## National mandatory HREDD laws and legislative proposals in Europe
### COMPARATIVE TABLE
December 2020

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<td>Publish the vigilance plan in the annual report</td>
<td>Whole supply chain: - directly/indirectly controlled companies - subcontractors and suppliers with an “established commercial relationship”</td>
<td>Parent company (direct) liability</td>
<td>Any concerned party can file a complaint for non-compliance before the judge</td>
</tr>
<tr>
<td>No disclosure requirement</td>
<td>Whole supply chain: - direct/indirect subsidiaries - other business relations</td>
<td>Parent company (vicarious) liability</td>
<td>The judge can give formal notice to comply in a three-month period</td>
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<tr>
<td>No disclosure requirement (statements are published on the authority’s website)</td>
<td>Whole supply chain: any natural or legal person throughout the supply chain</td>
<td>For damage caused by controlled companies</td>
<td>If non-compliance persists, the judge can oblige the company to publish a plan and impose periodic penalty payments</td>
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<td>Publish yearly their DD process in line with the OECD DD Guidance and the UNGP Reporting Framework.</td>
<td>Whole supply chain: - own activities - those linked to them by business relationships, including along their entire value chain</td>
<td>Whole supply chain: liability</td>
<td>The company must send a report to the authority, which may object to it. Failing to rectify may lead to fines</td>
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<td>Publish their annual DD plan on the company’s website.</td>
<td>Whole supply chain</td>
<td>For damage to life, body or property, or for damage derived from the violation of international human rights recognised by DE or environmental harm caused by subsidiaries and suppliers</td>
<td>The company must answer within three weeks or two months, depending on the request</td>
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<td>Report annually that they are aware of impacts and that they take action (accessible online)</td>
<td>Whole supply chain: - activities - those associated with their business activities, products or services as a result of a business relationship</td>
<td>unless serious infringements of the general right of personality (a violation can also result from environmental damage)</td>
<td>The Consumer Authority and the Market Council monitor compliance</td>
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<td>Publish the production sites (all companies)</td>
<td>Whole supply chain: all entities supplying goods and services that deliver products or factor inputs to an enterprise</td>
<td>Whole supply chain: liability</td>
<td>Any person can file a request for information about a company’s DD before the company</td>
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<td>Publish the DD process and results (only large companies)</td>
<td>Whole supply chain: - activities - those associated with their business activities, products or services as a result of a business relationship</td>
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**DUTCH LAW PROVISIONS:**

- **Civil Liability:** Victims must prove the causal link between the fault of the company and the damage. Unless the company proves that:
  - it took all due care, or
  - the damage would have occurred even if all due care had been taken.

- **Public Enforcement:** Any person can file a complaint for non-compliance before the judge. The judge can give formal notice to comply in a three-month period. If non-compliance persists, the judge can oblige the company to publish a plan and impose periodic penalty payments.

- **Transparency Obligations:** Publish the vigilance plan in the annual report and annually publish the DD process and results (only large companies). Publish yearly their DD process in line with the OECD DD Guidance and the UNGP Reporting Framework. Publish their annual DD plan on the company’s website.

- **Reach of Due Diligence:** Whole supply chain: any natural or legal person throughout the supply chain. Whole supply chain: own activities; those linked to them by business relationships, including along their entire value chain.

- **Civil Liability:** Parent company liability (direct and vicarious). For damage caused by controlled companies (subsidiaries and economically controlled companies), unless the company proves that:
  - it took all due care, or
  - the damage would have occurred even if all due care had been taken.

- **Public Enforcement:** Any person can file a complaint for non-compliance before the company. If the response is found inadequate, they can file a complaint before the regulator. The regulator can issue an order to require compliance. Failing to comply is punishable with fines, up to imprisonment.

- **Civil Liability:** Any concerned party can file a complaint before the company. The regulator monitors and determines the company’s link to an impact, and can oblige the company to cease and remedy it. Failing to comply is punishable with fines, up to imprisonment.
In February 2020, the French General Council of the Economy published an [assessment report](https://www.gouvernement.fr/sites/default/files/Loi_n°_2017-399_du_27_mars_2017_relative_au_devoir_de_vigilance_des_sociétés_mères_et_des_entreprises_donneuses_d'ordre.pdf) of the law, calling for a broader scope, for harmonising the thresholds, and for scaling the law up to the EU level.

