

## Recommendations for EU Legislation governing Business Enterprises' Human Rights and Environmental Due Diligence, including on Climate Change

The proposed legislation should draw from and build on the UN Guiding Principles on Business and Human Rights (UNGPs), the OECD Guidelines for Multinational Enterprises (OECD MNE Guidelines), OECD Due Diligence Guidance For Responsible Business Conduct, relevant sector-specific OECD Due Diligence Guidance, and the ILO Tri-partite Declaration of Principles concerning Multinational Enterprises and Social Policy, and incorporate, *at a minimum*, the following key elements:<sup>1</sup>

- 1. Require business enterprises to respect internationally recognized human rights, labor, and environmental rights, in their own operations and business relationships, including global value chains.<sup>2</sup>**

The conduct of business enterprises, through action or omissions, can cause, contribute, or be linked with a variety of human rights abuses, not only in their own operations but also in their business relationships, including global value chains.

Human rights are indivisible and interconnected. The human rights and environmental due diligence legislation should therefore require businesses to respect the full range of international human rights, labor, and environmental standards, as set out in international human rights and environmental instruments, including the Paris Agreement on climate change, and interpreted by relevant authoritative treaty bodies, ILO supervisory mechanisms, and UN special procedures. Legislation should require business enterprises to identify and address human rights risks and impacts, including those related to labor, environment, climate change, and corruption that could have a detrimental effect on the full range of human rights.<sup>3</sup>

The substantive standards for business enterprises with respect to the environmental due diligence should be considered through the lens of human rights, including the human right to a healthy environment, as authoritatively defined in the Framework Principles on Human Rights and the

<sup>1</sup> Office of the United Nations High Commissioner for Human Rights, "Guiding Principles on Business and Human Rights," New York and Geneva: 2011, [https://www.ohchr.org/documents/publications/GuidingprinciplesBusinessshr\\_eN.pdf](https://www.ohchr.org/documents/publications/GuidingprinciplesBusinessshr_eN.pdf) (accessed June 12, 2020). OECD, "OECD Guidelines for Multinational Enterprises," 2011, <http://www.oecd.org/daf/inv/mne/48004323.pdf> (accessed June 12, 2020). OECD, "OECD Due Diligence Guidance for Responsible Business Conduct," 2018, <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf> (accessed June 12, 2020); OECD sector-specific due diligence guidance, <http://www.oecd.org/corporate/mne/> (accessed June 12, 2020); ILO, "Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy," 5th edn., 2017, [https://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/---emp\\_ent/---multi/documents/publication/wcms\\_094386.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf) (accessed June 12, 2020).

<sup>2</sup> UNGPs, principle 13, commentary. "Business relationships" are understood to include relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services.

<sup>3</sup> See below, point 3, for further additional information about processes and principles.



Environment and the standards and good practices identified by the UN Special Rapporteur on human rights and the environment.<sup>4</sup>

## **2. Broadly apply to all business entities across all sectors regardless of how they are incorporated or structured**

The legislation should impose a duty on business enterprises to respect human rights in their own operations and in their business relationships, which includes their entire global value chain. It should include within its scope not only business enterprises based in the EU but also all those offering products and services in the EU market. It should apply to all business enterprises regardless of how they are incorporated or structured.

The legislation should be applied broadly to business entities across all sectors. Any subsequent sector-specific legislation should supplement, but not limit, the development and implementation of the proposed general legislation.

It should bring all business enterprises, regardless of size, within its scope. This is especially important for business enterprises in sectors that present heightened human rights risks, including mining, food and agriculture, oil and gas, and textiles, garments, leather, and footwear.

Any concerns that micro, small, and medium enterprises would be unfairly over-burdened by the legislation should be allayed since the “scale and complexity of the means” that business enterprises should use to discharge their human rights and environmental due diligence obligations should be commensurate with the size, sector, operational context, ownership, structure, and the severity of their adverse human rights risks and impacts.<sup>5</sup>

## **3. Require business enterprises to conduct effective human rights and environmental due diligence, including on climate change, incorporating important processes and operating principles.**

The legislation should impose a duty on business enterprises to conduct human rights and environmental due diligence, including on climate change, that incorporate a key set of processes and principles needed to make it effective.

