

[Background Note] November, 2018

Evidence for mandatory HRDD legislation

In the last years, several European countries, as well as the EU, have adopted or started to consider legislation that embeds elements of human rights due diligence (HRDD) into law. European institutions, United Nations bodies and other international organisations have also acknowledged the need for binding regulation to promote the implementation of HRDD and to improve access to justice for victims of corporate-related human rights abuses. This type of regulation is also starting to gain support from the business community, which considers it a means to help them implement their responsibility to respect human rights.

This document collects key policy and legal developments in the field of mandatory HRDD or parent company liability, which show the emergent trend towards legislation. The paper will be regularly updated.*

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* For a collection of worldwide developments, news, academic articles and other resources, visit the collective website www.bhrinlaw.org.

A) Legislative processes at country level:

France:¹ The “Duty of vigilance” law adopted in February 2017 requires large French companies to establish and publish a vigilance plan with measures to adequately identify risks and prevent serious harms to human rights, human health and safety, and to the environment linked to their own activities and to the activities carried out by subsidiaries, subcontractors and suppliers. The law also establishes civil liability for harms resulting from a company’s failure to observe its duty of vigilance.

The United Kingdom (UK):² The Transparency in Supply Chains clause included in the Modern Slavery Act (2015) requires companies domiciled or conducting business in the UK to disclose the steps undertaken (including due diligence measures) to ensure that slavery or human trafficking is not taking place in their supply chains.

The Netherlands:³ the Child Labour Due Diligence bill, awaiting vote in the Senate, creates HRDD requirements for those companies, wherever incorporated, that deliver products and services to the Dutch market two or more times a year. Companies will have to submit a statement to the regulatory authority declaring that they have carried out due diligence to identify risks related to child labour throughout their full supply chain. In case child labour is presumed to take place, the company has to draw up an action plan.

Italy:⁴ The Legislative Decree on administrative liability of legal entities (2001) introduces corporate criminal liability for crimes committed in the interest or advantage of the company, including human rights violations. Corporate liability may also accrue for human rights abuses committed by Italian enterprises operating abroad, especially if part of violations occurred in Italy. In order to avoid liability, companies shall demonstrate that they implemented compliance programs. This provision has raised awareness among companies about the idea of preventing human rights offenses, in accordance with HRDD procedures.

Switzerland:

- **Responsible business Initiative:** the First Chamber of the Parliament approved in June 2018 a legislative proposal that requires large companies to undertake human rights and environmental due diligence according to the UNGPs and the OECD Guidelines⁵. It also establishes civil liability for parent companies for harm caused by their subsidiaries. The bill was approved as a counter-proposal to the citizen Responsible Business Initiative⁶, which proposed changing the Constitution to introduce a duty of care for companies, including HRDD obligations and civil liability. The Parliament’s counter proposal will be discussed in the Parliament’s Second Chamber (Senate) in the next months.

- The **Federal Act on Private Security Services Provided Abroad (PSSA)**, in force since 2015, establishes the prohibition of direct and indirect participation in hostilities⁷. Private security companies abroad are required to disclose the nature and place of the activity, the provider, the recipient and the personnel employed.

B) Policy statements at country level:

UK: The Parliament’s **joint Committee on Human Rights** recommended⁸ in March 2017 legislation imposing a duty on all companies to prevent human rights abuses. This duty of care would require implementing HRDD and would enable civil remedies against the parent company when abuses occur.

Germany:⁹ Based on its **National Action Plan** to implement the UNGPs (2016), the German government announced in its Coalition Agreement that it would consider legislation if less than half of major German companies adopt adequate HRDD processes by 2020.

Italy: The **National Action Plan** (2016)¹⁰ sets the Government’s commitment to evaluate the integration of more human rights offences into law 231/2001 regarding administrative liability of legal entities, as well as to assess and evaluate legislative reforms requiring corporate respect of human rights, including due diligence for companies.

Sweden:¹¹ In the outcome of a study commissioned by the Minister of Trade, the Swedish Agency for Public Management recommended that the government looks into binding human rights due diligence requirements for Swedish companies, as well as to address access to remedy obstacles faced by victims of corporate abuse.

