

EU Mandatory Human Rights Due Diligence Directive: Recommendations to the European Commission

2 July 2021

A. Introduction

This note has been prepared by the Office of the UN High Commissioner for Human Rights (“OHCHR”) as a contribution to the European Commission’s work on human rights and environmental due diligence.¹ **OHCHR welcomes the Commission’s announcements that it intends to introduce a new regime for EU-wide “mandatory supply chain due diligence” which draws from and is aligned with the UN Guiding Principles on Business and Human Rights (UNGPs).** Mandatory human rights due diligence regimes have a potentially vital role to play as part of a **smart mix** of measures to effectively foster business respect for human rights, as called for in the UNGPs.

OHCHR is the UN agency responsible for leading the business and human rights agenda within the UN system.² Since the unanimous endorsement of the UNGPs by the UN Human Rights Council in 2011, OHCHR has contributed to the dissemination and implementation of the UNGPs in many different ways. This includes providing practical and interpretative advice, tools and other resources,³ supporting capacity building, and carrying out detailed comparative and empirical research, notably in relation to accountability and remedy.⁴

On 10 March 2021, the European Parliament passed a resolution (the “EP resolution”) calling upon the Commission to prepare and submit legislative proposals for EU-wide “mandatory supply chain due diligence” and setting out a number of suggestions as to what that legislation should contain.⁵ In this note, OHCHR draws on its extensive expertise on the implementation of the UNGPs to offer some reflections and recommendations to aid the Commission as it works to further develop its legislative proposals against the background of the EP resolution.⁶ For convenience and brevity, this note **focuses on the issues that seemed most pressing in light of the EP resolution**, and especially the recommendations set out in the annex to that resolution (“EP model legislation”). **It should not be taken as a comprehensive commentary; the aim is rather to draw attention to some issues which**

¹ These proposals form part of the European Commission’s Sustainable Corporate Governance Initiative. See ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance.

² The High Commissioner’s office is mandated to promote the UNGPs. Further, OHCHR acts as secretariat for the UN Working Group on Business and Human Rights, which is independently mandated by the Human Rights Council to promote the effective and comprehensive dissemination and implementation of the UNGPs.

³ www.ohchr.org/EN/Issues/Business/Pages/Resources.aspx.

⁴ www.ohchr.org/EN/Issues/Business/Pages/OHCHRaccountabilityandremedyproject.aspx.

⁵ European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)), available at www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.html.

⁶ While the EP resolution references a number of significant international standards and resources relevant to human rights due diligence by companies (including the OECD Guidelines on Multinational Enterprises, the 2018 OECD Due Diligence Guidance for Responsible Business Conduct, and the 2017 version of the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy), this note works from the framework laid down in the UNGPs, as the authoritative global standard, upon which subsequent standards are based.

will require early consideration and resolution by the Commission, to bring about alignment between the EU regime and the UNGPs.⁷

The first part of this note is focussed on issues connected with the translation of **human rights due diligence** (as laid down in the UNGPs) into a binding legal standard. The second part addresses some **specific themes concerning corporate accountability and remedy under the regime.**

B. Human rights due diligence

1. Scope

OHCHR strongly supports the statements set out in the EP resolution about the need for human rights due diligence to encompass the entire value chain, both upstream and downstream.⁸ As the UNGPs state, human rights due diligence “should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships”.⁹ A legislative approach that is limited to, or which causes companies to prioritise, those relationships with which companies have a direct commercial relationship (e.g. “Tier 1 suppliers”) would not be aligned with the UNGPs. Neither is it likely to prove particularly effective in many cases, given that serious abuses in supply chains are often found at points further upstream or downstream in value chains involving parties with which there might not be a direct (i.e. “Tier 1”) relationship.

For a robust and impactful legislative regime that is aligned with the UNGPs, the Commission should avoid creating requirements or incentives that could narrow the focus of human rights due diligence to operations or activities with which a company has the closest commercial relationships.

