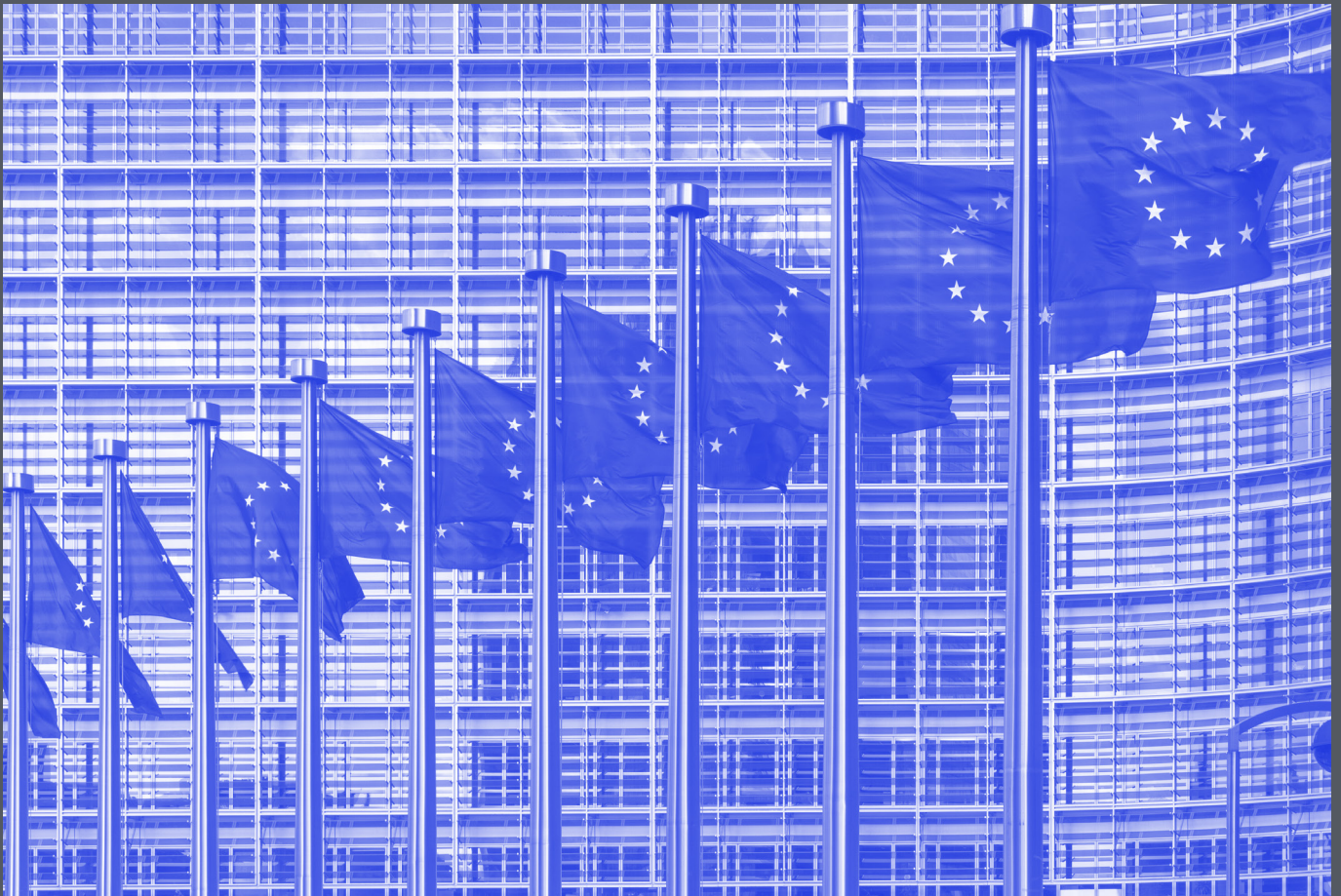


EU model law on corporate accountability in global value chains

Model provisions on global corporate due diligence and liability for human rights abuses and environmental harm



Background

ECCJ has long been calling for EU legislation on mandatory human rights and environmental due diligence and corporate liability, requiring companies to identify, prevent, mitigate and account for human rights abuses and environmental damage in their global value chains.