Green Card:¹² In 2016, members of parliaments in eight EU Member States launched a “Green Card” asking the European Commission to initiate a legislative procedure in order to ensure corporate accountability for human rights abuses. The initiative (promoted by Danielle Auroi, member of the French Parliament, and supported by France, UK, Italy, Estonia, Lithuania, Slovakia, Portugal, and The Netherlands) calls for an EU duty of care legislation that protects individuals and communities whose human rights and local environment are affected by the activities of EU-based companies.

C) EU legislation:

EU Conflict Minerals Regulation (2016):¹³ lays down supply chain due diligence obligations for EU importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas.

EU Timber Regulation (2010):¹⁴ requires companies or persons placing timber or timber products on the EU market to conduct due diligence in order to determine the source of the timber and its legality.

Non-Financial Reporting Directive (2014):¹⁵ establishes general disclosure requirements for large and listed companies. Companies are required to report annually on their principal risks regarding, among others, environmental impacts and respect for human rights, as well as on the due diligence policies implemented to address these risks and their outcomes. The disclosure obligation covers information related to the company’s own operations and to its supply chains and business relationships.

D) Support by EU and European institutions:

European Commission (EC): The Action Plan Financing Sustainable Growth (2018)¹⁶ includes, among other measures aimed at improving corporate governance, a commitment to assess by 2019 the possibility of introducing supply chains due diligence requirements for corporate boards. Such mandatory due diligence would not be limited to a particular topic such as conflict minerals or timber.

Council of the EU: Its Conclusions on Global Value Chains¹⁷ (May 2016) call the EC and EU Member States to enhance the implementation of due diligence in order to achieve a global level playing field. The same year, the Conclusions on Business and Human Rights (June 2016)¹⁸ called on the EC to launch an EU Action Plan on Responsible Business Conduct addressing due diligence and access to remedy, including at EU legislative level, as appropriate. The document endorsed the 2016 Council of Europe Recommendations on Human Rights and Business and called for their implementation.

European Parliament: The institution has stressed the need for binding HRDD regulation at the EU legislative level in a number of occasions. In 2018, the Report on Sustainable Finance called for an EU overarching mandatory due diligence framework including a duty of care based, among others, on the French duty of vigilance law¹⁹. This same year, the Report on indigenous peoples stressed the need to hold European multinational corporations and business enterprises accountable for the human rights violations, including by means of human rights due diligence measures²⁰. The 2017 Report on EU Flagship Initiative for the garment sector²¹ demanded the Commission to propose binding supply chains due diligence legislation. That same year, the EP Report on Global Value Chains²² asked the Commission to consider proposals for corporate due diligence, taking into account the French duty of vigilance law, and the Green Card initiative. In 2016, the EP Report on corporate liability for serious human rights abuses in third countries²³ asked for urgent binding and enforceable rules in the field of corporate responsibility and due diligence, related sanctions and monitoring mechanisms.

Fundamental Rights Agency (FRA): The Agency published its Opinion on improving access to remedy in the area of business and human rights²⁴ in April 2017. After revising the key obstacles faced by victims of corporate-related human rights abuses to obtain proper remedy, the document recommended the

establishment of due diligence obligations, including for parent companies linked to human rights performance in subsidiaries or supply chains (FRA Opinion 21).

Council of Europe (CoE): The body which monitors the implementation of the *European Convention on Human Rights* (ECHR) has also addressed the issue. In 2016, the CoE's Committee of Ministers published a "Recommendation on Human Rights and Business"²⁵ which includes measures to secure victims of business-related human rights abuses access to court and proper remedies, wherever the defendant company is based. It recommended legal measures, including mandatory HRDD, for certain circumstances.

E) United Nations (UN) bodies and other international organisations:

UN High Commissioner for Human Rights: The UN body presented in 2016 its report on the accountability and remedy for victims of business-related human rights abuses project²⁶. It recommended policies and legal reforms that respond to the challenges of complex global supply chains. Among other measures, this included ensuring that the principles for assessing corporate liability under domestic law regimes are properly aligned with the companies' responsibility to exercise HRDD.