2. Capturing the structure, sequencing and logic of human rights due diligence

Human rights due diligence is the ongoing risk management process which enterprises need to undertake to meet their responsibility to respect human rights. Under the UNGPs, it comprises the following activities:

- **Identification and assessment of actual and potential human rights risks** (drawing on internal and/or independent external human rights expertise and involving meaningful stakeholder consultation). It is at this point in the cycle that supply chain mapping and risk evaluation would take place;¹⁰
- **Integrating the findings from human rights impact assessments across all relevant internal functions and processes and taking appropriate action to prevent or mitigate impacts,** including through the use of leverage;
- **Tracking the effectiveness of responses** to human rights impacts and risks; and
- **Communicating** information on progress in relation to human rights risk management.¹¹

⁷ Further information, tools and technical guidance on human rights due diligence can be found in the box at the end of this document.

⁸ EP Resolution, esp. para. 7.

⁹ UNGP 17 and commentary.

¹⁰ The EP model legislation calls for mapping of the value chain after the identification stage (see Article 4(4)).

¹¹ For further information and authoritative guidance on each of these four key aspects of human right due diligence, please see OHCHR, *The Corporate Responsibility to Respect: An Interpretive Guide* (2012), p. 8, available at www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf; *OECD Due Diligence Guidance for*

Each of these activities is critical to a robust and effective human rights due diligence process. However, the EP model legislation does not appear to fully reflect this process. OHCHR notes with concern the suggestion that a “due diligence strategy” (see Article 4(4)) is somehow separate from the identification and assessment process needed in order to determine whether an undertaking is or may be causing, contributing to, or directly linked to actual or potential adverse impacts (see Articles 4(2 – 4)).

A binding legal standard that is aligned to the UNGPs would clearly stipulate that these determinations (i.e. as to whether or how a company might be involved with actual or potential adverse human rights impacts) are made on the basis of a thorough risk assessment that reflects, at a minimum, UNGP 18 and, moreover, would be designed in such a way as to reinforce the need for ongoing, iterative management processes based around the concept of proportionality.¹² OHCHR urges the Commission to revisit the relevant provisions of the UNGPs, and also relevant supplementary guidance produced by OHCHR, to ensure alignment with the UNGPs in the Commission’s eventual legislative proposal.¹³

3. Stakeholder engagement

Proactive and meaningful stakeholder engagement occupies a central and crucial place in human rights due diligence.¹⁴ In the framework laid down in the UNGPs, it is a key source of information from which companies can better identify, understand and address human rights risks, and by which companies can track the effectiveness of their responses.¹⁵

OHCHR welcomes the emphasis given to stakeholder engagement in the text of the EP resolution. However, some modifications will be needed to the EP model legislation to ensure that stakeholder engagement is properly integrated into human rights due diligence in the manner envisaged in the UNGPs. For example, the UNGPs call for meaningful consultation with “potentially affected” groups or stakeholders such that companies can understand, as far as possible, the concerns of those who may be directly affected by their operations and the operations of other entities with which they have business relationships.¹⁶ However, the EP model legislation definition of “stakeholders” in Article 3(1) broadens the definition to include groups that may not understand the concerns and perspectives of those adversely impacted by business (for instance, “undertakings’ shareholders” are included in the definition). This definition frustrates the purpose of meaningful stakeholder engagement in human rights due diligence processes.

Further, the UNGPs explicitly mention that when business enterprises “identify and assess” their impacts, this process should “involve meaningful consultation with potentially affected groups and

Responsible Business Conduct (2018), available at www.oecd.org/investment/due-diligence-guidance-for-responsible-business-conduct.htm.

¹² See letter from UN Working Group on Business and Human Rights to Commissioner Reynders (22 October 2020), p. 4, available at www.ohchr.org/Documents/Issues/Business/RecommendationsLegislativeProposal.pdf.

¹³ E.g., OHCHR, *The Corporate Responsibility to Respect: An Interpretive Guide*.

¹⁴ OHCHR defines stakeholder engagement in this context as “an ongoing process of interaction and dialogue between an enterprise and its potentially affected stakeholders that enables the enterprise to hear, understand and respond to their interests and concerns, including through collaborative approaches.” *Id.* at p. 8.

