



ECCJ Position Paper, June 2018.

## KEY FEATURES OF MANDATORY HUMAN RIGHTS DUE DILIGENCE LEGISLATION

---

*The absence of legal standards which define companies' duties and ensure access to justice for victims of corporate malpractice has produced serious **accountability gaps**.*

*ECCJ has identified **ten key features** for **effective, comprehensive** mandatory HRDD legislation.*

*Decision-makers at country and the EU levels should take note of these elements when developing mandatory HRDD legislation.*

---

### About ECCJ

ECCJ is the only European coalition bringing together European campaigns and national platforms of NGOs, trade unions, consumer organisations and academics to promote corporate accountability.



*Child miners as young as 11 in Eastern Congo. Picture by Sasha Lezhnev-Enough Project, CC License.*

## Background

Today, corporations operate across national borders with few or no obstacles. **Complex corporate structures** and supply chains make it difficult, frequently impossible, to attribute responsibility to parent companies for human rights violations in their global operations.

The absence of legal standards which define companies' duties and ensure access to justice for victims of corporate malpractice has produced **accountability gaps**, and has allowed companies to profit from operating in countries where laws guaranteeing human rights or environmental standards do not exist or are not adequately enforced.

Human Rights Due Diligence (HRDD) was established in the United Nations Guiding Principles on Business & Human Rights (UNGPs) as the procedure enabling companies to put their responsibility to respect human rights into practice. **HRDD has the potential to prevent human rights abuses in global business operations** provided that it is correctly implemented and the appropriate enforcement mechanisms are established.

There are ongoing efforts at the international level to regulate businesses' responsibility to respect human rights, such as the discussions at the United Nations to establish an international binding instrument<sup>1</sup>. Nonetheless, these processes should not delay the implementation of existing frameworks at country and regional levels.

Since the UN Human Rights Council's adoption of the UNGPs in 2011, full implementation of the corporate responsibility to respect human rights and of HRDD has remained marginal. **A general reliance on voluntary and incentive-driven measures** to promote business respect for human rights by European Union (EU) decision-makers has proven insufficient.

In the last years, however, **several European and non-European countries**<sup>2</sup>, as well as the EU, have adopted or started to consider legislation that embeds elements of HRDD into law<sup>3</sup>.

Three generations of regulation can be observed in this regard:

- The first generation concentrates on **HRDD reporting obligations**. The Transparency in Supply Chains clause in the UK Modern Slavery Act<sup>4</sup> is representative of this type of norms. In the EU, the Non-Financial Reporting Directive has also established general disclosure requirements for large companies<sup>5</sup>.
- The second generation stipulates a **full HRDD obligation**, which includes risks identification, the obligation to take action and to report on measures taken, including their outcomes. The EU already imposes HRDD obligations for importers of conflict minerals<sup>6</sup>. It has also established due diligence requirements for operators that place timber and timber products on the EU single market<sup>7</sup>. The European Commission has

committed to assess by 2019 the possibility of introducing supply chains due diligence requirements for corporate boards<sup>8</sup>.

In The Netherlands, the Child Labour Due Diligence bill implements this approach with a specific focus on child labour<sup>9</sup>. However, the link between corporate liability and access to justice for victims of corporate malpractice remains in many countries ill-defined<sup>10</sup>.

- A third emerging generation of laws, starting with the French "duty of vigilance law" (2017)<sup>11</sup>, the Swiss citizen Responsible Business Initiative<sup>12</sup> and a respective counterproposal by the Swiss parliament<sup>13</sup>, explicitly **links HRDD obligations to existing (civil) corporate liability**.

While such an explicit link does not currently exist in most country jurisdictions, it should not be assumed that such liability could not be construed based on existing legal principles and tort provisions<sup>14</sup>. Explicit and clear regulation would therefore increase the practice of HRDD while also contributing to greater legal certainty for all stakeholders.