UN Committee on Economic, Social and Cultural Rights (CESCR): The body's General Comment No. 24 concerning states' obligations in the context of business activities (2017)²⁷ affirmed that states have the duty to establish general human rights due diligence obligations for companies, and to remove barriers to access to remedies, including by establishing corporate liability regimes, among others.

UN Committee on the Rights of the Child: The body's General Comment No. 16 concerning states' obligations regarding the impact of the business sector in children's rights (2013)²⁸ affirmed that, in order to meet their obligation to ensure that business enterprises respect children's rights, states should require business to undertake due diligence.

UN Working Group on BHR: In its 2018 report to the UN General Assembly, the WG recommended States "the use of legislation to create incentives to exercise due diligence, including through mandatory requirements". The report welcomed the adoption of the French duty of vigilance law as "a development that other Governments should learn from"²⁹.

UN Open-Ended IGWG on Transnational Corporations and Other Business Enterprises with respect to Human Rights:³⁰ In July 2018 the Chair of the Working Group published the Zero Draft for an International UN Legally Binding Treaty. The document establishes that states shall legislate on the field of mandatory HRDD and ensure corporate liability for human rights violations.

OECD: Its report on the implementation of the Recommendation on Due Diligence Guidance for Responsible Supply Chains of Conflict Minerals (April 2016)³¹ recognized that regulatory measures have provided the strongest impetus to promote responsible conduct from business.

F) Support by the business community:

In Finland,³² companies have joined a campaign calling for mandatory HRDD legislation. The coalition campaign, launched on 24 September 2018, is made up of over 115 companies, civil society and trade unions. Other 20 companies and NGOs have publicly supported the call.

Dutch companies (including multinationals like Nestlé, Heineken or G-Star) have signed an open letter in support of the Dutch Child due diligence Bill (2017)³³.

In a submission to the UK Government concerning the **Modern Slavery Act**, IKEA declared in 2014 that it would support appropriate due diligence requirements as described in the United Nations Guiding Principles.³⁴

The Swiss Association 'Groupement des Entreprises Multinationales' (GEM), representing 90 large multinational companies, supports a Swiss legislative proposal establishing mandatory HRDD and corporate

liability (2017-8)³⁵. Additional business people joined forces with legal experts and former MPs in a support committee for this legislative proposal. The committee's website also features a supportive statement by Prof. John Ruggie.³⁶

Senior corporate executives, have ranked “make human rights due diligence a legal requirement” in the top 3 out of 10 measures to enable companies to fulfil their responsibility to respect human rights, in a global survey by the Economist³⁷.

ENDONTES:

¹ Law num. 2017-399 from 27 March 2017 concerning the duty of vigilance of parent companies and ordering companies. See FAQs by [ECCJ](#). [more information at [BHRinLaw.org](#)]

² Modern Slavery Act 2015, [Provision 54, Transparency in Supply Chains](#).

³ [Child Labour Due Diligence Law](#), currently awaiting Senate approval. [more information at [BHRinLaw.org](#)]

⁴ Legislative Decree No. 231/2001 for Administrative Criminal Liability, [read overview](#) by Human Rights International Corner. [more information at [BHRinLaw.org](#)]

⁵ Read “[Another step towards the adoption of a HRDD bill in Switzerland](#)”, July 2018, [corporatejustice.org](#). [more information at [BHRinLaw.org](#)]

⁶ Responsible Business Initiative, [Text and explanations](#). [more information at [BHRinLaw.org](#)]

⁷ [Activity Report 2015/2016 on the implementation of the Federal Act on Private Security Services Provided Abroad](#) (1 September 2015- 31 December 2016). [more information at [BHRinLaw.org](#)]

⁸ House of Lords, House of Commons, Joint Committee on Human Rights, “[Human Rights and business 2017: Promoting responsibility and accountability](#)”, Sixth report of Session 2016-2017.

⁹ National Action Plan, [implementing the UN Guiding Principles on Business and Human Rights](#), 2016-2020. Published by the Federal Foreign Office; [German Government Coalition Agreement](#), 2018, in Chapter XII.6: Human Rights, Crisis Prevention and Humanitarian Aid.