Key legislative prescriptions on processes and principles should guide business enterprises and support compliance with these requirements. They should also guide administrative and judicial authorities’ to ascertain the effectiveness of business enterprises’ due diligence.

---

<sup>4</sup> See the mandate’s Framework Principles on Human Rights and the Environment, January 14, 2018, <https://undocs.org/A/HRC/37/59> (accessed on June 16, 2020) and Good practices on the right to a healthy environment, December 30, 2019, <https://undocs.org/en/A/HRC/43/53> (accessed on June 16, 2020).

<sup>5</sup> UNGPs, principle 14, p. 15.

## Processes

The legislation should require a business enterprise to design its due diligence incorporating, at a minimum, the following processes:

- a. Adopt a policy commitment to respect human rights and embed it in all relevant business functions.<sup>6</sup>
- b. Identify and assess human rights and environmental risks and impacts of its actions and omissions, in its own operations and in business relationships, including its global value chains.<sup>7</sup> This identification and assessment of human rights risks should cover all of the business enterprises' own activities, including examining how its practices cause or contribute to adverse impacts,<sup>8</sup> or how it may be directly linked to its operations, products, or services by its business relationships.<sup>9</sup>
- c. Develop and implement measures to cease, prevent, and mitigate human rights and environmental risks and impacts commensurate with their severity.<sup>10</sup>
- d. Remediate or cooperate in remediation where the business enterprise causes or contributes to adverse impacts.<sup>11</sup>
- e. Track results of the measures adopted, and draw on feedback from internal and external sources, including affected stakeholders.<sup>12</sup>
- f. Regularly publish the results of due diligence processes, including human rights risks and adverse impacts identified; the range of measures designed to address them; methods to ensure appropriate remedies, and the results and effectiveness of these measures.<sup>13</sup> In some cases, this may also satisfy other non-financial reporting requirements, but where it is not required by other directives, business enterprises should be required to undertake public reporting under the human rights and environmental due diligence legislation.

## Operating Principles

Processes alone do not guarantee that business enterprises will design effective due diligence. Therefore, the legislation should require that a business enterprise develops and implements all its due diligence processes systematically integrating, *at a minimum*, the following principles:

---

<sup>6</sup> UNGPs, principles 15 and 16.

<sup>7</sup> UNGPs, principle 17.

<sup>8</sup> Due diligence should include assessment of human rights risks arising out of business enterprises' model and associated processes, like purchasing and pricing.

<sup>9</sup> UNGPs, principle 13 (a); "avoid causing or contributing to adverse impacts through *their own activities*"; principle 17(a); OECD Guidance on Due Diligence, para 1.3 (e), p. 24.

<sup>10</sup> UNGPs, principle 17; OECD Due Diligence Guidance, Chapter 3, p. 29.

<sup>11</sup> UNGPs, principle 22.

<sup>12</sup> UNGPs, principle 20.

<sup>13</sup> UNGPs, principle 17, 20, 21.

- a. *Dynamism*: Regularly review, update, and evaluate the due diligence processes;<sup>14</sup>
- b. *Risk-based and preventative*: Develop a system that identifies and addresses risks before they cause harm, taking action to prevent or mitigate human rights and environmental risks based on their severity and likelihood.
- c. *Context specific*: Ensure due diligence processes address risks and impacts in a manner that is tailored to national, local, and context-specific conditions in a rights respecting manner.
- d. *Intersectionality*: Take into consideration intersecting and multiple forms of discrimination and exclusion,<sup>15</sup> including based on age, gender and sexuality, class, disability, religion, race, ethnicity, caste, nationality, and migrant and refugee statuses.
- e. *Meaningful stakeholder consultation and communication*: Businesses should consult and communicate with a wide range of civil society and other relevant stakeholders, including those most impacted or likely to be adversely impacted by their operations.<sup>16</sup>

### Human Rights Due Diligence Relating to Climate Change

In regards to climate change mitigation and adaptation as a component of human rights and environmental due diligence, the regulation should require that business enterprises, including financial institutions, measure their total carbon footprint, set targets for reducing emissions to align with the most ambitious goal of the Paris Agreement—specifically, to hold the increase in the global average temperature to 1.5 degrees Celsius above pre-industrial levels—and publicly communicate on their progress towards meeting these targets (see “Principles” under “Processes” above).