These developments represent solid steps in the right direction, and they show a growing acceptance by decision-makers of the need for mandatory HRDD<sup>15</sup>.

Decision-makers at country and the EU levels should take note of this emerging trend and begin work for **the adoption of mandatory HRDD legislation**.



*Friends of the Earth Europe (FoEE) exposed the damage to communities and the environment caused by Shell's oil operations, at Shell's 2011 General Assembly in The Hague.*  
©FoEE

In light of the variety of standards and requirements that are emerging across jurisdictions, ECCJ has identified **ten key features for effective, comprehensive mandatory HRDD legislation**.

These key features are essential to achieving legislative reforms that implement HRDD to its full potential, while helping to alleviate the **numerous obstacles faced by victims of corporate-related human rights abuses when seeking justice** and remedy for harm suffered.

The selection derives from a review of existing institutional and civil society-driven initiatives<sup>16</sup>, taking into account the various differences among national legal systems and traditions.

These ten key features represent a **set of minimum common principles** that lawmakers can adapt into their specific legal contexts.

States should take these features into account when developing HRDD legislation. The EU should also consider them in a future legal framework to harmonize mandatory HRDD at European level.

## **Key features of mandatory Human Rights Due Diligence (mHRDD) Legislation**

### *Scope of human rights protected*

- 1 The law covers **all internationally recognized human rights and environmental standards**.

Human rights covered include, at a minimum, those enshrined in the *International Bill of Human Rights*, as well as the principles concerning fundamental rights set out in the *International Labour Organisation's Declaration on Fundamental Principles and Rights at Work*. For EU Member States, they also include the rights enshrined in the *EU Charter of Fundamental Rights*.

International environmental standards refer to those norms adopted in the framework of international processes (including Public International Law<sup>17</sup>, or standards developed by international organisations<sup>18</sup>).

The law makes clear that, depending on their particular circumstances and context, companies must look **to additional standards** defined in international treaties for the protection of the **rights of particularly vulnerable groups or individuals** such as indigenous peoples, migrants or women.

### **Companies covered by the law**

- 2 The law applies to **large companies** whose corporate seat, headquarters or principal place of business lays in the respective jurisdiction, regardless of their legal form.

At a minimum, the law also applies to **small or medium-sized enterprises (SMEs)** whose business activity bears particular risk of severe adverse impacts on human rights and the environment, for example because they operate in conflict or high-risk sectors and areas.

### **Nature of the companies' obligation**

- 3 The law enshrines the **companies' responsibility to respect internationally recognized human rights and environmental standards** in their own operations; and to take measures in order to ensure that human rights and environmental standards are respected in their supply chains. In order to meet this responsibility, companies are legally required to exercise **due diligence**.

### **Content of the due diligence obligations**

- 4 Companies are required to put in place appropriate due diligence measures, and to report on their adoption and outcomes.

This means that companies have to take, on a continuous basis, **appropriate measures to identify, prevent, mitigate, and account for** how they address adverse human rights and environmental impacts. The specific content of a company's due diligence obligations will depend on the actual risks to the environment and human rights linked to its operations.

### **Reach of due diligence obligations**

- 5 The company's obligation to exercise appropriate due diligence extends to **its entire corporate structure**, including controlled companies, as well as its **business relationships**.

As stipulated in the UNGPs and the OECD Guidelines for Multinational Enterprises, this includes the company's **entire supply chain**. The type of measures to address the impact that the company is reasonably expected to take will vary according to its degree of leverage.

### **Liability and access to justice**

- 6 The law establishes **civil liability** of companies for damage caused by entities under their direct or indirect control, where these entities have infringed internationally recognized human rights or environmental standards. Control is to be determined according to the factual circumstances. It may also result through the **exercise of power in a business relationship**.



