultimately create a competitive advantage”.<sup>(32)</sup> The *EU Council conclusions on Business and Human Rights* of 2016 states that “the EU recognises that corporate respect for human rights and its embedding in corporate operations and value and supply chains is indispensable to sustainable development. and achieving the SDGs”. The conclusions stress the importance of ensuring access to remedy for

victims and encourages the Commission to enhance the implementation of due diligence.<sup>(33)</sup>

The **European Economic and Social Committee's** recent work on business and human rights includes *inter alia* the 2015 *information Report on Corporate social and societal responsibility as a lever for action in the EU's partnership agreements (trade, investment and cooperation/development)* and the 2016 *Opinion on Decent work in global supply chains*.<sup>(34)</sup>

In 2016, **eight national parliaments** (France, UK, Italy, Estonia, Lithuania, Slovakia, Portugal and the Netherlands) launched a Green Card Initiative to call on the European Commission to move towards mandatory human rights due diligence at European level, following on the example of the French law.

A **network of NGOs and civil society organisations** is strongly advocating for the introduction of European legislation establishing mandatory due diligence covering companies' operations and supply chains.<sup>(35)</sup>

During the **hearing in the European Parliament of Commissioner designate for Justice Didier Reynders**, several questions on the need to introduce a binding legal framework on due diligence were raised. The Commissioner designate did not engage to put forward a proposal, but recognised that voluntary commitments are not enough. He added: "I am sure that we need to go through a real change in company law to ask more obligations about the social interest of the companies, and I'm also sure that it is quite important to discuss about the supply chain". In the previous written replies to the European Parliament, he had declared: "as for any further legislative initiatives on responsible business practices or 'due diligence', I will first assess carefully the concrete effect and impact, the proportionate nature of any measure and the possible effect on the level playing field for our industries. But these ideas deserve further exploration at EU level".<sup>(36)</sup>

## Endnotes

(1) ETUC, *Action Programme 2019-2023*, 2019.

<https://www.etuc.org/sites/default/files/page/file/2019-06/20190621%20Action%20Programme.pdf>

(2) Ivi, p. 50. "The ETUC will actively support a legally binding treaty on multinational companies and human rights currently under negotiation within the UN and will work to ensure that the European Union receives a formal negotiating mandate from the European Council".

(3) According to the explanation of the Commission, "this study aims to provide a detailed examination of the existing regulation and proposals for due diligence in the supply chain in the area of human rights, environment and governance. The study will address the state of play and how it could be improved as regards human rights abuses, including on rights of the child, and sustainability, including on the one hand environmental sustainability and fighting climate change, and on the other hand sustainable corporate governance in a broad sense. The output from this study will help the Commission in assessing a range of options regarding due diligence through the supply chain and their likely impacts. It will do so by considering various models of due diligence requirements as they are already contained in existing or proposed regulatory and industry mechanisms, as well as current business practices to implement human rights and environmental due diligence".  
European Commission, *Letter of recommendation for sustainable due diligence study of Maija Laurila*, 27 March 2019.

(4) According to the Commission, the objectives of the fitness check are:

- a) to assess whether the EU public reporting framework is overall still relevant for meeting the intended objectives, adds value at the European level, is effective, internally consistent, coherent with other EU policies, efficient and not unnecessarily burdensome;
- b) to review specific aspects of the existing legislation as required by EU law; and

c) to assess whether the EU public reporting framework is fit for new challenges (such as sustainability and digitalisation).

- (5) In this context, the Commission set up a technical expert group on sustainable finance (TEG) to assist in the development of a unified classification system for sustainable economic activities, an EU green bond standard, methodologies for low-carbon indices, and metrics for climate-related disclosure.

The Commission proposed three legislative proposals. An provisional agreement between the institutions was reached and voted by the EP on the proposal for a Regulation on disclosures relating to sustainable investments and sustainability risks and amending Directive (EU)2016/2341 [COM(2018)354] and on the proposal for a Regulation amending the benchmark regulation [COM(2018)355]. The proposal for a Regulation on the establishment of a framework to facilitate sustainable investment [COM(2018)353] (including a taxonomy for environmentally sustainable economic activity) is still under discussion.