EU-wide mandatory corporate due diligence and accountability legislation would:

- Enable the EU to fulfil its international duties under the UNGPs.¹
- Prevent human rights abuses in global business operations.
- Ensure a level playing field and a coherent legal framework for all EU companies.
- Promote responsible business conduct, including by foreign undertakings, which would be required to implement due diligence measures to operate in the single market.
- Ensure respect for core labour rights worldwide and reverse the current trend towards a race to the bottom in terms of social standards.
- Preserve the EU's reputation as a global champion for human rights.
- Give consumers the confidence that the goods and services they buy are produced and provided responsibly.

ECCJ has now identified and detailed a set of minimum provisions that such legislation should include to ensure an effective and comprehensive EU regulatory framework for the above purposes.

Objective

The law should address:

- Potential and actual impacts on international human and labour rights²
- Potential and actual impacts on international environmental standards³ and other environmental impacts
- Impacts on internationally recognised rights of particularly vulnerable groups or individuals⁴

EU competence

The EU has the duty to promote respect for human rights and the environment when it adopts and implements legislation as well as in its relations to the wider world.⁵

The EU has the competence to harmonise national company laws to attain freedom of establishment⁶ and approximate legislation to ensure the proper functioning of the internal market.⁷

Institutional support

Several EU and international institutions have long acknowledged the need for human rights and environmental due diligence legislation:

European Parliament

- Resolution on the liability of companies for environmental damage (2021)
- Resolution on the effects of climate change on human rights and the role of environmental defenders (2021)
- Resolution on the New Circular Economy Action Plan (2021)
- Resolution on corporate due diligence and corporate accountability (2021)
- Resolution on human rights and democracy in the world and the EU's policy on the matter - annual report 2019 (2021)
- Resolution on a strong social Europe for Just Transitions (2020)
- Resolution on the EU Trade Policy Review (2020)
- Resolution with recommendations to the Commission on an EU legal framework to halt and reverse EU-driven global deforestation (2020)
- Resolution on EU coordinated action to combat the COVID-19 pandemic and its consequences (2020)
- Report on competition policy – annual report 2019 (2020)
- Resolution on child labour in mines in Madagascar (2020)
- Resolution on violation of the rights of indigenous peoples, including land grabbing (2018)
- Resolution on sustainable finance (2018)
- Resolution on the impact of international trade and the EU's trade policies on global value chains (2017)
- Resolution on the EU flagship initiative on the garment sector (2017)
- Resolution on corporate liability for serious human rights abuses in third countries (2016)

Subject	AM	Voting	+	-	o
Wolters (A9-0018/2021) Corporate due diligence resolution (as a whole)			695	504	79 112
Doleschal (A9-0012/2021) Construction Products Regulation (as a whole)			695	686	4 5

↑ Result of the European Parliament vote on the Resolution on corporate due diligence and corporate accountability in March 2021.

Council of the European Union

- Conclusions on Human Rights and Decent Work in Global Supply Chain (2020)
- Conclusions on EU Priorities in UN Human Rights Fora (2019, 2020)
- Conclusions on Business and Human Rights (2016)
- Conclusions on the EU and Responsible Global Value Chains (2016)

European Economic and Social Committee:

- Opinion on mandatory due diligence (2020)
- Opinion on sustainable supply chains and decent work in international trade (2020)

Fundamental Rights Agency

- Report on Business and human rights – access to remedy (2020)
- Opinion on improving access to remedy in the area of business and human rights at the EU level (2017)

Council of Europe

- Recommendation on Human Rights and Business (2016)

Office of the High Commissioner for Human Rights

- Mandatory Human Rights Due Diligence Regimes - Some Key Considerations (2020)
- “Issues Paper” on legislative proposals for mandatory human rights due diligence by companies (2020)
- Report on improving accountability and access to remedy for victims of business-related human rights abuse (2016)

Green Card initiative

- MPs in eight Member States call for an EU duty of care legislation to ensure corporate accountability for human rights abuses (2016).

