



Proposal for a directive on corporate sustainable due diligence

What's new?





General context

Publication of the European Commission proposal on the 23rd of February 2022

General objective: to create new obligations at the European level for companies regarding sustainable governance and due diligence





Definition of due diligence

The duty of companies to « avoid infringing on the rights of others and to address adverse impacts with which they are involved » by identifying, preventing, mitigating and accounting for how they address their impacts on human rights, whether such impacts are caused by the business enterprise itself or whether they are « directly linked to its operations, products or services by its business relationships »

O. de Schutter, ITUC





Legal context

International level: voluntary approach

[2011 UN Guiding Principles on Business and Human Rights](#) : preventing negative human rights effects resulting from business activities

[2011 OECD Guidelines for Multinational Enterprises](#) : extending due diligence interpretation to other areas of responsible business conduct such as climate change and supply chain

[2011 Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy of ILO](#) focuses its attention on achieving decent work, sustainable businesses and more inclusive growth in order to accomplish UN Sustainable Development Goal 8

[2018 OECD Due Diligence Guidance for Responsible Business Conduct](#) helps companies to successfully achieve due diligence goals.





Legal context

European level :

The EU introduced due diligence obligations through secondary law

Ex: [Directive 2014/95/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups](#) ;

[Regulation \(EU\) 2019/2088 on sustainability-related disclosures in the financial services sector](#) ;

[Regulation \(EU\) 2020/852 on the establishment of a framework to facilitate sustainable investment, and amending Regulation \(EU\) 2019/2088](#) ;

[Directive \(EU\) 2022/2464 as regards corporate sustainability reporting](#)





Legal context

Sectoral obligations : [Regulation \(EU\) No 995/2010 laying down the obligations of operators who place timber and timber products on the market ;](#)

[Regulation \(EU\) 2017/821 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](#)



Legal context

Problems:

- narrow scope of application (they only apply to companies operating within the EU and do not extend to their supply chain)
- focus on transparency and reporting
- sectorial obligations





Legal context

National level:

Ex: France, legislation on due diligence (2017) -> Narrow scope of application but creates an obligation to establish and effectively implement a vigilance plan

Germany, Supply chain Act (2022) -> companies operating in Germany and their subsidiaries must establish a risk management system

Norway, Law on transparency (2022) -> companies have to integrate responsible conduct into their policies