- (6) Also, the National Contact Points for the OECD Guidelines for Multinational Enterprises have no effective instruments and incisive powers to counter companies' decisions even when they choose not to introduce due diligence mechanisms.

(7)

<https://phys.org/news/2019-07-samsung-deceptive-advertising-france-ethics.html>;  
<https://www.bbc.com/news/technology-35311456>

- (8) IndustriALL suspends global agreement with Volkswagen, 2019.

<http://www.industrialall-union.org/industrialall-suspends-global-agreement-with-volkswagen>

- (9) Reuters, Campaign groups accuse Total of breaching French corporate duty law in Uganda, 2019.

<https://www.reuters.com/article/us-total-uganda-ngos/campaign-groups-accuse-total-of-breaching-french-corporate-duty-law-in-uganda-idUSKCN1TQ10Q>

- (10) BHRRC, Oxfam releases 2nd scoring of US & European supermarkets' global food supply chains, 2019.

<https://www.business-humanrights.org/en/oxfam-releases-2nd-scoring-of-us-european-supermarkets%E2%80%99-global-food-supply-chains>

- (11) *Inter alia:*

Business & Human Rights Resource Centre, *Investors representing \$1.3 trillion call on govts to make human rights due diligence mandatory throughout investment lifecycle*, 2019.

<https://www.business-humanrights.org/en/investors-representing-13-trillion-call-on-govts-to-make-human-rights-due-diligence-mandatory-throughout-investment-lifecycle>

Business & Human Rights Resource Centre, *List of large businesses & associations with public statements & endorsements in support of human rights due diligence regulation*, 2019.

<https://www.business-humanrights.org/en/list-of-large-businesses-associations-with-public-statements-endorsements-in-support-of-human-rights-due-diligence-regulation>

- (12) OECD, *Guidelines for Multinational Enterprises*, cit., Chapter II, Point 10.

- (13) UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, cit., Principle 18.

- (14) United Nations, *General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, adopted by the Committee on Economic, Social and Cultural Rights at its sixty-first session (29 May-23 June 2017).

<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmIBEDzFEovLCuW1a0Szab0oXTdImnsJZZVQcIMOUuG4TpS9jwLhCJcXiuZ1yrkMD%2fSj8YF%2bSXo4mYx7Y%2f3L3zvM2zSUBw6ujlnCawQrJx3hlK8Odk6DUwG3Y>

- (15) UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, 2011.

[https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr\\_eN.pdf](https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf)

Before the endorsement of the *Guiding Principles*, the United Nations Sub- Commission on the Promotion and Protection of Human Rights approved the *Norms on the*

*Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* in 2003. The Norms were considered by the UN Commission on Human Rights in April 2004 but were not approved.

United Nations Sub- Commission on the Promotion and Protection of Human Rights, *Responsibilities of transnational corporations and other business enterprises with regard to human rights*.

<https://documents-dds-ny.un.org/doc/UNDOC/LTD/G03/154/42/PDF/G0315442.pdf?OpenElement>

(16) UN Global Compact, *The Ten Principles of the UN Global Compact*.

<https://www.unglobalcompact.org/what-is-gc/mission/principles>

(17) ILO, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, adopted in 1977 and amended in 2000, 2006 and 2017.

[https://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/---emp\\_ent/---multi/documents/publication/wcms\\_094386.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf)

(18) ILO, *Declaration of Philadelphia*, 1944.

<https://www.ilo.org/legacy/english/inwork/cb-policy-guide/declarationofPhiladelphia1944.pdf>

(19) ILO, *Declaration on Social Justice for a Fair Globalization*, 2008.

[https://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/genericdocument/wcms\\_371208.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/genericdocument/wcms_371208.pdf)

(20) ILO, *ILO Centenary Declaration*, 2019.

[https://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_711674.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_711674.pdf)

(21) ILO, *Resolution concerning decent work in global supply chains*, 2016.

[https://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_497555.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_497555.pdf)

(22) CoE, *Committee of Ministers Recommendation on Human Rights and Business*, 2016.