National precedents^{8,9}

Austria

In 2020, the Social Democratic Party introduced a draft for a Social Responsibility Law that would impose due diligence requirements as regards forced and child labour in garment supply chains.

Belgium

In 2021, Belgian MPs introduced a draft for a Duty of Vigilance Law that would impose supply chain due diligence requirements. Under such law, non-compliant companies would face large fines and victims would be able to hold them civilly liable for human rights abuses and environmental harm.

Denmark

In 2019, three political parties put forward a parliamentary motion requesting the government to develop a legislative proposal on human rights due diligence and corporate liability.

Finland

In 2019, the current government of Finland committed to mandatory human rights due diligence legislation at national and EU levels.

France

In 2017, France adopted the Duty of Vigilance Law obliging the largest French companies to identify and address adverse human rights and environmental impacts linked to their global operations. Under this law, affected workers and communities are entitled to hold French companies liable for harm caused by subsidiaries, subcontractors and suppliers.

Germany

In 2021, Germany adopted a supply chain law that will impose human rights and environmental due diligence requirements on large companies, which will face large fines in case of non-compliance. The new German government agreement strongly supports binding legislation at EU level.

Italy

The National Action Plan (2016) set the Government’s commitment to evaluate the integration of more human rights offences into law, and to consider legislative reforms requiring corporate respect for human rights.

Luxembourg

In 2018, the current government of Luxembourg committed to explore national human rights due diligence legislation and to support EU legislation.

Netherlands

In 2019, the Netherlands adopted the Child Labour Due Diligence Law, obliging companies that deliver products or services to the Dutch market to conduct supply chain due diligence relating to child labour. Once in force, failing to follow the law may lead to severe fines. The new Dutch government is committed to advancing broader due diligence legislation at both national and EU levels.

