

30.05.2018

ECCJ submission to the UN Working Group on Business and Human Rights consultation on “Corporate Human Rights Due Diligence – identifying and leveraging emerging practice”.

Summary:

The present submission responds to the call of the UN Working Group on Business and Human Rights for contributions on the topic “corporate Human Rights Due Diligence – identifying and leveraging emerging practice”. It takes note of the remark in the Working Group’s concept note that scaling up in the implementation of HRDD “will also require push and pull efforts by a wider range of actors: notably States”ⁱ. In particular, this contribution addresses the questions “*To what extent would it be useful to examine the role of regulation and government policy in relation to HRDD?*” and “*What concrete examples of government regulation, policy and initiatives might be useful to highlight?*”ⁱⁱ.

In order to respond to the questions above, the document provides a number of relevant examples of **adopted legislation or legislative initiatives** that embed HRDD or some of its elements into legal frameworks at country and EU levels. Moreover, the document draws attention to the growing presence, within law-making processes and policy discussions, of the link between HRDD requirements and **corporate liability**. This development presents important implications for addressing some of the key obstacles faced by victims of business-related human rights abuses when they seek remedy.

In addition to regulatory developments, this contribution collects policy statements by governments, European institutions and United Nations bodies which acknowledged the need for binding regulations to promote HRDD implementation, or commit to undertake or assess policy reforms in this regard.

1) Examples of government regulation, policy and initiatives related to HRDD obligations.

Human Rights Due Diligence (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. Since the UN Human Rights Council’s adoption of the United Nations Guiding Principles on Business and Human Rights (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 decision-makers has proven insufficient.

In the last years, however, several European and non-European countriesⁱⁱⁱ, as well as the EU, have adopted or started to consider legislation that embeds elements of HRDD into law. The BHRinlaw.org website provides a global overview of legislative and case-law developments in the field of mandatory Human Rights Due Diligence and parent company liability.

These developments show a growing acceptance by decision-makers of the **need for regulatory action and, in particular, for the adoption of binding legislation** in order to incentivize and promote the implementation of HRDD by companies.

Three generations of regulations can be observed in this regard:

1.1 Legislation establishing HRDD reporting or disclosure obligations:

A first generation of legal developments establishes company reporting or disclosure obligations. These laws general require companies to disclose information about the human rights and/or environmental impacts or risks of impacts connected to their activities or to the activities of their business relationships, as well as on their plans to address these risks. Some examples within this category are:

UK: The **Transparency in Supply Chains** clause in the UK Modern Slavery Act (MSA, 2015)^{iv} 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. If a company has taken no steps, it has to publish a statement declaring that no steps have been taken.

EU: The **Non-Financial Reporting Directive**^v has established 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.

1.2 Legislation establishing full HRDD obligation:

A second generation of laws establish requirements that cover the entire HRDD procedure, including risks identification, the obligation to take action, and to report on measures taken, including their outcomes. Some examples can be found both at the level of the EU and Member States:

EU: The recent **Conflict Minerals Regulation**^{vi} imposes HRDD obligations for importers bringing ores and metals of tin, tantalum, tungsten, and gold (3TG) into the EU. The DD obligations for importers of minerals have been defined according to the OECD Due Diligence Guidance Framework^{vii}. Previous to this law, the **EU Timber Regulation**^{viii} (2010) already required 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. This year, the European Commission (EC) has published its **Action Plan on Financing Sustainable Growth** (March 2018). Among other measures aimed at improving corporate governance, the document includes a commitment to assess by 2019 the possibility of introducing supply chains due diligence requirements for corporate boards^{ix}.

The Netherlands: the **Child Labour Due Diligence bill**^x is awaiting vote in the Senate. The proposed law creates HRDD requirements for those companies, wherever incorporated, that deliver products and services to the Dutch market two or more times a year. According to the bill, these 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 to deal with it.

1.3. Legislation linking HRDD obligations to existing (civil) corporate liability:

A third emerging generation of laws establishes for companies the obligation to identify, prevent and account for the human rights and environmental impacts linked to their own operations or to their business relationships, while they also include a provision on corporate civil liability. These models address the liability of the parent company for damage caused by third parties when certain conditions are met. Persons harmed by the breach of human rights or environmental standards are allowed to bring an action against the parent company in order to seek remedy for the harm that would have been avoided if due diligence had been exercised appropriately. There are two leading examples of this type of emerging legislation in Europe:

France: The **duty of vigilance law**^{xi} (adopted in 2017) represents a landmark development. It requires large French companies to establish a *vigilance plan* with measures to adequately identify the 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. This duty of vigilance obligation also requires companies to effectively implement and to publish the plan. The law also establishes civil liability for harms resulting from a company's failure to observe its duty of vigilance.

Switzerland: The citizen **Responsible Business Initiative (RBI)**^{xii} proposes introducing in the Constitution the companies' obligation to respect human rights and environmental standards. In order to fulfil this obligation, companies would be required to carry out appropriate due diligence with respect to risks to human rights and the environment linked to their activities and to its business relationships. The initiative also includes the civil liability of the parent company for damage caused by entities under their control that result from the violation of internationally recognized human rights or environmental

standards. In May 2018, the Parliament's Legal Affairs Committee approved a **counter-proposal**^{xiii} which includes mandatory HRDD and civil liability for parent companies.

2) Examples of policy documents recognizing the need for binding HRDD and/or committing to assess HRDD legislation

2.1. State's policy documents

UK: In March, 2017 the Parliament's **joint Committee on Human Rights recommended**^{xiv} to the Government to develop legislation to impose 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: The **National Action Plan** to implement the UNGPs (NAP) (2016) includes a commitment by the Government to consider legislative measures if fewer than half of major German companies adopt HRDD processes by 2020^{xv}.