<https://edoc.coe.int/en/fundamental-freedoms/7302-human-rights-and-business-recommendation-cmrec20163-of-the-committee-of-ministers-to-member-states.html>

In the framework of the CoE European Programme for Human Rights Education for Legal Professionals (HELP) a handbook was elaborated on “HR and business: handbook for legal practitioners”

<https://rm.coe.int/business-and-human-rights-a-handbook-of-legal-practitioners/168092323f>

An Online Platform for Human Rights and Business to monitor the developments in implementation of the Recommendation has been established.

[https://search.coe.int/cddh/Pages/result\\_details.aspx?ObjectId=090000168088ae09](https://search.coe.int/cddh/Pages/result_details.aspx?ObjectId=090000168088ae09)

The Platform is not operational yet, but all relevant material is being currently collected. Any case progress in the work is reported upon to the CDDH (Steering Committee for Human Rights), where the ETUC has a permanent observer status.

(23) The Recommendation elaborates on access to judicial remedy, drawing on Council of Europe expertise and legal standards in the field (civil and criminal liability, reduction of judicial barriers, legal aid, collective claims etc). It puts special emphasis on the additional protection needs of workers, children, indigenous people and human rights defenders. Section V of the Recommendation states that Member States should require businesses to respect workers’ rights in their territory and through their operations abroad and involving social partners in defining and implementing policies on these matters.

CoE, *Committee of Ministers Recommendation on Human Rights and Business*, cit.

“Section V: Additional protection of workers

58. Member States should require business enterprises to respect the rights of workers when operating within their territorial jurisdiction and, as appropriate, throughout their operations abroad when domiciled in their jurisdiction;

59. Member States should reinforce efforts to meet their obligations with regard to workers under the UN Covenant on Economic, Social and Cultural Rights, the European Convention on Human Rights, the European Social Charter, the European Social Charter (revised) and the fundamental conventions of the International Labour Organization concerning in particular freedom of association, the right to collective bargaining, the



prohibition of discrimination, child and forced labour, and all other relevant international instruments, including those relating to the health and safety of workers and people working in the informal economy.

60. Member States should involve social partners in the drafting and implementation of policies on matters which are particularly sensitive with regard to workers' rights".

- (24) In addition to the above-mentioned instruments, in 2010 the CoE Parliamentary Assembly adopted a Recommendation, a Resolution and a Report on Human rights and business, containing interesting relevant information, as well as the call for
- complementary legal instruments (convention or protocol to the ECHR),
  - enforcing supervisory systems e.g. those related to the European Social Charter,
  - making the link to actions MS can take in the areas of public procurement/ethical investment etc.

<http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=12991&lang=EN>

A more recent draft resolution calls for amongst others: to review the rules governing private transnational litigation such as the Rome II Regulation (setting the applicable law in transnational lawsuits) with the aim of securing access to remedies for victims of corporate abuse in third countries and to ensure better access to evidence and to address the reversal of the burden of proof in human rights cases.

<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=22985&lang=en>

- (25) OECD, *Guidelines for Multinational Enterprises*, 2011

<http://www.oecd.org/daf/inv/mne/48004323.pdf>

- (26) OECD, *Due diligence Guidance for responsible business conduct*, 2018.

<http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>

- (27) 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.

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0095&from=EN>

- (28) Regulation (EU) No 995/2010 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market.

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010R0995&from=EN>

Regulation (EU) 2017/821 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas.

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2017:130:FULL&from=EN>

- (29) The 2015 Resolution on the Second anniversary of the Rana Plaza building collapse and the state of play of the Sustainability Compact states that "new EU legislation is necessary to create a legal obligation of due diligence for EU companies outsourcing production to third countries, including measures to secure traceability and transparency, in line with the UN Guiding Principles on Business and Human Rights and the OECD MNE Guidelines".