EU COMMISSION PROPOSAL FOR A DIRECTIVE ON DUE DILIGENCE

EU PARLIAMENT RESOLUTION ON CORPORATE DUE DILIGENCE

FRENCH LAW ON DUTY OF VIGILANCE

GERMAN LAW ON SUPPLY CHAIN

NORWEGIAN LAW ON TRANSPARENCY

DUTCH PROPOSAL ON RESPONSIBLE BUSINESS CONDUCT

AUSTRIAN MOTION FOR A RESOLUTION ON SUPPLY CHAIN

BELGIAN PROPOSAL ON DUTY OF VIGILANCE

	EU COMMISSION PROPOSAL FOR A DIRECTIVE ON DUE DILIGENCE	EU PARLIAMENT RESOLUTION ON CORPORATE DUE DILIGENCE	FRENCH LAW ON DUTY OF VIGILANCE	GERMAN LAW ON SUPPLY CHAIN	NORWEGIAN LAW ON TRANSPARENCY	DUTCH PROPOSAL ON RESPONSIBLE BUSINESS CONDUCT	AUSTRIAN MOTION FOR A RESOLUTION ON SUPPLY CHAIN	BELGIAN PROPOSAL ON DUTY OF VIGILANCE
STATUS	<ul style="list-style-type: none"> Proposal by the European Commission 	<ul style="list-style-type: none"> Recommendation by the European Parliament 	<ul style="list-style-type: none"> In force 	<ul style="list-style-type: none"> Adopted but not yet in force (2023) 	<ul style="list-style-type: none"> In force 	<ul style="list-style-type: none"> Proposal by political parties in Parliament 	<ul style="list-style-type: none"> Motion by political party in Parliament 	<ul style="list-style-type: none"> Proposal by political parties in Parliament
COMPANY SCOPE	<ul style="list-style-type: none"> Very large EU companies (>500 employees and >€150m turnover worldwide) Very large non-EU companies operating in the EU (>€150m turnover in the EU) Large EU companies in high-risk sectors: agriculture, garment and minerals (>250 employees and >€40m turnover worldwide) Large non-EU companies in high-risk sectors: agriculture, garment and minerals (>€40m turnover in the EU) 	<ul style="list-style-type: none"> Large EU companies, listed SMEs and SMEs in high-risk sectors Large non-EU companies, listed SMEs and SMEs in high-risk sectors operating in the EU 	<ul style="list-style-type: none"> Very large French companies (≥5,000 employees worldwide) Very large non-French companies operating in France (≥10,000 employees worldwide) 	<ul style="list-style-type: none"> Very large German companies (≥3,000 employees in Germany; thereafter from 2024, ≥1,000 employees) Very large non-German companies operating in Germany (≥3,000 employees in Germany; thereafter from 2024, ≥1,000 employees) 	<ul style="list-style-type: none"> Medium-sized and large Norwegian companies (exceeding two of these three thresholds: NOK 70m turnover, NOK 35m balance sheet, 50 employees) Medium-sized and large non-Norwegian companies operating in Norway (exceeding two of these three thresholds: NOK 70m turnover, NOK 35m balance sheet, 50 employees) 	<ul style="list-style-type: none"> Large Dutch companies (exceeding two of these three thresholds: €20m balance sheet; €40m turnover; 250 employees) Large non-Dutch companies operating in the Netherlands (exceeding two of these three thresholds: €20m balance sheet; €40m turnover; 250 employees) (General duty of care for all companies operating in the Netherlands) 	<ul style="list-style-type: none"> All Austrian companies (above a certain turnover to be defined) All non-Austrian companies operating in Austria (above a certain turnover to be defined) 	<ul style="list-style-type: none"> Large Belgian companies (≥250 employees and either >€43m balance sheet or >€50m turnover) Large non-Belgian companies operating in Belgium (≥250 employees and either >€43m balance sheet or >€50m turnover) SMEs operating in high-risk sectors (including conflict minerals, agriculture, garment, minerals, extractive industry and finance) and regions (General due diligence duty for all companies established or active in Belgium)
MATERIAL SCOPE	<ul style="list-style-type: none"> Human rights Labour rights Environment (narrow list of standards, excl. climate) 	<ul style="list-style-type: none"> Human rights Labour rights Environment (incl. climate) Governance 	<ul style="list-style-type: none"> Human rights Health and safety Environment (broadly defined) 	<ul style="list-style-type: none"> Human rights Labour rights Environment (narrow list of standards: Stockholm, Minamata and Basel conventions only) 	<ul style="list-style-type: none"> Human rights Labour rights 	<ul style="list-style-type: none"> Human rights Labour rights Environment (broadly defined) 	<ul style="list-style-type: none"> Human rights Labour rights Environment (all internationally recognised environmental and climate standards) 	<ul style="list-style-type: none"> Human rights Labour rights Environment (broadly defined)
VALUE CHAIN SCOPE	<ul style="list-style-type: none"> Own operations and subsidiaries 'Established business relationships' (direct and indirect relationships that are or are expected to be lasting, not negligible and not merely ancillary) in all tiers of the global value chain, upstream and downstream SME clients are excluded from financial institutions' due diligence 	<ul style="list-style-type: none"> Own operations and subsidiaries All business relationships in all tiers of the global value chain, upstream and downstream 	<ul style="list-style-type: none"> Own operations and subsidiaries 'Established business relationships' with suppliers and subcontractors in the global supply chain 	<ul style="list-style-type: none"> Own operations and subsidiaries (full obligations) Direct suppliers (full obligations) Indirect suppliers (companies are required to identify, prevent and mitigate impacts only if they obtain "substantiated knowledge" of abuses) 	<ul style="list-style-type: none"> Own operations and subsidiaries All suppliers and subcontractors in the entire global supply chain All other business partners supplying goods or services directly to the company 	<ul style="list-style-type: none"> Own operations and subsidiaries All business relationships in the entire global value chain 	<ul style="list-style-type: none"> Own operations and subsidiaries All suppliers and subcontractors in the entire global supply chain 	<ul style="list-style-type: none"> Own operations and subsidiaries All business relationships in the entire global value chain, upstream and downstream