¹⁵ UNGPs 18 and 20 and commentary.

¹⁶ See OHCHR, *The Corporate Responsibility to Respect: An Interpretive Guide*, pp. 43-45.

other relevant stakeholders.”¹⁷ However, the requirement to identify and assess impacts in Article 4(2) does not make any reference to the need to consult these stakeholders; rather, the EP model legislation requires stakeholder engagement only *after* the identification stage.¹⁸ This is particularly problematic as undertakings that conclude they have not caused or contributed to, and are not directly linked to, adverse impacts do not need to establish and implement a “due diligence strategy.” As undertakings cannot accurately identify their impacts on human rights without seeking to understand the concerns of potentially affected stakeholders, failing to require stakeholder engagement at the identification stage can have deleterious consequences for the effectiveness of the law.¹⁹

As the Commission works towards a clearer articulation of the role and importance of stakeholder engagement in human rights due diligence in its forthcoming draft directive (as well as its various technical aspects), it is recommended that the Commission considers resources that have already been made available by OHCHR and the UN Working Group on Business and Human Rights on this topic.²⁰

4. *The role of “leverage” in addressing risks*

The use of leverage is key to preventing and mitigating adverse impacts identified through human rights due diligence processes.²¹ Under the UNGPs, where business enterprises are contributing to or are directly linked to adverse impacts of third parties, they are expected to exercise their leverage to mitigate the impacts to the greatest extent possible and, if the necessary leverage is lacking, to find ways of increasing it.²²

The importance of the concept of “leverage” in the UNGPs does not seem to have been properly reflected in the EP model legislation. Article 4(7) appears to consider “leverage” only as a limiting factor in determining the scope of human rights due diligence exercises; whereas, it is actually of critical importance in helping to define the different opportunities and responsibilities an undertaking may have to **address** potential and actual harms.²³

As the Commission develops its proposal, OHCHR urges relevant EU bodies to give proper weight to the need for companies to proactively seek out ways to enhance their leverage, and then to deploy it effectively, as part of a comprehensive human rights risk mitigation strategy. Attention should be given to the different ways that implementing institutions (at both the EU and Member State levels) could support companies in identifying ways to enhance their leverage, including through collaborative, multi-stakeholder and/or sector-level initiatives.

¹⁷ UNGP 18(b).

¹⁸ See EP model legislation, Article 5 in connection with Article 4(4).

¹⁹ See UNGP 18, commentary.

²⁰ E.g., OHCHR, *The Corporate Responsibility to Respect: An Interpretive Guide*; OHCHR, *Frequently Asked Questions on the Guiding Principles on Business and Human Rights* (2014), available at www.ohchr.org/Documents/Publications/FAQ_PrinciplesBusinessHR.pdf; Working Group report on human rights due diligence to the 2018 General Assembly, A/73/163, esp. para. 45.

²¹ OHCHR defines “leverage” in this context as “the ability of a business enterprise to effect change in the wrongful practices of another party that is causing or contributing to an adverse human rights impact.” OHCHR, *The Corporate Responsibility to Respect: An Interpretive Guide* (2012), p. 7.

²² UNGP 19 and commentary.

²³ See OHCHR, *The Corporate Responsibility to Respect: An Interpretive Guide*, pp. 49-52.

5. *The purpose of human rights due diligence*

As opposed to other forms of corporate due diligence, **human rights due diligence is first and foremost concerned with the prevention of harm to people.**²⁴ OHCHR notes the statements of intent by Commission representatives to integrate mandatory human rights due diligence into a broader regime aimed at achieving more sustainable corporate governance, and which will also require environmental due diligence. While processes for assessing human rights impacts can certainly be incorporated within other risk assessment processes,²⁵ care will need to be taken to preserve the distinctiveness of human rights due diligence as a risk management activity, in particular its focus on risks *to people* as opposed to risk to the business (e.g. to the company or financial risks to shareholders). It will also be important to look at where there are close connections to, and where there are points of difference with, other relevant sustainability risks (e.g. to the environment or related to corporate governance).²⁶ To this end, it will be important that the corporate governance and environmental aspects of any “integrated” due diligence processes are methodologically robust in their own right, and *reinforce* the methodological framework set out in the UNGPs to manage human rights risks.