*European Parliament resolution of 29 April 2015 on the second anniversary of the Rana Plaza building collapse and progress of the Bangladesh Sustainability Compact (2015/2589(RSP)), par 23.*

[http://www.europarl.europa.eu/doceo/document/TA-8-2015-0175\\_EN.pdf](http://www.europarl.europa.eu/doceo/document/TA-8-2015-0175_EN.pdf)

The 2016 Resolution on Corporate liability for serious human rights abuses in third countries called on the EU and the Member States "to lay down clear rules setting out that companies established in their territory or under their jurisdiction must respect human rights throughout their operations, in every country and context in which they operate, and in relation to their business relationships, including outside the EU; considers that companies, according to their size and capabilities, and including banks and other financing or lending institutions active in third countries, should ensure that they have systems in place to assess risks and mitigate potential negative impacts related to human rights, labour, environmental protection and disaster-related aspects of their operations

and value chains; calls on the Member States to assess periodically the adequacy of such laws and address any shortcomings”. The Resolution also highlighted the necessity of initiatives to ensure proper remedies and access to justice in case of violation of human rights in companies’ operations.

*European Parliament resolution of 25 October 2016 on corporate liability for serious human rights abuses in third countries* (2015/2315(INI)), par. 18.

[http://www.europarl.europa.eu/doceo/document/TA-8-2016-0405\\_EN.pdf](http://www.europarl.europa.eu/doceo/document/TA-8-2016-0405_EN.pdf)

(30) The Pledge included also the call for the “implementation of mandatory human rights due diligence standards as regards business operations, investments, business relations and global supply chains”.

*Pledge on Business and Human Rights.*

<https://responsiblebusinessconduct.eu/wp/2019/03/16/pledge-on-business-and-human-rights/>

(31) Working group on Responsible Business Conduct, *Shadow EU Action Plan on the Implementation of the UN Guiding Principles on Business and Human Rights within the EU*, 2019.

<https://responsiblebusinessconduct.eu/wp/wp-content/uploads/2019/03/SHADOW-EU-Action-Plan-on-Business-and-Human-Rights.pdf>

(32) *EU Council conclusions on Responsible Global Value Chains*, 2016.

<http://data.consilium.europa.eu/doc/document/ST-8833-2016-INIT/en/pdf>

(33) *EU Council conclusions on Business and Human Rights*, 2016.

<https://ec.europa.eu/anti->

[trafficking/sites/antitrafficking/files/council\\_conclusions\\_on\\_business\\_and\\_human\\_rights\\_foreign\\_affairs\\_council.pdf](https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/council_conclusions_on_business_and_human_rights_foreign_affairs_council.pdf)

(34) EESC, *information Report of the Section for External Relations on Corporate social and societal responsibility as a lever for action in the EU's partnership agreements (trade, investment and cooperation/development)*, 2015.

<https://www.eesc.europa.eu/en/our-work/opinions-information-reports/information-reports/corporate-social-and-societal-responsibility>

EESC, *Opinion on Decent work in global supply chains*, 2016.

<https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/decent-work-global-supply-chains>

Also, the EESC *Opinion on the Proposal for a Regulation of the European Parliament and of the Council establishing a financing instrument for the promotion of democracy and human rights worldwide* of 2013 is relevant in this area.

<https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/financing-instrument-promotion-democracy-and-human-rights-worldwide>

(35) See, *inter alia*: ActionAid International, Amnesty International, Anti-Slavery International, Clean Clothes Campaign, European Coalition for Corporate Justice (ECCJ), International Federation for Human Rights (FIDH), *Joint statement – NGOs welcome MEP initiative on responsible business conduct*, 2019.

<https://amnestyeu.azureedge.net/wp-content/uploads/2019/03/NGOs-welcome-MEP-initiative-on-responsible-business-conduct-18-march.pdf>

P. Blommer (BHRR) and C. Saller (ECCJ), *Why von der Leyen must put rights at core of business*, 2019.

<http://corporatejustice.org/news/16781-why-von-der-leyen-must-put-rights-at-core-of-business>

ECCJ, *Evidence for mandatory HRDD legislation*, 2018.

[http://corporatejustice.org/policy-evidence-mhrdd-november-2018-final\\_1.pdf](http://corporatejustice.org/policy-evidence-mhrdd-november-2018-final_1.pdf)

ECCJ, *Position Paper – Key features of mandatory human rights due diligence*, 2018.

[http://corporatejustice.org/eccj-position-paper-mhrdd-final\\_june2018\\_3.pdf](http://corporatejustice.org/eccj-position-paper-mhrdd-final_june2018_3.pdf)

ECCJ, *Launch of "BHRinLaw" Website to track State initiatives on Corporate Accountability and Access to Remedy*, 2019.

