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## An EU mandatory due diligence legislation to promote businesses' respect for human rights and the environment

All around the world, businesses are responsible for human rights abuses and environmental harm, as underscored by the recent COVID-19 crisis. Businesses must not be allowed to close their eyes to the impact of their business decisions on other actors in the chain. Voluntary measures have proved to be vastly insufficient, as recognised by the recent European Commission [study on due diligence requirements through the supply chain](#). **Therefore, new legislation is urgently needed to establish clear, robust and enforceable cross-sectoral requirements on business enterprises, including financial institutions, to respect human rights and the environment and to carry out due diligence.**

The European Commission has committed, within the framework of the [European Green Deal](#), to bring together all EU actions and policies to help achieve a successful and just transition towards a sustainable future. As highlighted by the President of the European Commission on several occasions, this transformation ahead of us will only work if it is just and works for all.<sup>1</sup> More recently, Commissioner Reynders has committed to a legislative proposal on human rights and environmental due diligence in 2021 as his contribution to the European Green Deal.

Furthermore, the COVID-19 pandemic has drastically laid bare the precarious nature of global value chains, and shown just how reliant all countries and people are on one another. The Council of the European Union has clearly recognised that corporate respect for human rights throughout corporate operations and value and supply chains is indispensable to achieving the Sustainable Development Goals.<sup>2</sup>

Business enterprises<sup>3</sup> domiciled or based in the EU, or active on the EU market continue to cause, contribute to or be directly linked to human rights abuses and environmental harms through their operations, value chains and business relations. This is in spite of their international responsibility to respect human rights set out in the [United Nations Guiding Principles on Business and Human Rights](#) (UNGPs), which have been unanimously endorsed by the international community nearly ten years ago.

Due diligence<sup>4</sup> has emerged as one of the primary tools for business enterprises, including financial institutions, to live up to their responsibilities towards people and planet. It is understood as the process of identifying and assessing; ceasing, mitigating and preventing; tracking and monitoring; communicating and accounting for environmental and human rights risks and impacts. It is at the core of the UN Guiding Principles; the [OECD Guidelines for Multinational Enterprises](#) (OECD MNE Guidelines); and [the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy](#) (ILO Tripartite Declaration). These international standards have been developed in collaboration with business enterprises, governments and civil society and across multiple sectors, and endorsed by the EU. They have been translated into practical due diligence frameworks as set out in the [OECD Due Diligence Guidance for Responsible Business Conduct](#), UN resolution,<sup>5</sup> and additional sectoral<sup>67</sup> and gender<sup>8</sup> guidelines.

<sup>1</sup> [Ursula von der Leyen at the Launch of the Just Transition Mechanism](#) (14 January 2020); [Ursula von der Leyen, My agenda for Europe](#).

<sup>2</sup> [Council Conclusions on Business and Human Rights](#) (20 June 2016).

<sup>3</sup> For the purposes of this paper, 'business enterprises' should be understood to include all type of public and private entities who are domiciled in, based in or commercially active with products or services on the European Single Market, including but not limited to financial institutions, limited liability companies, business associations, joint ventures, non-profits and foundations.

<sup>4</sup> The term 'due diligence' is used in this paper in line with the definition in international standards. The [UNGPs](#) use the term 'Human Rights Due Diligence'. The [OECD](#) uses the term 'Due Diligence for Responsible Business Conduct'.

<sup>5</sup> OHCHR, [The report of the Working Group on the issue of human rights and transnational corporations](#) (A/73/163) (16 July 2018).

<sup>6</sup> [OECD sectoral guidelines cover Minerals, Extractives, Garment & Footwear, Agriculture, Child Labour, Institutional Investors, Corporate Lending & Securities Underwriting](#).

<sup>7</sup> [FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests](#) (2012); [OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas](#) (2016).

<sup>8</sup> [UN guidance on the Gender Dimensions of the Guiding Principles on Business and Human Rights](#) (2019).

A growing number of Member States are making progress in developing legally binding Human Rights and Environmental Due Diligence frameworks based on the above standards. An EU-wide legislation applicable to all business enterprises domiciled or based in the EU, or active on the EU market, will help prevent human rights abuses and environmental harms while ensuring a level playing field within the EU, a coherent legal framework, and increase leverage over third parties in the value chain.

This paper lays out below a vision for the principal elements of such an EU legislation, jointly prepared by the above-signed organisations.

## Principal elements

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At a minimum, an effective legislation must include a number of key elements, including:

**1. Business enterprises must have an obligation to respect human rights and the environment in their own operations, in their global value chains and within their business relationships<sup>9</sup>.**

This obligation to respect human rights and the environment must relate to the business enterprises', including financial institutions, domestic and international operations, products and services. Business enterprises must integrate this obligation across all their business practices and decisions, for instance their purchasing practices or product design. It must include the duty to duly exercise leverage to ensure that all internationally recognised human rights, including labour rights, and environmental standards are respected in their global value chains and business relationships. When there is not sufficient leverage, business enterprises need to increase their leverage.

