

CORPORATE DUE DILIGENCE: HISTORY AND FUTURE PROSPECTS

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On the 23rd of February 2022, the European Commission released its much-awaited Draft Directive on Corporate Sustainability Due Diligence.² The overall objective is to ensure that companies active in the internal market contribute to sustainable development [...] through the identification, prevention and mitigation, bringing to an end and minimization of potential or actual adverse human rights and environmental impacts connected with companies' own operations, subsidiaries and value chains.³ Indeed, development cannot be sustainable without the respect for two of its key dimensions: the social (including human rights) and the environmental (including climate change) dimensions. The preamble of the UN Sustainable Developments Goals recalls in this respect that the 17 Sustainable Development Goals and 169 targets 'seek to realize the human rights of all'.⁴

Various studies have highlighted that, whilst companies can have significant positive impacts on society and the environment, they can contribute to countries' economic growth and development by

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² EUROPEAN COMMISSION, *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM(2022) 71 final*, available at <https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0001.02/doc_1&format=PDF>.

³ Ibid, Recital 15.

⁴ UNITED NATIONS, *Transforming Our World: The 2030 Agenda for Sustainable Development* - UN Doc A/RES/70/1, New York: UN, 2015, available at <https://www.un.org/en/development/desa/population/migration/generalassembly/docs/global-compact/A_RES_70_1_E.pdf>.

creating jobs and transferring skills and technology. However, a growing number of well-documented cases have shown that companies can cause or contribute to human rights and environmental harms, both in their own operations and in their value chains worldwide.⁵ Examples include issues of forced labour, child labour, as well as poor and unsafe working conditions in global supply chains. For example, one of every five cotton garments that are sold is said to be made with force labour of the Uyghur in the Xinjiang China.⁶ For the first time in recent history, child labour has actually been on the rise in the past 4 years where it has increased by 8,4 million to reach 160 million.⁷

Adverse human rights impacts have also frequently been observed in the so-called 'Global North' and have been aggravated by the COVID-19 crisis. Examples include issues of discrimination, precarious employment of workers in the hospitality sector and in the gig economy, labour standards of workers in the garment industry, or the working conditions of migrant workers in the agricultural sector.

As for the environmental, issues of pollution as well as climate change-related impacts resulting from corporate activities of multinational companies have been widely observed. According to the report of UN Special Rapporteur Philip Alston, fossil fuel companies are the main drivers for climate change and account for 91% of global industrial greenhouse emissions and 70% of all human-made emissions.⁸ It has been increasingly acknowledged that environmental harms have negative consequences for human rights and the right to a safe, clean

⁵ Axel MARX / Claire BRIGHT / Jan WOUTERS, *Access to Legal Remedy for Victims of Corporate Human Rights Abuses in Third Countries* (Study Requested by the European Parliament's Sub-Committee on Human Rights), Brussels: European Parliament, 2019, available at <[http://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU\(2019\)603475_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf)>.

⁶ Jewher ILHAM, «There's a good chance your cotton T-shirt was made with Uyghur slave labor», *The Guardian* (9 Apr. 2021), available at <<https://www.theguardian.com/commentisfree/2021/apr/09/cotton-slave-labor-uyghur-region-china>>.

⁷ INTERNATIONAL LABOUR ORGANIZATION, *Child labour rises to 160 million – first increase in two decades*, Genève: ILO, 10 Jun. 2021, available at <https://www.ilo.org/global/about-the-ilo/newsroom/news/wcms_800090/lang--en/index.htm>.

⁸ Philip ALSTON, *Climate change and poverty: report of the Special Rapporteur on Extreme Poverty and Human Rights*, A/HRC/41/39, New York: UN, 17 Jul., 2019, available at <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/218/66/PDF/G1921866.pdf?OpenElement>>.

healthy and sustainable environment was itself recognized as a human rights by the UN Human Rights Council in October 2021.⁹

Against this backdrop, there have been various attempts to regulate corporate activities in relation to human rights and the environment, in a first step through self-regulatory approaches, in a second step through soft law approaches, and more recently through hard law mechanisms on mandatory human rights and environmental due diligence.