<http://corporatejustice.org/news/5552-launch-of-bhrinlaw-website-to-track-state-initiatives-on-corporate-accountability-and-access-to-remedy>

ClientEarth and Global Witness, *Strengthening corporate responsibility. The case for mandatory due diligence in the EU to protect people and the planet*, 2019.

<https://www.documents.clientearth.org/wp-content/uploads/library/2019-07-23-strengthening-corporate-responsibility-the-case-for-mandatory-diligence-in-the-eu-to-protect-people-and-the-planet-coll-en.pdf>

E. Choidas (ShareAction), L. Cunha (ActionAid International), R. Owens (Global Witness), *Human rights and green finance: friends or foes?*, 2019.

<https://www.euractiv.com/section/energy-environment/opinion/human-rights-and-green-finance-friends-or-foes/>

The Textilbündnis initiative.

<https://en.textilbuendnis.com/en/>

(36) Answers to the European Parliament. Questionnaire to the Commissioner-designate Didier Reynders (Commissioner-designate for Justice).

<https://www.europarl.europa.eu/resources/library/media/20190927RES62432/20190927RES62432.pdf>

Hearing of Commissioner-designate Didier Reynders (Commissioner-designate for Justice), 2 October 2019.

<https://www.europarl.europa.eu/resources/library/media/20191002RES63250/20191002RES63250.pdf>

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<sup>i</sup> A directive would constitute the most appropriate legal act. It would have binding force, but it would leave room for Member States to define in the transposition specific and more stringent rules according to national traditions and specificities, while ensuring the achievement of the minimum results defined in the European legal act. See Article 288 TFEU.

<sup>ii</sup> See in annex *ETUC discussion paper on Due diligence, focusing on human rights and responsible business conduct*, Chapter “Setting the scene”.

<sup>iii</sup> There are different options - which could be used in conjunction - including Article 50(1) TFEU (freedom of establishment), Article 207 TFEU (common commercial policy), Article 192(1) TFEU (objectives of the EU policy on environment) and/or Article 114 TFEU (functioning of the internal market). The choice in the combination of legal bases should allow for the achievement of the abovementioned objectives.

<sup>iv</sup> UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, 2011.

[https://www.ohchr.org/documents/publications/GuidingprinciplesBusinessshr\\_eN.pdf](https://www.ohchr.org/documents/publications/GuidingprinciplesBusinessshr_eN.pdf)

OECD, *Guidelines for Multinational Enterprises*, 2011.

<http://www.oecd.org/daf/inv/mne/48004323.pdf>

OECD, *Due diligence guidance for responsible business conduct*, 2018.

<http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>

ILO, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, adopted in 1977 and amended in 2000, 2006 and 2017.

[https://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/---emp\\_ent/---multi/documents/publication/wcms\\_094386.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf)

CoE, *Committee of Ministers Recommendation on Human Rights and Business*, 2016.

<https://edoc.coe.int/en/fundamental-freedoms/7302-human-rights-and-business-recommendation-cmrec20163-of-the-committee-of-ministers-to-member-states.html>

<sup>v</sup> EU Recommendation 2003/261

<sup>vi</sup> As for the definition of Human Rights in general, they should include the rights enshrined in:

- UN instruments:
  - Universal declaration of Human Rights (UDHR),
  - International Covenant on Civil and Political Rights (ICCPR),
  - International Covenant on Economic, Social and Cultural Rights (ICESCR);
- ILO Conventions and Recommendations (all, in particular the 8 fundamental ones, but also in relation to this issue the Convention(s) on Labour Inspection and Public Procurement/public contracts are particularly relevant);
- CoE:
  - European Convention of Human Rights (ECSR),

- 
- European Social Charter (ESC),
  - (Revised) European Code of Social Security (ECSS);

- EU:

- Charter of Fundamental Rights of EU, but also
- the articles of the primary EU Treaties recalling/referring to the Human Rights objectives and instruments (see e.g. article 2 TEU - The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights...).