In 2016, a broad civil society coalition, the [Swiss Coalition for Corporate Justice](https://www.corporatejustice.ch/about-the-initiative/), launched the [Responsible Business Initiative (RBI)](https://www.corporatejustice.ch/about-the-initiative/), which proposed changing the Constitution to introduce a duty of care for companies, including human rights due diligence obligations and civil liability (more information is available on the RBI's website [https://corporatejustice.ch/about-the-initiative/](https://corporatejustice.ch/about-the-initiative/)).

On 29 November 2020, the RBI was narrowly rejected in referendum. While the initiative received 50.7% of the popular vote, it only gained 8.5 of the required 12 regional majorities across Switzerland's cantons. A majority of both the popular vote and cantonal vote is needed for an initiative to pass.


In March 2020, the Christian Union (CU), one of the four national government coalition partners, published an [outline for a broad due diligence law](https://www.covenant.nl/covenant不相信/papers/covenant-lcl-cut-empty.html). In December 2019, the German Ministers for Labour and Development jointly committed to developing a supply chain due diligence law.

Draft for the cornerstones of a federal law on strengthening corporate due diligence to avoid human rights violations in global value chains, available in German [here](https://www.bzhb.de/fileadmin/auswaertigkeit/2020_06_29_draft_lcl_english.pdf). The information in this table is based on the translation by Markus Krajewski.

In 2018, the Norwegian government mandated an expert committee, the [Ethics Information Committee](https://www.regjeringen.no/contentassets/20914124b1c24821bb2255c3c5d7890d/eti-nor-dokument-1.pdf), to explore responsible business and supply chain regulation. In November 2019, the Ethics Information Committee published a [draft act relating to transparency regarding supply chains, the duty to know and due diligence](https://www.regjeringen.no/contentassets/20914124b1c24821bb2255c3c5d7890d/eti-nor-dokument-1.pdf).

The RBI proposes introducing (i) a new article 101a into the Federal Constitution, establishing an obligation on companies to respect human rights and the environment, and (ii) implementing legislation, most probably via a special act, including company law, private international law and tort law provisions.

The scope of the law covers companies that for two consecutive financial years employ: (a) 5,000 employees itself and in its direct and indirect subsidiaries whose registered office is in France, or (b) 10,000 employees itself and in its direct and indirect subsidiaries whose registered office is in France or abroad. French subsidiaries of foreign companies are also covered if they reach the thresholds.

The Child Labour Due Diligence Law covers every company that supplies goods or services to Dutch end-users (i.e. the last-tier companies, which are closest to the Dutch end-users of the products and services). The preamble of the law defines end-users as “the natural or legal persons that use or use up the goods or make use of the services”. As such, it may apply not only to companies that are registered in the Netherlands, but also to companies that are registered abroad. The Act contains a number of exemptions: (i) companies that do not supply goods or services to Dutch end-users, (ii) companies that merely transport the goods that are to be supplied (art. 4(4)). Moreover, certain other categories of companies may be exempted by a subsequent General Administrative Order (GAO) (art. 6). These other categories of companies may include for instance small companies and companies from low-risk sectors.

According to section 267 of the German Commercial Code, large companies are companies that meet at least two of the following three thresholds: (a) more than 250 employees; (b) total assets of more than €20 million; (c) turnover of more than €40 million.
The law should cover companies that are resident in Germany, and have more than 500 employees. Within a group of companies, the employees in all affiliated companies will be taken into account to reach the number of 500 employees for the parent company.

Approximately 7,280 companies are affected. Both partnerships and corporations under German and foreign law are covered.

The criterion of “residency” means that there is a strong domestic connection and that entrepreneurial management decisions are taken in Germany. Mere commercial activities in Germany are not sufficient.

STANDARDS

The material scope of the duty of vigilance covers “risks” and “severe impacts” on human rights, health and safety and the environment. ‘Severe impacts’ are not defined in the law. The UNGPs can offer guidance, insofar as the severity of an impact is defined according to scale, scope and irremediable character. The notion is also linked to the notion of ‘vigilance raisonnable’ in the law (reasonable vigilance). Reasonable vigilance can be related to the ‘due diligence’ notion in the UNGPs (reasonable measures link to impacts over which the company has the ability to act, in connection to business activities or relationships). The assessment of the context (including operational sector and context) is crucial.