1. Self-regulation by private actors

In recent decades, the outsourcing of production activities in developing countries and the exploitative conditions of the labour force have generated public outcry and given rise to scandals and controversies. As a result, protests and legal actions against large multinational companies have intensified. In order to address the reputational risk, from the 90s onwards, companies started to embark on a path of self-regulation through the adoption of codes of conduct and public commitments.¹⁰ However, doubts about the effectiveness (or lack thereof) of self-regulation by private actors soon emerged.¹¹

In a second phase, companies began to explore other avenues, notably through audits and membership in certification schemes to address social and environmental concerns. These voluntary approaches have sometimes become part of a formal framework at the international level. The most significant example in this respect is undoubtedly that of the United Nations Global Compact, launched in 1999 at the initiative of the former UN Secretary General, Kofi Anan, who, at the World Economic Forum in Davos, called on business leaders

⁹ UN HUMAN RIGHTS COUNCIL, *The human right to a clean, healthy and sustainable environment, Resolution adoption by the Human Rights Council on 8 October 2021, A/HRC/RES/48/13*, New York: UN, 18 Oct. 2021, available at <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/289/50/PDF/G2128950.pdf?OpenElement>>.

¹⁰ Anita RAMAISTRY, «Closing the governance gap in the business and human rights arena: lessons from the anti-corruption movement», in Surya DEVA / David BILCHITZ, *Human Rights Obligations of Business – Beyond the Corporate Responsibility to Respect?*, Cambridge: Cambridge University Press, 2013, 162-190, 162.

¹¹ Claire BRIGHT *et al.*, «Toward a Corporate Duty for Lead Companies to Respect Human Rights in their Global Value Chains?», *Business and Politics*, Cambridge: Cambridge University Press, 22/4 (2020), 667-697, 667.

to gather around common values and principles in order to give a “human face to the global market”.¹² The Global Compact is based on ten principles derived from international instruments around human rights, labour standards, the environment and anti-corruption that member companies publicly commit to embrace.¹³ It has been a successful initiative and nearly 15,500 companies have now joined the Global Compact. However, its intrinsic limitation lies in the fact that it remains completely powerless in relation to companies who do not wish to join the initiative and that it lacks teeth in relation to the one who do but only superficially comply with their commitments.

In a second step, a different approach was pursued which saw the emergence of soft law instruments.

2. The emergence of soft law instruments

In 2005, the architect of the UN Global Compact and Harvard Professor John Ruggie, was called upon to identify standards and good practices in business and human rights, as well as to clarify certain key concepts. His mandate, which lasted six years, was marked by numerous consultations with stakeholders, and eventually lead to the unanimous endorsement of the UN Guiding Principles on Business and Human Rights (UNGPs) by the Human Rights Council in 2011.¹⁴

The UNGPs differ in their approach from the UN Global Compact insofar as they do not require adherence by private or state actors, but rather affirm to apply “to all states and to all business enterprises, regardless of their size, sector, location, ownership or structure”.¹⁵ The UNGPs have contributed to significant progress towards promoting

¹² Kofi ANNAN, *Kofi Annan's address to World Economic Forum in Davos*, New York: UN, 1 Feb. 1999, available at <<https://www.un.org/sg/en/content/sg/speeches/1999-02-01/kofi-annans-address-world-economic-forum-davos>>.

¹³ UNITED NATIONS GLOBAL COMPACT, *The Ten Principles of the UN Global Compact*, New York: UN, available at <<https://www.unglobalcompact.org/what-is-gc/mission/principles>>.

¹⁴ UNITED NATIONS, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, UN Doc. A/HRC/17/31, New York: UN, 2011, available at <https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf>.

¹⁵ UNITED NATIONS HUMAN RIGHTS, *Guiding principles on business and human rights*, 1.

respect for human rights and the environment in the context of business activity. They have articulated the complementary roles of States and business in preventing, addressing and remedying business-related human rights and represent a global standard of expected conduct for all business enterprises wherever they operate. Their adoption marked the first time in history that an international instrument of this type recognised that companies have a responsibility to respect human rights, meaning that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.

The UNGPs are presented as a text that does not create new legal obligations, but rather clarifies the existing obligations of states to protect human rights under international law and the responsibility of companies in this respect based on the social expectations and their so-called licence to operate.¹⁶ In order to gather the necessary consensus around the text, the UNGPs have opted for a soft law approach, meaning that they are not legally binding. Nevertheless, they have inherent persuasive power, and have shaped the legislative developments that are currently taking place.¹⁷

Importantly, the UN Guiding Principles introduced the concept of “human rights due diligence” which constitutes the operational means through which companies can fulfil their responsibility to respect human rights. Human rights due diligence refers to an ongoing process that companies are expected to put in place through which they can identify, prevent, mitigate and account for the actual and potential adverse human rights impacts that they may cause or contribute to through their own activities, or which may be directly linked to their operations, products, or services by their business relationships.