**2. Business enterprises must have an obligation to identify, cease, prevent, mitigate, monitor and account for potential and actual human rights and environmental adverse impacts through an ongoing due diligence process, in accordance with existing international due diligence standards.**

Due diligence is a continuous, preventative, risk-based process through which all business enterprises must effectively identify and assess; cease, prevent and mitigate; track and monitor; and communicate and account for specific risks and actual and potential adverse impacts in their operations and along their global value chains and business relationships.

### The due diligence process

Due diligence focuses on the risks and harms not to the enterprise itself but to human rights and the environment.

At all stages of the due diligence process, business enterprises must conduct effective, meaningful and informed consultations with both affected and potentially affected rights-holders, including but not limited to communities, workers, trade unions, civil society and women's organisations, human rights defenders and indigenous peoples. Businesses enterprises must enable participation by addressing specific barriers that certain groups may face and must also adapt the process to the needs and rights of specific groups. Such consultations should also ensure the safe participation of rights-holders without fear of reprisal. The goal of consultations is for rights holders to contribute to the shaping of, and have confidence in, the due diligence strategy and its implementation.

The due diligence process should respect and not undermine rights and protections guaranteed to certain groups under local, national, European or international law, and business must avoid interfering in these rights. For example, indigenous peoples and local communities enjoy the right to Free, Prior and Informed Consent, and workers enjoy the right to Freedom of Association and Collective Bargaining.

### Identifying and assessing

Business enterprises should use appropriate methodologies to identify and assess the risks of harm in their own operations and those of their business partners and carry out risk-based due diligence. The extent of due diligence is determined by the likelihood and severity of the adverse impacts, and should be regularly re-assessed and adapted to ensure appropriateness and effectiveness.

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<sup>9</sup> "All types of business relationships of the enterprise – suppliers, franchisees, licensees, joint ventures, investors, clients, contractors, customers, consultants, financial, legal and other advisers, and any other non-State or State entities linked to its business operations, products or services" (OECD Due Diligence Guidance for Responsible Business Conduct, p.10).

Business enterprises must explicitly consider how actual or potential adverse impacts can differ or be specific to certain rights-holders, and ensure that the assessment accounts for that. Many rights-holders face additional risks due to intersecting factors of discrimination based on their gender, ethnicity, race, caste, sexual orientation, disability, age, social status, migrant or refugee status, informal employment status, union involvement, exposure to conflict or violence, poverty, or other factors. For example, the identification of gendered impacts, including gender-based violence and harassment, requires specific methodology.

#### **Ceasing, preventing and mitigating**

Business enterprises must take a range of proactive, appropriate and gender-responsive<sup>10</sup> measures to cease adverse impacts they cause or contribute to, and to prevent and mitigate adverse impacts they contribute to through their business decisions or to which they are linked through their value chains and business relationships. This may include taking steps to modify own purchasing practices and ensuring that suppliers have the financial capacity to comply with human rights and environmental standards. Alternatively, it may be that as a result, some activities should cease altogether, such as situations in which Free, Prior and Informed Consent has not been obtained. In some cases, a delayed response may perpetuate or aggravate the harm, and therefore responses need to be prompt and timely in relation to the risk and harm. The effectiveness of due diligence is measured by the extent to which actual and potential harm is prevented and mitigated.

#### **Tracking and monitoring**

Business enterprises must monitor the implementation and effectiveness of the adopted measures. This includes the collection of relevant data specific to the risk(s), such as data disaggregated by supplier and gender. The results of these tracking and monitoring processes must be used to inform possible changes to the global business operations and human rights and environmental due diligence process.

#### **Communicating**

Business enterprises must regularly and publicly disclose, including but not limited in their annual report, detailed, relevant, timely and meaningful information about their operations and value chain<sup>11</sup> as well as their due diligence processes and the findings, activities and outcomes thereof. Communication must also include continuous reporting to impacted rights holders, and be easily accessible and available to potentially affected rights holders in a manner appropriate to their context, for example by taking account of language and literacy levels.

### **3. Business enterprises must provide for or cooperate in the remediation of adverse impacts in their global value chains and within their operations and business relationships.**

Due diligence must enable and support the provision of remedy. The obligation to respect human rights and the environment requires active engagement in remediation of adverse impacts where business enterprises, including financial institutions, cause or contribute to harm by way of actions or omissions. Remediation must be provided, as appropriate, by the business entity on its own or in cooperation with other actors, in accordance with the above-mentioned international standards. In cases of adverse impacts, which a business enterprise has not caused or contributed to, but which are directly linked to its operations, products or services, the business enterprise must also exercise or increase its leverage over those responsible to help ensure that remediation is provided.