The Child Labour Due Diligence Law defines child labour along the lines of ILO Conventions C138 (the Minimum Age Convention 1973) and C182 (the Worst Forms of Child Labour Convention 1999) (art. 2).

DUE DILIGENCE OBLIGATIONS

Instead of ‘due diligence’, the French law resorts to the concept of ‘duty of vigilance’, which could be assimilated to a particular form of statutory ‘duty of care’ (the concept of “duty of care” does not exist in France).

The vigilance plan must include the following measures:

1. A risk map intended for their identification, analysis and prioritization.
2. Procedures for regular assessment of subsidiaries, subcontractors and suppliers, with regard to risk mapping.
3. Appropriate actions to mitigate risks or prevent serious harm.
4. An alert mechanism relating to the existence or realization of risks, established in consultation with trade unions.
5. A system for monitoring the adopted measures and evaluating their effectiveness.

The scope of due diligence will depend on risks to human rights and the environment (risk-based approach). The duty of care includes: (i) assessing risks and impacts; (ii) preventing violations and ceasing existing violations and (iii) accounting for the actions taken.

Due diligence to prevent child labour from being used in the production of goods and services supplied to Dutch end-users.

Due diligence is defined as the process by which enterprises identify, prevent and mitigate the actual and potential negative consequences of their actions, and remediate such impacts when they occur. The proposal aims at passing into law the six-step process set in the OECD Due Diligence Guidance for Responsible Business Conduct (2018).

The proposal focuses on avoiding and remediating adverse impacts through due diligence. The company would not be relieved of its duty to address an impact it caused/contributed to/is linked to until the impact was effectively addressed (i.e., ceased and remediated), even if the company had conducted what appeared to be appropriate due diligence. If a company caused or contributed to an impact, it would be obliged to stop the activity causing or contributing to the harm and to provide for or contribute to remediation. In cases of an adverse impact directly linked to a company, the company would be obliged to use its leverage to encourage the entity causing the impact to cease the activity causing the impact and remediate the impact.

All enterprises would be obliged to know of salient risks that may have an adverse impact on fundamental human rights and decent work, both within the enterprise itself and in its supply chains. The scope of the duty to know depends on factors that include the size of the enterprise, its ownership and structure, activities, industry and type of goods or services. The duty to know applies in all cases where the risk of adverse impact is most severe, such as the risk of forced labour and other slavery-like labour, child labour, discrimination in employment and at work, lack of respect for the right to form and join trade unions and undertake collective bargaining and risks to health, safety and the environment in the workplace.
Large enterprises would be obliged to exercise due diligence in order to identify, prevent and mitigate any possible adverse impact on fundamental human rights and decent work and account for how they address any adverse impacts.

TRANSPARENCY OBLIGATIONS

The proposal would oblige enterprises to communicate the way in which they identify, prioritize and deal with actual or potential adverse impacts. The information should be accessible for intended target groups (particularly, rights-holders) and be sufficient to demonstrate that the enterprise’s response to the (risk of) adverse impacts is adequate.

REACH OF DUE DILIGENCE

Large enterprises would be obliged to exercise due diligence in order to identify, prevent and mitigate any possible adverse impact on fundamental human rights and decent work and account for how they address any adverse impacts.

CIVIL LIABILITY

Under French tort law, an individual is liable for his/her own fault (responsabilité pour faute) except in certain circumstances, where an individual can be liable for someone else’s fault (responsabilité du fait d’autrui). The duty of vigilance establishes liability for a company’s own fault. There are three conditions for establishing liability under French general tort law: (i) damage, (ii) a breach of one of the obligations established in law, (iii) causation between the two. The burden of proof is on the plaintiff, who has to prove the case satisfies the three conditions. Breach and causation are likely to be most difficult to establish under the French law due to:

- Difficulty in determining whether a company has breached its vigilance obligations.
- Difficulty in proving causation (many factors interacting in long supply chains). To establish it, a judge will assess:
  - If a breach of the vigilance obligations caused the damage (and consider other factors that led to the damage).
  - If meeting those obligations would have prevented the damage.