Norway

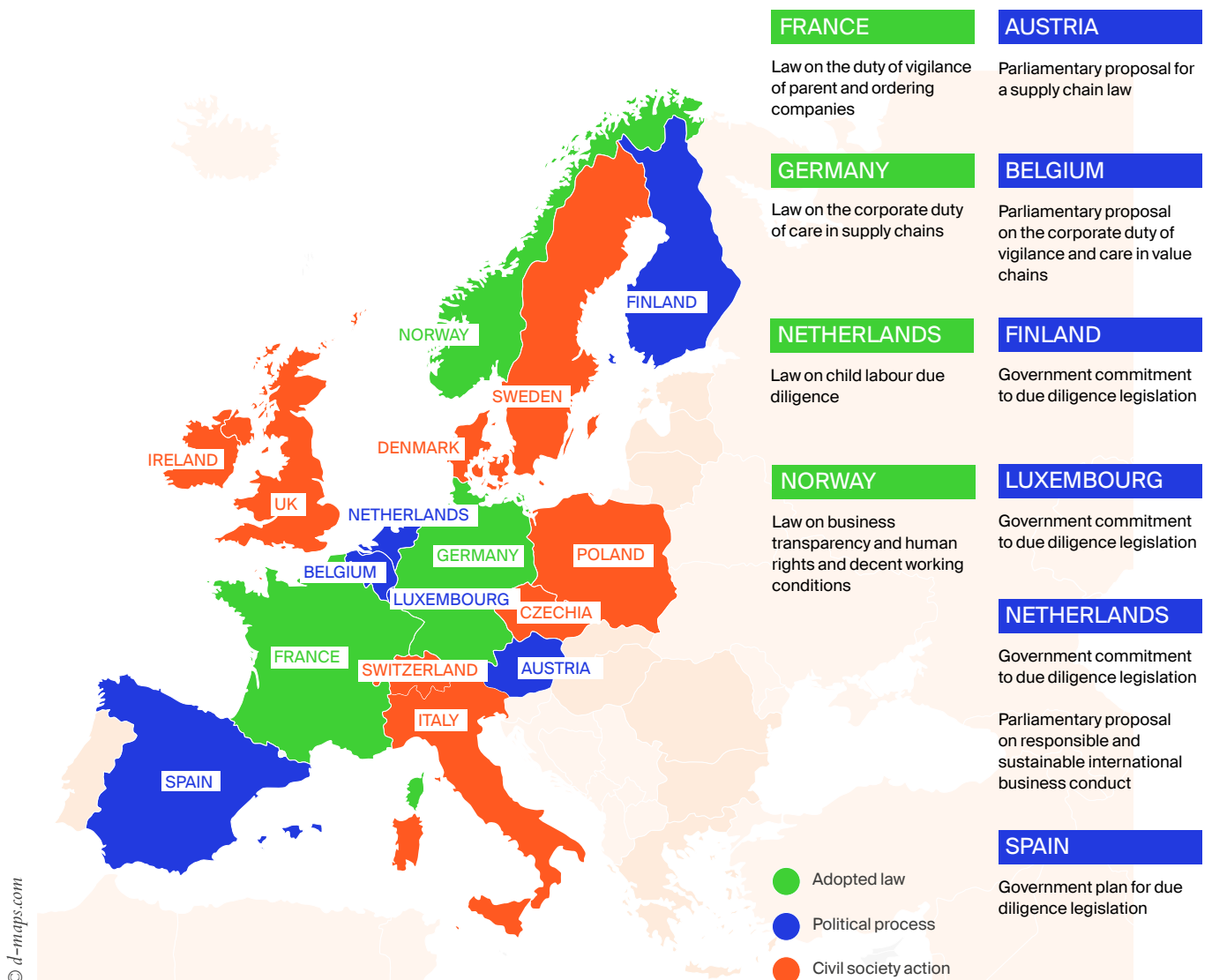
In 2021, Norway adopted the Transparency Law, obliging large and mid-size companies to conduct human rights and decent work due diligence throughout their entire global value chains.

Spain

The Spanish government included in its Annual Regulatory Plan for 2022 a law for the protection of human rights, sustainability and due diligence in transnational business activities.

Switzerland

In 2021, after a long campaign for a popular initiative on the topic, Switzerland adopted supply chain due diligence requirements as regards impacts linked to conflict minerals, as well as child labour.



Proposal for an EU law on corporate accountability in global value chains

Company scope

Undertakings, including financial institutions, regardless of size and sector, should be within the scope of this law if:

- a. they are domiciled in a Member State; or
- b. they place products on or provide services in the internal market –only with respect to the human rights and environmental impacts within the global value chains of those products or services.

General obligation

Undertakings should:

- a. Respect, in their own activities, international human rights and environmental standards.
- b. Ensure that these standards are respected by companies under their control.
- c. Take appropriate measures to ensure that these standards are respected throughout their global value chain.

These obligations should be applicable to business operations inside and outside of the EU.

Duty to identify, prevent and mitigate harm in global value chains

Duty of due diligence

Undertakings should take all necessary measures to respect and ensure respect for human rights and the environment throughout their entire value chain,¹⁰ including by adequately and effectively:

- a. Identifying and assessing real and potential impacts.

- b. Ceasing and remedying existing abuses.
- c. Preventing and mitigating risks of abuse.
- d. Monitoring the implementation and effectiveness of the adopted measures.

Undertakings should continuously evaluate and improve the effectiveness of their due diligence.

Given the lack of a comprehensive body of internationally recognised environmental standards, principles and normative standards of international environmental agreements should be complemented by a non-exhaustive catalogue of adverse environmental impacts.