The concept of human rights due diligence has been introduced in a number of other international and regional standards and instruments, such as the OECD Guidelines on Multinational Corporations

¹⁶ Chiara MACCHI / Claire BRIGHT, «Hardening Soft Law: the Implementation of the Human Rights Due Diligence Requirements in Domestic Legislations», In Martina BUSCEMI, et al., *Legal Sources in Business and Human Rights: Evolving Dynamics in International and European Law*, Leiden: Brill, 2020, 218-247, 218.

¹⁷ John G. RUGGIE / Caroline REES / Rachel DAVIS, «Ten years after: From the UN Guiding Principles to multi-fiduciary obligations», *Business and Human Rights Journal* (forthcoming), Cambridge: Cambridge University Press, 1.

where it was extended to other fields such as the environment. However, the UNGPs, like the other international instruments which followed suit, did not frame the corporate responsibility to respect human rights as legal obligation but rather as a moral or ethical responsibility grounded on social expectations and the so-called social licence to operate. In practice, the soft law nature of the instrument entails that the decision to exercise human rights due diligence remains at the companies' discretion, with no sanction in case of non-compliance. As a result, the uptake of the human rights due diligence expectations by companies has remained limited. For example, in the 2020 Corporate Human Rights Benchmark assessment - which assessed the human rights disclosures of 230 of some of the biggest companies in the world - nearly half of the companies assessed (46.2%) failed to score any points on the human rights due diligence part of the assessment. In Germany, the results of the 2020 monitoring process revealed that only 13-17% of the 455 companies surveyed could show that they adequately meet their due diligence obligations as contained in the German National Action Plan for Business and Human Rights.¹⁸ In Portugal, the first National Enquiry on Responsible Business Conduct and Human Rights revealed that less than one in five companies have human rights due diligence processes in place.¹⁹

These findings are of particular relevance since human rights due diligence processes have been recognised as a core practice of responsible business conduct, key to the fulfilment of the UN Sustainable Development Goals (SDGs). In relation to the COVID-19 crisis, preliminary studies have suggested that companies who had solid human rights due diligence processes in place had responded to the crisis in

¹⁸ GERMANY, Federal Foreign Office, *Monitoring the National Action Plan for Business and Human Rights (NAP)*, Berlin: AA, 13 Oct 2020, available at <<https://www.auswaertiges-amt.de/en/aussenpolitik/themen/aussenwirtschaft/wirtschaft-und-menschenrechte/monitoring-nap/2131054>>.

¹⁹ Ana Lúcia Romão et al., *Resultados do Iº Inquérito Nacional sobre Conduta Empresarial Responsável e Direitos Humanos*, Lisbon: DGAE, ISCSP, CAPP, 2018, available at <<https://www.dgae.gov.pt/servicos/sustentabilidade-empresarial/responsabilidade-social-das-empresas.aspx>>. See also Claire BRIGHT, «Some Concluding Remarks on Business and Human Rights in Portugal», NOVA Centre on Business Human Rights and the Environment Blog, Lisbon: Nova, 12 Nov. 2020, available at <<https://ncbhre.novalaw.unl.pt/concluding-remarks-business-human-rights-portugal/>>.

a way that was more human-rights compatible, and were more likely to cope better with the long term negative effects of the pandemic.²⁰

In an attempt to address this gap, an increasing number of jurisdictions have adopted, or are considering the adoption of legislation mandating companies to exercise due diligence in relation to human rights and environmental harms.

3. Towards mandatory human rights and environmental due diligence

In recent years, a growing number of jurisdictions have started to implement the human rights due diligence requirements set out in the UNGPs through the adoption of legally binding legislation at the domestic level.