Remedy may include, but is not limited to, financial or non-financial compensation, reinstatement, apologies, restitution, rehabilitation, contribution to investigation as well as the prevention of additional harm through, for example, guarantees of non-repetition. Business enterprises should ensure that remedy is effective<sup>12</sup> and ensure there is mutual agreement with the rights-holders on the parameters of the remedy and how it is provided. Both the process of defining remedy and the remedy itself should take into account and seek to redress imbalances in power, resources and information between the rights holders and the business enterprise. This includes taking into account the specific barriers rights-holders may face by reason of their gender, and/or because they face heightened risks of vulnerability and/or marginalisation.

<sup>10</sup> Able to respond to the differentiated, inter-sectional and disproportionate adverse impacts on women's human rights, and responsive to women's experiences. See also [UN guidance on the Gender Dimensions of the Guiding Principles on Business and Human Rights](#).

<sup>11</sup> This includes the disclosure of granular up-to-date information about different assets (e.g. power plant) or individual facilities in a supply chain (e.g. factories, mills and farms).

<sup>12</sup> [UNGPs](#) Principle 31 specifies effectiveness of remedy as being legitimate, accessible, predictable, equitable, transparent, rights-compatible, a source of continuous learning, and based on engagement and dialogue.

**4. Business enterprises must be liable for human rights and environmental adverse impacts in their global value chains and within their operations and business relationships.**

Business enterprises must be liable for harm they, or a company they control or have the ability to control, have, by acts or omissions, caused or contributed to. Equally, grounds for liability must be established on the basis of failure to carry out due diligence. Stricter liability must be imputed in certain situations and for certain conducts.

Where two or more business enterprises are liable for the same harm, they shall be liable jointly and severally.

Rules on disclosure of evidence<sup>13</sup> and statute of limitations<sup>14</sup> must ensure adequate, timely and effective access to judicial remedy<sup>15</sup>. In particular, where a claimant has presented reasonably available facts and evidence sufficient to support their action, the business enterprise must bear the burden of clarifying the nature of its relationship with the entities involved in the harm, and proving whether it took all reasonable measures to prevent the harm from occurring.

**5. Member States must ensure robust enforcement of all the above obligations and ensure the right to an effective remedy.**

Member States must put in place effective measures to ensure compliance with the above-mentioned obligations as well as access to remedy, including judicial remedy, for victims. Victims of human rights abuses must be afforded the right to an effective remedy under international,<sup>16</sup> EU<sup>17</sup> and national law. Competent administrative and judicial authorities must have the mandate to, as appropriate, provide a central registry for annual reporting, investigate potential infringements, enforce compliance, provide access to remedy and penalise or sanction infringements through an array of instruments.

Administrative authorities should be able to act on their own initiative, and both administrative and judicial authorities should be able to act on a complaint by third parties, including members of the public and, as such, civil society organisations and trade unions, through safe and accessible channels which prevent and respond to the threat of reprisals.

**6. The above provisions must apply irrespective of the law otherwise applicable to the resolution of the conflict, as described in Article 16 of Regulation (EC) No 864/2007 (Rome II).**

Unless the claimant(s) choose(s) otherwise, where international private law requires the application of the law of the State where the harm occurred, the provisions of this new legislation must be considered as overriding mandatory in line with Rome II.

**7. This legislation must be cross-sectoral, covering all business enterprises, including financial institutions.**

This new legislation must apply to business enterprises, both public and private, including financial institutions, of all sizes and across all sectors, domiciled or based in, operating, or offering a product or service, within the EU. It must recognise that both small and large business enterprises are part of the same value chain and the focus must be on identifying and mitigating the risks in the entire value chain.

Although cross-sectoral in scope, it should allow for additional measures or specifications for specific sectors, products or activities, especially when they pose high human rights and environmental risk. Such additions must not limit the obligations established in this general legislation.

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<sup>13</sup> This legislation must establish rules of evidence ensuring effective access to remedy, taking into special account the particularities of transnational litigation and sourcing evidence and documentation from third countries.

<sup>14</sup> Any limitation period for bringing legal actions must be reasonable and sufficient, taking into special account the particularities of transnational litigation. The limitation period should be no less than five years and should not begin to run before the human rights or environmental adverse impact has ceased and the claimant knows or can reasonably be expected to know the facts as a result of which their right can be exercised.

<sup>15</sup> This legislation should in no way constitute grounds for undermining the liability and access to remedy frameworks already existing in individual Member States.

<sup>16</sup> The right to an effective remedy is contained in article 2(3) of the [International Covenant on Civil and Political Rights \(ICCPR\)](#).

<sup>17</sup> The right to an effective remedy is contained in article 47 of the [Charter of Fundamental Rights of the European Union](#).

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