Italy: The **National Action Plan** (2016)^{xvi} sets the Government's commitment to look into ways of enhancing enforcement of laws requiring corporate respect of human rights, including duty of care or due diligence for companies.

Green Card: In 2016, members of eight EU Member States parliaments launched a "**Green Card**"^{xvii} asking the European Commission to initiate a legislative procedure 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.

2.2. EU and European institutions:

Council of the EU: In May 2016, the Council approved its Conclusions on Global Value Chains^{xviii}, which includes a call to the European Commission (EC) and Member States to enhance the implementation of due diligence in order to achieve a global level playing field. In June that same year, the Council passed its Conclusions on Business and Human Rights^{xix}. The document 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 endorses the 2016 Council of Europe Recommendations and calls for their implementation.

European Parliament: The institution has highlighted the need for binding HRDD regulation at the EU legislative level in a number of reports. The 2017 Report on EU Flagship Initiative for the garment sector^{xx} demanded the Commission to propose binding supply chains due diligence legislation. That same year, the EP Report on Global Value Chains^{xxi} 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 countries^{xxii} 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 rights^{xxiii} in April 2017. After revising the key obstacles faced by victims of corporate-related human rights abuses to obtain proper remedy, the document recommends 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 of corporate-related human rights abuses. In 2016, the CoE's Committee of Ministers published a "Recommendation on Human Rights and Business"^{xxiv} that

includes measures to secure victims of business-related human rights abuses access to court and proper remedies, even when the company is not domiciled within the courts' State jurisdiction. It recommended legal measures, including mandatory HRDD, to be applied in certain circumstances.

2.3. United Nations (UN) bodies:

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 project^{xxv}. It recommended States to develop 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 issued its General Comment No. 24 concerning states' obligations in the context of business activities in 2017^{xxvi}. It affirmed that States have the duty to establish 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 issued its General Comment No. 16 concerning states' obligations regarding the impact of the business sector in children's rights^{xxvii} in 2013. It affirmed that, in order to meet its obligation to ensure that business enterprises respect children's rights, states should require business to undertake due diligence.

2.3. Other international organisations, the OECD:

In April 2016, the OECD published its report on the implementation of the Recommendation on Due Diligence Guidance for Responsible Supply Chains of Conflict Minerals^{xxviii}. The document recognized that regulatory measures have provided the strongest impetus to promote responsible conduct from business.

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.

Contact

Rue d'Edimbourg 26
1050 Brussels - Belgium
(T) +32 (0)2 893 10 27
eccj@corporatejustice.org
www.corporatejustice.org

ENDNOTES:

- ⁱ “Corporate human rights due diligence – identifying and leveraging emerging practice”, Background
- ⁱⁱ “Corporate human rights due diligence – identifying and leveraging emerging practice”, Background Note, op. cit. p. 4.
- ⁱⁱⁱ On non-European States, see California Transparency in Supply Chains Act 2010 (US); Dodd–Frank Act, sec 1502, 2010 (US).
- ^{iv} Modern Slavery Act 2015, Provision 54, Transparency in Supply Chains.
- ^v 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.
- ^{vi} EU Conflict Minerals Regulation (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).
- ^{vii} OECD’s Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, including its Supplements on 3TG, <http://www.oecd.org/corporate/mne/mining.htm>.
- ^{viii} 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).
- ^{ix} 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. See Action Point 10.
- ^x Child Labour Due Diligence Law, currently awaiting Senate approval. See FAQs [here](#).
- ^{xi} Law num. 2017-399 from 27 March 2017 concerning the duty of vigilance of parent companies and ordering companies. See ECCJ’s FAQs [here](#).
- ^{xii} Responsible Business Initiative (RBI), Switzerland. See text of the Initiative with explanations [here](#).
- ^{xiii} Counter-proposal by the Swiss Parliament to the citizen initiative 'Responsible Business Initiative' (original text published May 4th 2018 in French and German), unofficial translation available [here](#).
- ^{xiv} 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. Available [here](#).
- ^{xv} National Action Plan, implementing the UN Guiding Principles on Business and Human Rights, 2016-2020. Published by the Federal Foreign Office. Available [here](#).
- ^{xvi} Italian Action Plan on Business and Human Rights, 2016-2021. Available [here](#).
- ^{xvii} “Members of eight Member States Parliaments support duty of care legislation for EU corporations”, 31 May, 2018. Available at [ECCJ website](#).
- ^{xviii} The EU and Responsible Global Value Chains, Council Conclusions (12 May 2016). Available [here](#).
- ^{xix} Council Conclusions on Business and Human Rights (20 June 2016). Available [here](#).
- ^{xx} EP Report on the EU flagship initiative on the garment sector (2016/2140(INI)), adopted on 28 March 2017. Available [here](#).
- ^{xxi} EP Report on the impact of international trade and the EU’s trade policies on global value chains (2016/2301(INI)), 20 July 2017. Available [here](#).
- ^{xxii} EP Report on on corporate liability for serious human rights abuses in third countries 2015/2315(INI). Available [here](#).

^{xxiii} "Improving access to remedy in the area of business and human rights at the EU level", FRA Opinion - 1/2017, 10 april 2017. Available [here](#).

^{xxiv} Human Rights and business – Recommendation CM/Rec(2016)3 of the Committee of Ministers to Member States (2016). Available [here](#).

^{xxv} "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. Available [here](#).

^{xxvi} 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/. Available [here](#).

^{xxvii} 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. Available [here](#).

^{xxviii} 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]. Available [here](#).