(See Brabant, S., Savourey, E., ‘A closer look at the penalties faced by companies’, Dossier Thématique, Revue Internationale de la Compliance et de L’éthique des Affaires, op. cit.)
NGOs and scholars argue that the law initiates a move away from the fiction of the ‘autonomy of corporate persons’ (the French equivalent of the ‘corporate veil’) because it creates a duty that must be exercised throughout the group. It makes the duty of vigilance very close to the common law notion of a ‘duty of care’. In short, the law per se does not pierce the veil, but it helps circumvent it.

Companies can be sued for breaches of the new obligation only under the already existing statute concerning civil liability for torts. Thus, the plaintiff will still need to prove the parent’s breach, the damage and the causal link. Therefore, the French law does not create a regime of vicarious liability, as CSOs originally pushed for.

Vicarious liability is a form of secondary liability that arises under the common law doctrine of agency, respondeat superior, the responsibility of the superior for the acts of their subordinate or, in a broader sense, the responsibility of any third party that had the “right, ability or duty to control” the activities of a violator. In Switzerland, vicarious liability is a form of strict liability that permits a company to raise a defence on the basis of its use of ‘due diligence’ to prevent the prohibited event”. This is different from “absolute liability”, which “does not require proof that the defendant intended to the relevant acts or harm, or that it was negligent, in order to establish legal liability. Instead, liability flows from the occurrence of a prohibited event, regardless of intentions or negligence.” (Office of the High Commissioner of Human Rights, “Improving accountability and access to remedy for victims of business-related human rights abuse: explanatory notes for guidance”. 12 May 2016).

This provision introduces liability for the harm caused by controlled companies. It only applies when there is a relationship between a controlling company and a controlled company. This liability has been modelled based on the existing concept of employer’s liability in the Swiss Code of Obligations.

When a controlled company causes harm, the controlling company is liable unless it can prove that it took all due care to avoid the harm or loss, or that the damage would have occurred even if all due care had been taken. It is up to the company to prove that it took all due care (partial reversal of the burden of proof). For the rest, this provision (section 2.c of the Responsible Business Initiative) does not reverse the burden of proof. It remains the plaintiff’s responsibility to prove the harm, the causality and the control relationship between the business entities.

If companies do not comply with any law in the Netherlands, they can be held liable anyway in civil courts. Therefore, once a legal obligation to conduct due diligence exists, the civil courts will be open for any interested party to claim for civil liability for failure to conduct due diligence.

PUBLIC ENFORCEMENT

Any “person with standing” can file a complaint for non-compliance before the judge. ‘Person with standing’ is a very broad notion in French law. NGOs, victims and unions are included.

No public institution monitors the quality of the vigilance plans. NGOs have created a website that identifies companies covered by the law and monitors their vigilance plans (see https://vigilance-plan.org/).

Periodic penalty payments are injunctive fines payable on a daily basis or per-event basis until the defendant satisfies a given obligation.

Complaints from interested third parties (e.g., trade unions/NGOs) will trigger enforcement by a competent authority. Any individual or entity wishing to submit a complaint must first submit the complaint to the company itself. If the company’s reaction is ‘inadequate’ according to the complainant, he/she can escalate the case to the supervising regulator. (see MVO Platform, ‘FAQ on the about the new Child Labour Due Diligence Law’).

Failing to comply with the order can lead to fines up to €4,100 for failing to submit a statement, and up to €820,000 (or 10% of the company’s annual turnover) for failing to conduct DD. If a company is fined twice within five years, the responsible director can face up to 2 years of imprisonment and a €20,500 fine (if the second transgression was committed without intent, it is considered a misdemeanour, punishable with a maximum of 6 months’ detention and a €20,500 fine; if the second transgression was committed with intent, it is considered a crime, punishable with a maximum of 2 years’ imprisonment and a €20,500 fine).

Any natural person and legal person from within or outside the Netherlands whose interests are affected by an enterprise’s failure to conduct due diligence could file a complaint.

Failing to comply is punishable with fines, including exclusion from public procurement, up to imprisonment of the responsible directors and board members.

Any person would be entitled to information about how an enterprise conducts itself with regard to fundamental human rights and decent work within the enterprise and its supply chains. Requests for information may concern: (a) general information about the enterprise’s work, systems and the steps taken to prevent or reduce adverse impact on human rights and working conditions; (b) information about any adverse impact on human rights and working conditions, significant risks of such impact occurring and how the enterprise manages this risk, including any risk associated with a particular product or service.

Rejection of requests may be appealed before the Consumer Authority.