DUE DILIGENCE OBLIGATIONS

- Obligation to integrate due diligence into the company's policy, including a code of conduct; identify potential and actual impacts (only severe impacts for not very large companies in high-risk sectors); prevent impacts via prevention plans, contractual assurances, third-party audits, investments and SME support; the possibility to suspend contractual relations; cease or minimize impacts via corrective plans, contractual assurances, third-party audits, investments and SME support; and establish a complaints mechanism
- No climate due diligence requirements, but an obligation to adopt a climate transition plan
- Financial institutions' due diligence need only be conducted before providing the service
- Company directors have a duty to put in place and oversee due diligence
- Obligation to integrate due diligence into the company's policy and strategy; identify and assess impacts; specify them, their severity, likelihood and urgency and relevant data; adopt and indicate all proportionate and commensurate measures to cease, prevent or mitigate impacts; set up a prioritisation strategy; ensure that business relationships implement policies in line with due diligence strategy, including via framework agreements, contractual clauses, codes of conduct or audits; verify compliance therewith; and set up a grievance mechanism
- Large companies with all their direct partners in the EU, and SMEs may conclude the absence of risks, and simply publish a no-risk statement
- Obligation to establish and effectively implement a vigilance plan which shall include a mapping assessment to identify and rank risks; set out procedures to assess subsidiaries, subcontractors and suppliers; establish appropriate action to mitigate risks and prevent violations; create an alert mechanism, and a monitoring scheme to assess the efficiency of the measures implemented
- Obligation to establish a risk management system; designate a responsible person within the company; perform regular risk analyses; issue a policy statement; lay down preventive measures in own operations, subsidiaries and vis-à-vis direct suppliers; take remedial action; establish a complaints mechanism; implement due diligence obligations with regard to risks at indirect suppliers in case of "substantiated knowledge" of abuses; and document and report
- Obligation to embed responsible business conduct into the company's policies; identify and assess actual and potential impacts; implement measures to cease, prevent or mitigate impacts based on prioritisations; track implementation and results; communicate with affected stakeholders how impacts are addressed; provide for or co-operate in remediation and compensation
- Obligation to integrate due diligence into the company's policies, management systems and business processes; identify and analyse potential and actual impacts; draw up and carry out an action plan to prevent and mitigate impacts; prioritisation; monitor the application and effectiveness of measures; set up remediation mechanism or cooperate with an existing one; offer to enable remediation or contribute to it
- Obligation to conduct risk analysis, implement follow-up measures (prevention and mitigation), carry out effectiveness reviews on the measures taken, involve stakeholders, and establish an early warning system
- Obligation to establish and effectively implement a vigilance plan which shall include a description of the value chain; a map of risks; set out procedures to assess subsidiaries, subcontractors and suppliers; establish appropriate action to mitigate risks and prevent violations; create an alert mechanism; an effective complaint and remediation mechanism; and a monitoring scheme to assess the measures implemented

REPORTING OBLIGATIONS

- Publish annual due diligence strategy (as per EU CSRD)
- Publish an annual statement (companies not subject to EU CSRD)
- Publish due diligence strategy on company's website and upload it on EU platform
- Inform strategy to workers' reps, unions, business partners
- Disclose relevant info about the global value chain
- Publish annual vigilance plan
- Publish annual reports on company's website and submit them to the competent authority
- Publish annual reports on company's website and update them in case of significant changes
- Publish annual reports on due diligence policy and measures, including findings and results
- Publish annual reports and submit them to the competent authority
- Publish annual vigilance plan (only large companies and SMEs operating in high-risk sectors or regions)

CIVIL LIABILITY AND ACCESS TO JUSTICE

- Liability for harms by "established business relationships" due diligence should have prevented
- No liability for harms caused by indirect partners if the company (1) sought contractual assurances, (2) verified compliance therewith and (3) it was reasonable to expect these measures would be adequate to prevent the harm
- EU law is overriding mandatory (applies even if the harm occurred abroad)
- Liability for harms caused or contributed to by own company and controlled entities that due diligence should have prevented
- Presumption of liability and control / reversal of the burden of proof (companies must prove they took all reasonable preventive measures)
- EU law is overriding mandatory (applies even if the harm occurred abroad)
- Reasonable time limitation periods for bringing a civil lawsuit
- Liability for harms due diligence should have prevented
- No presumption of liability / reversal of the burden of proof
- No new civil cause of action created (explicitly states that a breach of due diligence obligations does not lead to civil liability)
- Enables injured parties to authorize German trade unions and NGOs to bring civil proceedings in Germany on their behalf
- No explicit provision
- Liability for harms due diligence should have prevented
- No presumption of liability / reversal of the burden of proof
- Existing Dutch tort law for the general duty of care is expected to apply
- Liability for harms due diligence should have prevented
- Guaranteed access of victims to Austrian courts
- Generous time limitation periods for bringing a civil lawsuit
- Financial support for claimants, incl. costs for lawyers, evidence, travel, opinions and interpreters
- Liability for harms due diligence should have prevented
- Presumption of liability / reversal of the burden of proof (companies must prove they conducted due diligence)
- Belgian law is overriding mandatory (applies even if the harm occurred abroad) unless claimant chooses otherwise
- Includes provisions on collective redress and injunctive measures