C. Corporate accountability and remedy

1. *Corporate accountability and legal liability*

As previously noted by OHCHR, it will be necessary to ensure that the design of the regime is capable *in practice* of delivering on the key aim of strengthening human rights due diligence by companies so as to prevent and address business-related human rights harms.²⁷

For this aim to be achieved, the regime will need to set out clearly the basis on which enforcement action may be taken, and by whom, in the event of non-compliance with human rights due diligence standards. The regime should also set out provisions designed to ensure proper regulatory oversight (such as reporting obligations).

Different aspects of the regime may call for different approaches to liability, for instance in terms of

- **forms of liability and enforcement** (e.g. whether civil, administrative and/or criminal); and
- **legal tests for liability** (e.g. whether they focus on the actions of individuals or the quality of systems; whether they are based on proof of fault or “no-fault-based;” or whether liability is defined in terms of non-compliance with standards or poor outcomes, or a combination of both).²⁸

²⁴ See Working Group report on human rights due diligence to the 2018 General Assembly, A/73/163, para. 17 (“The prevention of adverse impacts on people is the main purpose of human rights due diligence.”).

²⁵ *Id.* at p. 40.

²⁶ This is not to imply that adverse human rights impacts, environmental harms and poor corporate governance are completely separate issues. Environmental harms (including climate change) certainly do have implications for human rights, and recognition that human rights risks can be exacerbated by poor corporate governance clearly underpins much of the content of Pillar II of the UNGPs. The development of an integrated approach to due diligence is clearly also an evolving discussion.

²⁷ *UN Human Rights “Issues Paper” on legislative proposals for mandatory human rights due diligence by companies* (June 2020), available at

www.ohchr.org/Documents/Issues/Business/MandatoryHR_Due_Diligence_Issues_Paper.pdf.

²⁸ For further discussion on this point see OHCHR, *Improving accountability and access to remedy for victims of business-related human rights abuse: The relevance of human rights due diligence to determinations of corporate liability*, A/HRC/38/20/Add.2 (2018).

In other regulatory areas connected with responsible business conduct, such as environmental law or consumer law, legal regimes often rely on more than one type of enforcement. For instance, administrative sanctions (e.g. determined by a regulatory body) are applied in cases of non-compliance with *technical aspects of a relevant standard*, whereas civil liability is a potential route to remedy *harm* that arises as a result of that non-compliance.

Mindful that judicial mechanisms are “at the core of ensuring access to remedy,” an important issue for the Commission to reflect upon will be how civil enforcement of the proposed regime can complement other liability regimes under the domestic laws of member States (e.g. the law of tort), which are becoming increasingly utilized in business and human rights cases. In light of the Commission’s goal of creating a more level playing field amongst business actors, it should consider the opportunities for (and potential benefits from) greater alignment between different potential sources of liability.

A more detailed discussion of the role of legal liability in mandatory human rights due diligence regimes, the different forms it can take and the different ways it serves to enhance the effectiveness and impact of such regimes can be found in OHCHR’s “issues paper” on this topic.²⁹

2. *Non-State-based grievance mechanisms*

OHCHR welcomes the emphasis placed on non-State-based grievance mechanisms in the EP model legislation.³⁰ From 2018 – 2020, OHCHR extensively analysed the utility and functioning of such grievance mechanisms as part of its Accountability and Remedy Project (ARP) and produced a report outlining how to enhance the effectiveness of these mechanisms in business and human rights cases.³¹ The provisions in the EP model legislation may need some reworking in order to bring them in line with the UNGPs and our ARP III findings. Some issues with these provisions, and some resources that will be useful in helping to rectify them, are highlighted below.