¹⁰ [Italian Action Plan on Business and Human Rights](#), 2016-2021.

¹¹ [Report of the Swedish Agency for Public Management](#), March 2018 (in Swedish).

¹² “[Members of eight Member States Parliaments support duty of care legislation for EU corporations](#)”, 31 May, 2018, [corporatejustice.org](#).

¹³ [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](#). [more information at [BHRinLaw.org](#)]

¹⁴ [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 \(and details provided by EC Implementing Regulation 607/2012\)](#). [more information at [BHRinLaw.org](#)]

¹⁵ [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](#).

¹⁶ 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](#)”, COM/2018/097 final. [more information at [BHRinLaw.org](#)]

¹⁷, Council Conclusions on the [EU and Responsible Global Value Chains](#) (12 May 2016).

¹⁸ Council Conclusions on [Business and Human Rights](#) (20 June 2016). [more information at [BHRinLaw.org](#)]

- ¹⁹ EP Report on [Sustainable Finance](#) (2018/2007(INI)), adopted on 29 May 2018.
- ²⁰ EP Report on [violation of the rights of indigenous peoples in the world](#), including land grabbing (2017/2206 (INI)), adopted on 29 May 2018.
- ²¹ EP Report on the [EU flagship initiative on the garment sector](#) (2016/2140(INI)), adopted on 28 March 2017.
- ²² EP Report on the [impact of international trade and the EU's trade policies on global value chains](#) (2016/2301(INI)), 20 July 2017.
- ²³ EP Report on [corporate liability for serious human rights abuses in third countries](#) (2015/2315(INI)).
- ²⁴ "[Improving access to remedy in the area of business and human rights at the EU level](#)", FRA Opinion - 1/2017, 10 April 2017. [more information at [BHRinLaw.org](#)]
- ²⁵ Council of Europe, [Human Rights and business](#) – Recommendation CM/Rec(2016)3 of the Committee of Ministers to Member States (2016). [more information at [BHRinLaw.org](#)]
- ²⁶ "[Improving accountability and access to remedy for victims of business-related human rights abuse](#)", Report of the United Nations High Commissioner for Human Rights, 10 May 2016, UN doc. A/HRC/32/19.
- ²⁷ Committee on Economic, Social and Cultural Rights, General comment No. 24 (2017) on [State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities](#), 10 August 2017, UN Doc. E/C.12/GC/24/.
- ²⁸ Committee on the Rights of the Child, General comment No. 16 (2013) [on State obligations regarding the impact of the business sector on children's rights](#), 17 April 2013, UN Doc. CRC/C/GC/16.
- ²⁹ UN Working Group on the issue of human rights and transnational corporations and other business enterprises, [Report to the General Assembly](#), 16th July 2018, A/73/163, specially paras. 67 and 93 (a).
- ³⁰ OEIGWG on Transnational Corporations and Other Business Enterprises with respect to Human Rights, [Zero Draft Binding Instrument](#), published in July 2018.
- ³¹ OECD, "[Report on the implementation of the recommendation on due diligence guidance for responsible supply chains of minerals from conflict-affected and high risk areas](#)" [c/min(2011)12/final].
- ³² Companies, Civil Society and Unions call on Finland to adopt mHRDD legislation, 24 September, 2018, [ECCJ](#).
- ³³ [Joint business letter in support to the Dutch Child Labour Due Diligence Bill \[English translation\]](#), 3 October, 2017. [Extended Dutch version](#), December 2017.
- ³⁴ [IKEA submission](#) to UK government, 24.3.2014
- ³⁵ Association of Multinational Enterprises (GEM), "The Groupement des Entreprises Multinationales (GEM) welcomes the adoption by the National Council of the counter-project to the initiative for responsible companies. (...) This legislation would benefit the attractiveness of Switzerland as a business location. (...) It now calls on the Council of States to give its assent." Translation of [French press release 15.7.18](#).
- ³⁶ Committee's website in [French](#) and [German](#). [John Ruggie's statement](#) in English.
- ³⁷ "[The road from principles to practice. Today's challenges for business in respecting human rights](#)", The Economist, Intelligence Unit, 2015.

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