Given the best available science indicates that limiting the increase to 1.5 degrees would substantially reduce harm to people and natural ecosystems in relation to the 2 degrees scenario that is also foreseen in the Paris Agreement, the regulation should place an obligation on business enterprises to strive to align their operations with the 1.5 degrees goal.<sup>17</sup>

Many major companies have already made a voluntary commitment to set climate targets across their operations and value chains aligned with limiting global temperature rise to 1.5 degrees and

<sup>14</sup> UNGPs, principle 17 (c).

<sup>15</sup> UNGPs, “Guiding Principles,” p. 1, “These Guiding Principles should be implemented in a non-discriminatory manner, with particular attention to the rights and needs of, as well as the challenges faced by, individuals from groups or populations that may be at heightened risk of becoming vulnerable or marginalized, and with due regard to the different risks that may be faced by women and men.”

<sup>16</sup> UNGP, Principle 18 (b), 20, 21. For example, relevant stakeholders include unions, indigenous peoples’ and peasants’ organizations, community organizations, disabled peoples’ organizations, patients’ rights groups, and victims’ groups.

<sup>17</sup> IPCC, “Summary for Policymakers of IPCC Special Report on Global Warming of 1.5 C approved by governments,” October 8, 2018, <https://www.ipcc.ch/2018/10/08/summary-for-policymakers-of-ipcc-special-report-on-global-warming-of-1-5-c-approved-by-governments/> (accessed June 15, 2020)

reaching net-zero emissions by no later than 2050.<sup>18</sup> However, analysis of compliance suggest that without appropriate processes to hold companies accountable to their pledges, they are unlikely to meet them, with irreversible consequences for rights and livelihoods.<sup>19</sup>

Human rights and environmental due diligence should then follow the processes and principles outlined above in this document, and further include climate change risk assessments and mitigation and adaptation measures that would at least require business enterprises to:

- **Measure:** Measure their total carbon footprint, which includes their direct and indirect emissions;
- **Set targets:** Publish specific and measurable goals of greenhouse gas emissions reduction, including intermediate targets; and
- **Steer:** Steer its business activities to reduce its direct and indirect greenhouse gas emissions to align with the most ambitious goal of the Paris Agreement to hold the increase in the global average temperature to 1.5 degrees Celsius above pre-industrial levels, in line with the best available science and their duty to prevent harm, as well as the objectives of the European Green Deal.

In addition to mitigating emissions, business enterprises should also address the climate change-related vulnerabilities of people impacted by their business operations.<sup>20</sup>

#### 4. Require transparency in value chains

The legislation should require business enterprises to be transparent about their value chains. The lack of transparency around a business enterprise’s global value chain is a serious barrier to accountability. Value chain transparency has a distinctly different function from other reporting requirements because it directly impacts victims’ ability to access grievance redress. Requiring business enterprises to publicly disclose the names, locations, and other important information of other entities in their value chain better facilitates grievance redress for those adversely impacted.

#### 5. Create a monitoring and enforcement mechanism that, at a minimum, requires adequate budget and infrastructure to support effective implementation

The legislation should require adequate budget and infrastructure, including competent authorities to support, monitor, and enforce implementation. Competent authorities should also create and

<sup>18</sup> UNFCCC, “87 Major Companies Lead the Way Towards a 1.5°C Future at UN Climate Action Summit”, September 22, 2019, <https://unfccc.int/news/87-major-companies-lead-the-way-towards-a-15degc-future-at-un-climate-action-summit> (accessed June 15, 2020)

<sup>19</sup> Jillian Ambrose, “Most of the world’s biggest firms ‘unlikely’ to meet Paris climate targets”, The Guardian, September 23, 2019, <https://www.theguardian.com/environment/2019/sep/24/most-of-worlds-biggest-firms-unlikely-to-meet-paris-climate-targets> (accessed June 15, 2020)