Effectiveness criteria: The UNGP 31 “effectiveness criteria” are not correctly reflected in Article 9(2) of the EP model legislation.³² Furthermore, only a subset of the criteria and ways of meeting them are addressed in the sub-provisions of Article 9. OHCHR’s ARP III report and explanatory addendum unpack the meaning of each of the effectiveness criteria and provide guidance on how to achieve the criteria in practice.³³ These materials can provide a useful resource if developing a more comprehensive article on grievance mechanisms and/or guidance on how to interpret provisions addressing grievance mechanisms.

Stakeholder engagement: The EP model legislation does not appear to give sufficient emphasis to the importance of meaningful stakeholder engagement in relation to grievance mechanisms. For instance, whereas UNGP 31(h) calls for engagement about grievance mechanism design *and performance*, Article 9(6) requires undertakings to take decisions informed by stakeholder positions only when

²⁹ www.ohchr.org/Documents/Issues/Business/MandatoryHR_Due_Diligence_Issues_Paper.pdf.

³⁰ EP model legislation, Article 9.

³¹ www.ohchr.org/EN/Issues/Business/Pages/ARP_III.aspx.

³² Compare “legitimate, accessible, predictable, safe, equitable, transparent, rights-compatible and adaptable” with the UNGP 31 effectiveness criteria: legitimate, accessible, predictable, equitable, transparent, rights-compatible, a source of continuous learning and (for operational-level mechanisms) based on engagement and dialogue.

³³ A/HRC/44/32, pp. 11-18; A/HRC/44/32/Add.1, pp. 9-16.

developing grievance mechanisms.³⁴ Further, as OHCHR found in its ARP III work, a key indicator of the “rights-compatibility” of grievance mechanisms will be the extent to which “[a]ffected stakeholders are meaningfully consulted about the type of remedy and the manner in which it should be delivered.”³⁵ However, Article 9(5) refers only to the right of grievance mechanisms to make proposals on how to address adverse impacts.

Protection of people from risks of retaliation: OHCHR welcomes the recognition in the EP resolution of the importance of protecting people from retaliation as a result of their engagement with grievance mechanisms; however, this important issue appears to receive insufficient attention in the EP model legislation. While ensuring confidentiality and anonymity (as detailed in Article 9(2)) are important steps that grievance mechanisms can take, there are other important measures that seem to be overlooked. OHCHR’s ARP III work highlights a host of additional sources of risk and challenge which will require careful handling in different kinds of contexts, and the report provides recommendations for addressing such risks.³⁶ These recommendations will be an important point of reference for the Commission as it works to develop an EU-wide regime that is capable of ensuring robust protections for people who may be at risk of retaliation because of a decision to speak up against business-related human rights abuses.

For further information, please contact bhr@ohchr.org.

Further reading and resources

Materials of the Office of the UN High Commissioner for Human Rights

- [Corporate Responsibility to Respect Human Rights: An Interpretative Guide \(2012\)](#)
- [Frequently Asked Questions on the Guiding Principles on Business and Human Rights \(2014\)](#)
- [Accountability and Remedy Project](#)
- [Improving accountability and access to remedy for victims of business-related human rights abuse: The relevance of human rights due diligence to determinations of corporate liability, A/HRC/38/20/Add.2 \(2018\)](#)
- [UN Human Rights “Issues Paper” on legislative proposals for mandatory human rights due diligence by companies \(June 2020\)](#)

Materials of the UN Working Group on Business and Human Rights

- [Working Group report on human rights due diligence to the 2018 General Assembly, A/73/163](#)
- [Letter from UN Working Group on Business and Human Rights to Commissioner Reynders \(22 October 2020\)](#)
- [Working Group page on mandatory human rights due diligence](#)
- [Working Group page on corporate human rights due diligence](#)

³⁴ A key finding of ARP III is that “[m]eaningful consultation with rights holders, as an ongoing endeavour, is fundamental to the legitimacy of [grievance] mechanism[s] in general and gaining and retaining stakeholder trust in particular.” A/HRC/44/32/Add.1, para. 34.

³⁵ See A/HRC/44/32, Annex, para. 12.2.

³⁶ For relevant excerpts from the ARP III report and addendum regarding retaliation, see www.ohchr.org/Documents/Issues/Business/ARPIII-retaliation.pdf.