The regulatory landscape was first marked by the emergence of laws aimed at encouraging companies to exercise human rights due diligence through transparency obligations.²¹ In this respect, California paved the way in 2010 with the California Transparency in Supply Chain Act,²² followed by the UK Modern Slavery Act in 2015,²³ and by the Australian Modern Slavery Act in 2018.²⁴

In spite of the differences between these laws, they share certain common features and in particular the fact that they require companies to publish a statement describing the measures, if any, that they have taken to prevent modern slavery and human trafficking in

²⁰ OECD, *OECD Policy Responses to Coronavirus (COVID-19): COVID-19 and responsible business conduct*, Paris: OECD, 16 Apr. 2020, available at oecd.org/coronavirus/policy-responses/covid-19-and-responsible-business-conduct-02150b06/.

²¹ Claire BRIGHT, «Mapping Human Rights Due Diligence Regulations and Evaluating their Contribution in Upholding Labour Standards in Global Supply Chains», in Guillaume DELAUTRE / Elizabeth ECHEVERRÍA MANRIQUE / Colin FENWICK, *Decent work in globalised economy: Lessons from public and private initiatives*, Genève: ILO, 2021, 75-108, 75.

²² California Transparency in Supply Chains Act of 2010, Senate Bill No 657, available at leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=200920100SB657.

²³ UK Public General Acts, 2015 c.30, Modern Slavery Act 2015, available at <http://www.legislation.gov.uk/ukpga/2015/30/contents/enacted>.

²⁴ Australian Modern Slavery Act 2018, No 153, 2018, available at <https://www.legislation.gov.au/Details/C2018A00153>.

their operations and supply chains. The aim is to make information available to enable stakeholders to better understand how companies are dealing with these issues to allow them to put the necessary pressure on companies and make informed choices. However, whilst these transparency laws have contributed to an increased awareness of modern slavery issues in global supply chains,²⁵ two main criticisms have been addressed to them. The first criticism is that the impact that they have had in practice on corporate practices has remained very modest. This is due in particular to the limited sanctions that they provide in case of non-compliance. For example, the UK Modern Slavery Act provides that in case of non-compliance, the competent judge may order the company to comply with these transparency obligations. However, in practice, this injunction has never been sought, even though widespread problems of non-compliance have been identified. The latest UK government report indicated that 40% of companies subject to the Act are not complying with the transparency obligation.²⁶ In addition, the excessive discretion given to companies by the Act and the lack of clarity on the criteria for reporting have led to a superficial application of the obligation by the companies subject to it, which does not allow for credible information to be provided to interested parties.²⁷

A second criticism relates to the limited scope of the reporting obligation, which concerns only one particular area: modern slavery and human trafficking. This choice of a segmented approach on the part of the legislator carries the risk of inducing perverse effects by leading companies to prioritise the treatment of these issues regardless of whether or not they constitute the most risky human rights within their own value chains.²⁸

²⁵ Hon Frank FIELD, *Independent Report: Independent review of the Modern Slavery Act: final report (accessible version)*, 31 Dec. 2021, available at <<https://assets.publishing.service.gov.uk/government/uploads/system/uploads>>.

²⁶ Hon Frank FIELD, *Independent Report*, at 42.

²⁷ Justine NOLAN / Gregory BOTT, «Global Supply Chains and Human Rights: Spotlight on Forced Labour and Modern Slavery Practices», *Australian Journal of Human Rights*, Sydney: Taylor and Francis, 24/1 (2018) 44-69, 44.

²⁸ Clifford CHANCE, *Business and Human Rights: Navigating a Changing Legal Landscape*, London: Global Business Initiative on Human Rights, 2019, available at <<https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2019/03/business-and-human-rights-navigating-a-changing-legal-landscape.pdf>>.

In response to these shortcomings, other countries have sought to go beyond simple transparency obligations to impose a genuine duty of care on companies. Different types of laws exist in this regard. Some target a particular labour law issue, while others provide for a more general duty of care in terms of human rights and sometimes also in terms of the environment.

For instance, France adopted the French Duty of Vigilance law in 2017²⁹ which requires large French companies to establish, effectively implement and disclose a vigilance plan setting out due diligence measures taken in relation to the companies' own activities, the companies under their control, or from the activities of their subcontractors and suppliers with whom they have an established business relationship. The Netherlands adopted the Dutch Child Labour Due Diligence Act adopted in 2019³⁰ requires companies that supply goods or services to Dutch end-users to exercise human rights due diligence in relation to child labour. Recent legislation on mandatory due diligence have also been adopted in Germany and in Norway and have been put forward in several other jurisdictions.