<sup>20</sup> See Chiara Macchi, ‘The Climate Change Dimension of Business and Human Rights: Legal and Policy Trends in the European Union’, Draft paper, 24 May 2020 (on file with the author).

maintain a searchable public database of all business enterprises and their human rights and environmental due diligence reports to promote transparency and accountability for legislative requirements. The database should include a full list of business enterprises that are covered by the legislation, organized by the level of compliance required by the legislation commensurate with a business enterprise's size, sector, operational context, ownership, structure, and the severity of their adverse human rights risks and impacts.

## **6. Incentivize compliance and carry consequences for non-compliance including penalties**

For the enforcement mechanism to be strong, the legislation should incentivize compliance and create a virtuous cycle in which responsible business enterprises benefit from their efforts. To this end, the legislation should look at how to incentivize compliance through procurement or other financial incentives so that business enterprises benefit from incorporating these practices.

Simultaneously, the legislation should carry consequences for business enterprises that do not comply with the law, including penalties. When the actions or omissions of business enterprises result in harm, or business enterprises have not taken good faith efforts to comply with regulation even when harm has not resulted, they should face penalties. Penalties can promote greater compliance and reduce the incidence of serious human rights abuses and environmental harms in value chains.

Penalties should:

- a. Be commensurate with the size, sector, operational context, ownership, and structure; and the nature and severity of the regulatory non-compliance.
- b. Include a range of measures, including fines.
- c. Carry escalation procedures and additional consequences for repeated non-compliance.
- d. Be dissuasive in nature to not only ensure that business enterprises subject to the legislation are compliant.

## **7. Create a civil course of action and access to judicial remedies**

Legislation should include potential liability for human rights and environmental harms caused by or substantially contributed to by a business enterprise, or jointly by more than one enterprise, either through actions or omissions in its own operations or in business relationships, including global value chains.

The legislation should ensure that those affected around the world have a clear path to judicial remedies, including access to domestic courts. Whether a business enterprise conducted effective human rights due and environmental diligence in good faith, should be considered as a factor in any litigation, but should not provide legal immunity. The burden of proof should rest with a business

enterprise to demonstrate their human rights and environmental due diligence efforts were effective.<sup>21</sup>

### **Develop or Implement Other Supporting EU Initiatives**

The legislation for EU mandatory human rights due diligence should be supplemented by the following key pieces of legislation and broader coherence and socialization across the EU.

1. The EU's trade and investment policies, and member states' bilateral investment policies, should be aligned with the EU legislation on mandatory human rights and environmental due diligence, including climate change. These trade and investment policies should reinforce, and not undercut, the efforts required of businesses to conduct human rights due diligence under the EU legislation.
2. The EU's Nonfinancial Reporting Directive, which is currently under review, should ensure that it is closely aligned with the human rights and environmental due diligence obligations introduced through the EU legislation governing mandatory human rights due diligence.
3. The EU's directive governing public procurement should be reviewed and amended to align it with the EU legislation on mandatory human rights and environmental due diligence.
4. Access to a remedy under any EU legislation on mandatory human rights due diligence will depend on the ability on victims and survivors of corporate harm, and their representatives, to document and bring cases. Therefore, such victims and survivors should be protected against retaliation. To this end, the EU's directive on whistleblower protection should be implemented to protect retaliation against individuals or organizations seeking a remedy. The EU should also adopt legislation that deters abuse of corporate power to silence civil society through the use of strategic litigation against public participation (SLAPP).

In parallel with adopting legislation, EU institutions should also continue and enhance their efforts to support civil society in third countries, denounce government or other actors' abuses and intimidation against peaceful activists, journalists, and lawyers documenting wrongdoings, and support capacity-building initiatives to strengthen the judiciary in line with international human rights standards.

---

<sup>21</sup> European Parliament Sub-Committee on Human Rights, "Access to legal remedies for victims of corporate human rights abuses in third countries," February 2019, [https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO\\_STU\(2019\)603475\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf) (accessed June 12, 2020), p. 109.