*Workers rallied on the 1st anniversary of Rana Plaza, Bangladesh. Picture by [Solidarity Centre](#). CC license.*

- 7 Companies may discharge their liability if they can prove that they took all due care to identify and avoid the loss or damage as per points 4. and 5. above, or that the damage would have occurred even if all due care had been taken. This constitutes a **reversal of the burden of proof** with respect to adequacy of company's exercise of due diligence.
- 8 The law allows persons harmed by the breach of human rights or environmental standards to **bring an action against the parent company** to take steps to ensure cessation of the violation and for compensating for the harm that would have been avoided if due diligence had been exercised appropriately.
- 9 **Disclosure of evidence:** the law introduces a general obligation for the defendant company to disclose evidence relevant to the case, in particular concerning the relationship and communication with the entity that has caused or contributed to the harm, when ordered to do so by a judge.
- 10 **Overriding mandatory rule:** The law sets out that its provisions apply irrespective of the law otherwise applicable under private international law.

<sup>1</sup> See [Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights](#).

<sup>2</sup> On non-European States, see California Transparency in Supply Chains Act 2010 (US); Dodd-Frank Act, sec 1502, 2010 (US).

<sup>3</sup> For a global overview of existing developments in the field of parent company liability and mandatory Human Rights Due Diligence, see the project [BHRinLaw.org](#).

<sup>4</sup> Modern Slavery Act 2015, Provision 54, [Transparency in Supply Chains](#).

<sup>5</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.

<sup>6</sup> Regulation (EU) 2017/821 of the European Parliament and the Council of May 2017 laying down supply due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas. For more information, consult CSOs document: "Advice note to companies, member States, and the European Commission. Implementation of the Regulation", March 2018. Available [here](#).

<sup>7</sup> 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, OJ L 295, 12.11.2010, p. 23-34. Further details are provided by EC Implementing Regulation 607/2012.

<sup>8</sup> Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the regions, "Action Plan: Financing Sustainable Growth", Brussels, 8.3.2018, COM(2018)97 final.

<sup>9</sup> [Child Labour Due Diligence Law](#), currently awaiting Senate approval.

<sup>10</sup> Some laws introduce liability for parent companies when certain conditions are met. See in Italy, Legislative Decree on administrative (criminal) liability of legal persons, Legislative Decree No. 231/2001. In other cases, courts are starting to recognize the liability of parent companies for their subsidiaries' behaviour. See the UK Court of Appeal's decision in *Chandler v. Cape PLC*, [2012] EWCA (Civ) 525.

<sup>11</sup> [French Duty of Vigilance law](#), LOI n° 2017-399, 27 March 2017.

<sup>12</sup> [Responsible Business Initiative \(RBI\)](#), Switzerland.

<sup>13</sup> Parliamentary counter-proposal to the Responsible Business Initiative, published on the 4 May 2018. Translation of the legal text available at [BHRinLaw.org](#).

<sup>14</sup> ["Business and Human Rights - What Swiss companies need to know"](#), Peter Burckhardt and Anya George, Lexology, November 2017.

<sup>15</sup> ["John Ruggie Weighs In on Swiss Debate on Mandatory Human Rights Due Diligence"](#), Shift, 22 March 2018.

<sup>16</sup> In addition to sources cited in previous footnotes, see also in Germany ["Legislative proposal: Corporate Responsibility and Human Rights. Legal text and Questions and Answers on the German Human Rights Due Diligence Act proposed by NGOs"](#).

<sup>17</sup> For instance, those norms adopted in the framework of the United Nations. See for example the Montreal Protocol on Substances that deplete the Ozone Layer, 16 September 1987.

<sup>18</sup> Such as the [Environmental and Social Standards](#) of the International Finance Corporation.

## Contact

European Coalition for Corporate Justice asbl  
Rue d'Edimbourg 26 1050 Brussels - Belgium  
Phone number : +32 (0)2 893 10 26  
Fax number : +32 (0)2 893-10-35  
[eccj@corporatejustice.org](mailto:eccj@corporatejustice.org)  
[www.corporatejustice.org](http://www.corporatejustice.org)