Duty of consultation

Undertakings should:

- a. Adequately, timely and directly consult impacted and potentially impacted stakeholders.
- b. Properly take into account stakeholders' perspectives in the definition and implementation of the due diligence measures.
- c. Ensure that representative trade unions and workers' representatives are involved in the definition and implementation of the due diligence measures.

Duty of reporting

Undertakings should publicly report on their due diligence and consultation processes and their results in a public, accessible and appropriate manner.

In particular, they should report on the identified impacts; the actions taken to cease and remedy existing abuses and to prevent and mitigate risks of abuse, as well as their outcomes; and the measures and results of monitoring the implementation and effectiveness of such actions.

Duty of documentation

Undertakings should maintain a written record of all due diligence actions and their results, and make them available to the competent authorities on request.

Enforcement and access to justice

Public enforcement

Member States should ensure, in accordance with their national law and practice, the enforcement of the above duties by:

- a. Providing for proportionate, effective and dissuasive penalties and sanctions^{11,12} where non-compliance contributes to, or aggravates, abuses or the risk of abuse.
- b. Designating competent investigating and enforcement authorities.
- c. Ensuring that members of the public¹³ may challenge non-compliance before the judicial or administrative authorities.

Civil liability and access to remedy

I. Civil liability

Undertakings should be:

- a. Jointly and severally liable for harm arising out of human rights and environmental abuses caused or contributed to by controlled¹⁴ or economically dependent entities.¹⁵
- b. Liable for harm arising out of human rights and environmental abuses directly linked to their products, services or operations through a business relationship, unless they can prove they acted with due care and took all reasonable measures that could have prevented the harm.¹⁶

II. Disclosure of evidence

Where a plaintiff has presented reasonably available facts and evidence sufficient to support their action, the defendant should bear the burden of proving:

- a. The nature of its relationship with the entities involved in the harm.
- b. Whether it acted with due care and took all reasonable measures to prevent the harm from occurring.

III. Statute of limitations

Member States should ensure that any limitation period for bringing legal actions under this law is reasonable and sufficient, taking into special account the particularities of transnational litigation.¹⁷

The limitation period for bringing legal actions under this law should be no less than five years.

The statute of limitations must take into account that environmental impacts may only be discovered long after they occurred and their effects may manifest only after a long delay.

IV. Legal standing

Member States should enable collective redress actions in cases of business-related human rights abuses or environmental harm, making affected people automatically eligible to join a claim without complex registration procedures.

Member State should also enable representative actions by civil society organisations and trade unions.

V. Financial risk

Member States should ensure that, where a claimant wins, legal costs can be fully recoverable from a defendant company; and, where a claimant loses, costs can be balanced by the court in light of the disparity of resources between the parties.

Member States' rules on legal aid and litigation funding should consider the financial barriers claimants face in judicial proceedings relating to business-related human rights abuses or environmental harm.

VI. Competent jurisdiction

In the future, the Brussels I Regulation should be modified to allow EU courts to assert jurisdiction to decide a claim where there is no alternative available forum able to guarantee the right to a fair trial ('forum of necessity'); to hear a claim against an EU-domiciled parent/lead company's foreign subsidiary or value chain partner, where both defendants are necessary party to the claim; and to hear a claim against the non-EU parent company of a corporate group with a strong presence in the EU.

VII. Parallel litigation

EU courts should have jurisdiction over legal actions under this law, regardless of whether related proceedings against the subsidiary, supplier or subcontractor are brought in the courts of a third state.

VIII. No claim preclusion

A foreign ruling against the liability of a subsidiary, supplier or subcontractor should not prevent EU courts

from determining the liability of an undertaking for the same harm.

Likewise, litigation for environmental harm must not preclude victims from bringing a case on human rights grounds and vice versa.