PUBLIC ENFORCEMENT

- National supervisory authorities may initiate investigations at their own initiative or following substantiated concerns by third parties
- National supervisory authorities may
 - order the cessation of infringements
 - abstention from repetition, remedial action
 - impose fines (incl. exclusion from public support)
 - adopt interim measures
- European Network of Supervisory Authorities
- National supervisory authorities may initiate investigations at their own initiative or following substantiated concerns by third parties
- National supervisory authorities may
 - order injunctive action
 - compel remediation
- issue fines (incl. exclusion from public procurement and confiscation of commodities)
- Any concerned party can file a complaint for non-compliance before the judge
- The judge may
 - give formal notice to comply in a three-month period
 - if non-compliance persists, the judge may oblige the company to publish a plan and impose periodic penalty payments
- Public regulator with 65 FTE staff has the power to review the reports, to conduct risk-based inspections at its own initiative or on claims raised by affected parties
- Public regulator may
 - order the company to comply within a specific timeline
 - issue fines (up to 2% of annual turnover) for failure to conduct DD (incl. exclusion from public procurement)
- Any person can file a request for information about a company's DD before the company
- The company must answer within three weeks or two months, depending on the request
- The Consumer Agency has the power to monitor compliance and may
 - request confirmation that a relationship has ceased
 - issue prohibitions or injunctions
 - issue fines
- Public regulator with 10 FTE staff has the power to investigate failures and act on complaints filed by stakeholders
- Public regulator may issue fines
- Criminal liability for company directors for repeated failure within 5 years to stop activities that cause or contribute to negative impacts or to provide remedy
- State authority with a civil society advisory board
- State authority may impose proportionate, effective and dissuasive sanctions including fines, exclusion from public procurement procedures and prohibition from placing goods on the market or offering services
- Criminal liability in certain cases
- State authority has the power to monitor compliance with DV obligations
- State authority may
 - order injunctive action
 - issue fines (up to €100,000 and incl. exclusion from public procurement)
 - establish guidelines for businesses
 - engage in dialogue with stakeholders
 - publish useful data
- Criminal liability of the responsible director

For more information, see: <https://corporatejustice.org/>



The answer: a proposal for a directive on corporate sustainable due diligence

Publication in february 2022

Negotiations in trilogues until December 2023

A provisional agreement was reached on the 14 December 2023



Scope of application of the provisional agreement

- EU companies
 - That have more than 500 employees and a net worldwide turnover over EUR 150 million
 - Or that is the parent company of a group that has more than 500 employees and generated EUR 150 million
 - Or that generated a turnover between EUR 40 million and EUR 150 million including at least EUR 20 million in specific sectors (textile, minerals, agriculture and construction)
- The same applies for third country companies (or parent companies)
 - That carried out more than EUR 150 million in the Union
 - Or the ones operating in textile, minerals, agriculture or construction.





Scope of application of the provisional agreement

The material obligations concern **the companies' own operations, those of their subsidiaries, and those carried out by their business partners.**

The draft agreement **excludes the financial sector.**





Obligations

Due diligence conduct substantial obligations:

- To **conduct a risk-based human rights and environmental due diligence**; i.e. identify, assess, prevent, mitigate, bring to an end and remedy to their actual or potential adverse impacts on the environment and human rights, and monitor the effectiveness of their due diligence policies.
- To **elaborate a climate plan in line with the 1.5C global warming limit** of the Paris agreement.

Companies would have to update their due diligence policies if important change occurs and monitor their effectiveness.



Obligations

These due diligence obligations could be part of **public procurement conditions**.

Companies would have to establish and maintain a notification mechanism and complaints procedure.





Obligations

More civil liability as victims could claim for reparation when they suffered from a violation of human rights or environmental standards provided by transposition of the directive.

National supervisory bodies would be established and could adopt sanctions, including pecuniary penalties, if the companies do not respect their due diligence obligations.



Next steps

Provisional agreement reached in December 2023

This agreement now needs to be formally adopted by both Institutions.

Currently blocked in the Council. Taken off the Agenda three times: no majority was expected, as Germany followed by other countries was expected to abstain.

One of several issues: France wants now to change the scope of application of the proposal. -> It would not apply to companies with more than 5000 employees instead of 500. This would reduce its application to 80% of the companies.

However, it is not very clear now: apparently France changed again its position after the Council meeting on the 28 February.

BUT deal is not completely off the table. The Belgian Presidency is waiting for window of opportunity to put it to the vote again. Isabelle Schömann (ETUC) stressed the **crucial role that national and European Trade Unions can still play.**