In 2020, the study that we undertook for the European Commission on 'Due Diligence Requirements Through the Supply Chains'³¹ was published. The study - which relied in part on consultation with multistakeholders across Europe - highlighted the limitations of current corporate practices in Europe in relation to human rights and environmental due diligence. In particular, only just over one-third of business respondents indicated that their companies undertake due diligence which takes into account all human rights and environmental

²⁹ Loi no. 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre [acces. xx Xxx. 202x <It is missing the access date>], available at <<http://www.respect.international/french-corporate-duty-of-vigilance-law-english-translation/>>.

³⁰ The Dutch Child Labour Due Diligence Act 2019 (unofficial English translation commissioned by the law firm of Ropes & Gray), available at <<https://www.ropesgray.com/en/newsroom/alerts/2019/06/Dutch-Child-Labor-Due-Diligence-Act-Approved-by-Senate-Implications-for-Global-Companies>>. Original Dutch language text available at <https://www.eerstekamer.nl/behandeling/20170207/gewijzigd_voorstel_van_wet/document3/f=/vkblk8pud2zt.pdf>.

³¹ Lise Smit et al., *Study on Due Diligence Requirements Through the Supply Chain*, FINAL REPORT, Brussels: European Commission, 2020, 10.2838/39830, available at <<https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1>>.

impacts, and for the majority of those, the due diligence exercise is limited to first tier suppliers. The majority of the stakeholders supported the introduction of a general requirement at EU level which would mandate companies to undertake human rights and environmental due diligence in their own operations and throughout their supply chains. In addition, nearly 70% of companies surveyed anticipated that mandatory human rights and environmental due diligence legislation would benefit business in that it would provide for a single, harmonised EU-level standard (rather than an array of fragmented approach at the national level), would provide legal certainty, would allow to level the playing field by holding EU competitors to the same standard and would facilitate leverage with business partners by setting a non-negotiable standard. Based on the findings of the study, European Commissioner Didier Reynders announced the commitment of the European Commission to introduce a legislative initiative which would make it mandatory for companies in Europe to exercise human rights and environmental due diligence.³²

On the 10th of March 2021, the European Parliament adopted, by a large majority, a resolution with recommendations to the Commission on corporate due diligence and corporate accountability,³³ containing the text of a draft directive in the annex. On the 23rd of February 2022, the European Commission published its Draft Directive on Corporate Sustainability Due Diligence³⁴ which aims 'to ensure that companies active in the internal market contribute to sustainable development [...] through the identification, prevention and mitigation, bringing to an end and minimization of potential or

³² EUROPEAN COALITION FOR CORPORATE JUSTICE (ECCJ), «Commissioner Reynders announces EU corporate due diligence legislation», New York: BHRRC, 30 Apr. 2020, available at <<https://www.business-humanrights.org/en/latest-news/commissioner-reynders-announces-eu-corporate-due-diligence-legislation/>>.

³³ Resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)), available at <[>](https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2020/2129(INL))

³⁴ Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM(2022) 71 final, available at <[>](https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0001.02/doc_1&format=PDF)

actual adverse human rights and environmental impacts connected with companies' own operations, subsidiaries and value chains'. The Draft Directive seeks to require large and midcap companies operating in certain 'high impact' sectors to undertake human rights and environmental due diligence. It will apply both to European companies as well as third-country companies generating a certain turnover in the EU market. It provides for strong enforcement mechanisms through both administrative oversight by public bodies which powers to investigate and issue sanctions, and civil remedies for victims. Once adopted, the Directive will then need to be implemented into the national laws of the Member States.

Conclusion

The field of business and human rights have known important developments over the past decades and the concept of human rights due diligence as set out in the UNGPs have gained traction and been extended to other fields such as the environment. The recent move towards hard law regulation and the introduction of mandatory human rights and environmental due diligence legislation places corporate due diligence as a cornerstone of the corporate responsibility in order to prevent and address adverse impacts of corporate activities throughout the value chain and contribute to sustainable development.

The hardening of the soft law has been driven through legislative developments at the national and European level but important developments are also taking place at the international level, where discussions are taking place around the introduction of a legally binding instrument on business and human rights.

Eventually, the key challenge will turn to the implementation of the new corporate due diligence requirements set out in law and whether they are approached as a tick-box exercise by companies through cosmetic changes or whether they are capable of fostering meaningful changes in corporate behaviour upholding respect for human rights and the environment in global value chains, thereby contributing to sustainable development.