In relation to the Human Rights instruments, this includes the case law of the respective (quasi-)judicial monitoring/enforcement bodies and the fact that "human rights are universal and inalienable; indivisible; interdependent and interrelated.

vii The UNGP refers to Human Rights due diligence, while the OECD Guidelines and the ILO Tripartite Declaration have a broader scope. According to the OECD Guidelines for example, due diligence should address actual or potential adverse impacts in a wide range of areas, including human rights, employment and industrial relations, environment, combating bribery, bribe solicitation and extortion, consumers interest... Considering the aim of the directive, i.e. to address not only actual and potential human rights violations, but also the respect of environmental standards, social and environmental impacts and other impacts linked with companies' operations, it is appropriate to ensure that due diligence obligations cover also those areas.

OECD, *Guidelines for Multinational Enterprises*, cit., Paragraphs 10-12.

viii UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, cit., Principles 17-23 and commentaries; OECD, *Guidelines for Multinational Enterprises*, cit., General Policies, Paragraphs 10-14 and commentaries; OECD, *Due diligence guidance for responsible business conduct*, cit., in particular pp. 21-35; ILO, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, cit., paragraph 10.

ix The following elements are based on a combination of the most advanced elements of the UNGP, the OECD Guidelines and Guidance and the ILO Tripartite Declaration.

x French corporate duty of vigilance law of 27 March 2017, Article 1.

xi See in particular OECD, *Due diligence guidance for responsible business conduct*, cit., in particular pp. 22-24.

xii UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, cit., Principles 18, 20-22 and commentaries; OECD, *Guidelines for Multinational Enterprises*, cit., General Policies, Paragraph 14 and commentaries; OECD, *Due diligence guidance for responsible business conduct*, cit., in particular pp. 18-19, 21-35; ILO, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, cit., paragraph 10(e).

xiii S. Vitols and N. Kluge, *The Sustainable Company: a new approach to corporate governance*, Vol. I, 2011 p. 26.

<https://www.etui.org/Publications2/Books/The-Sustainable-Company-a-new-approach-to-corporate-governance>

xiv UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, cit., Principle 13, 17-19 and commentaries; OECD, *Guidelines for Multinational Enterprises*, cit., General Policies, Paragraph 12-13 and commentaries; ILO, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, cit., paragraph 10(c) and (e).

xv This challenge is also recognised by the UNGP. UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, cit., commentary to Principle 25: "legal barriers that can prevent legitimate cases involving business-related human rights abuse from being addressed" including "where claimants face a denial of justice in a host State and cannot access home State courts regardless of the merits of the claim".

xvi French corporate duty of vigilance law of 27 March 2017, Article 2.

xvii This would constitute an improvement of the French legislation, where civil liability for those cases has been established, but the burden of proof is on the claimant. French corporate duty of vigilance law of 27 March 2017, Article 2. See European Parliament, Policy Department for External Relations, *Study on Access to legal*

*remedies for victims of corporate human rights abuses in third countries*, 2019.

[https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO\\_STU\(2019\)603475\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf)

xviii UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, cit., commentary to Principle 17.

xix *ETUC Resolution for an EU progressive trade and investment policy*.

<https://www.etuc.org/en/document/etuc-resolution-eu-progressive-trade-and-investment-policy>

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<sup>xx</sup> The current mission letters of Phil Hogan, Commissioner-designate, only foresee such approach for child labour [https://ec.europa.eu/commission/sites/beta-political/files/mission-letter-phil-hogan-2019\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/mission-letter-phil-hogan-2019_en.pdf)

<sup>xxi</sup> See the attached *ETUC discussion paper on Due diligence, focusing on human rights and responsible business conduct*, Chapters “Setting the scene” and “Discussions at EU level”.

<sup>xxii</sup> A call for EU due diligence legislation was already co-signed by the ETUC and by several European Trade Union Federations together with NGOs and civil society organisations. *A call for EU human rights and environmental due diligence legislation*, 2019. [https://www.etuc.org/sites/default/files/document/file/2019-10/Final\\_CS0\\_EU\\_Due\\_Diligence\\_Statement\\_03.10.19-compressed.pdf](https://www.etuc.org/sites/default/files/document/file/2019-10/Final_CS0_EU_Due_Diligence_Statement_03.10.19-compressed.pdf)