Trade restrictions

EU import controls on products made in whole, or in part, or transported with, forced labour should complement the above provisions. This will particularly be the case when corporate due diligence efforts are effectively impossible to implement on the ground or where due diligence efforts have proven ineffective or are unlikely to deliver.¹⁸

Final provisions

Overriding mandatory provisions

All provisions in this law, procedural and substantial, should be considered as overriding mandatory and therefore apply irrespective of the law otherwise applicable to the non-contractual obligation.

In the future, the Rome II Regulation should be modified so that claimants are allowed to choose the applicable law in judicial proceedings relating to business-related human rights abuses.

Non-regression

The implementation of this law should in no way constitute grounds for justifying a reduction in the general level of protection of human rights and the environment.

More favourable provisions

Member States may introduce or maintain provisions that are more favourable to the protection of human rights and the environment.

Footnotes

1. The EU and all its Member States signed endorsed the UN Guiding Principles on Business and Human Rights in 2011.
2. At a minimum, those set out in the International Bill of Human Rights, the International Labour Organisation's Declaration of Fundamental Principles and Rights at Work and the EU Charter of Fundamental Rights.
3. Including norms adopted in the framework of the UN (e.g., the Montreal Protocol on Substances that deplete the Ozone Layer) and standards developed by international organisations (e.g., the Environmental and Social Standards of the International Finance Corporation).
4. E.g., indigenous peoples, migrants or women.
5. Articles 2, 3.5, 21 of the Treaty of the European Union.
6. Article 50 of the Treaty on the Functioning of the European Union.
7. Article 114 of the Treaty on the Functioning of the European Union.
8. More information is available in ECCJ's comparative analysis of the different human rights and environmental due diligence laws and legislative proposals in Europe.
9. Map from "Unpacking the upcoming EU law to stop corporate abuse" by Anti-Slavery International, Amnesty International, CIDSE, Clean Clothes Campaign, ECCHR, ECCJ, FIDH, Friends of the Earth Europe, Global Witness and Oxfam (December 2021), <https://corporatejustice.org/publications/unpacking-the-upcoming-eu-law-to-stop-corporate-abuse/>
10. Including all types of business relationships of the undertaking with business partners and entities along its entire value chain (suppliers, franchisees, licensees, joint ventures, investors, clients, contractors, customers, consultants, financial, legal and other advisers), and any other non-State or State entity directly linked to its business operations, products or services
11. "Putting the Environment in Human Rights and Environmental Due Diligence," <https://corporatejustice.org/publications/puttingenvironment-in-due-diligence>.
12. Including exclusion from public procurement and public funding.
13. Member States could likewise provide for positive incentives to encourage compliance.
14. Including any individuals or groups whose rights and obligations or interests are affected, directly or indirectly, by the undertaking's total or partial failure to perform its duties, including employees, customers, consumers and end-users, trade unions, transnational trade union federations, local communities, national or local governments or institutions, journalists, NGOs and local civil society organisations.
15. A legal person should be deemed under the control of an undertaking where the latter has the possibility of exercising, or actually exercises, control or decisive influence over the legal person or over its human rights, labour, environmental or health and safety policies or practices, on the basis of rights, contracts or any other means, either separately or in combination, and having regard to the considerations of fact and law involved.
16. A legal person should be deemed economically dependent on an undertaking where, as supplier or purchaser of a certain type of goods or services, the former depends on the latter in such a way that sufficient and reasonable possibilities of switching to other undertaking(s) do not exist.
17. Undertakings may therefore discharge their liability if they can prove that they took all due care to identify and avoid the damage.
18. Limitation periods should not begin to run before the human rights or environmental abuse has ceased and the plaintiff knows, or can reasonably be expected to know: a) of the behaviour and the fact that it constitutes a human rights or environmental abuse; b) of the fact that the abuse caused or contributed to the harm; and c) of the identity of the undertaking potentially liable for the harm.
19. "Key considerations for an EU instrument to control the importation of forced labour products," <https://corporatejustice.org/publications/keyconsiderations-for-an-eu-instrument-to-control-the-importation-offorced-labour-products>.

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