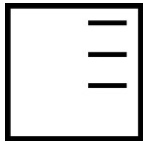


EU Monitor

Is EU leading the way to
becoming a global change in
Business and Human Rights?

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Starting from Parliament pressure to Commission action

In the EU Parliament latest agenda, a proposal on Business and Human Rights has been launched. On March 10, it took place the voting session on the legislative initiative report from the Legal Affairs Committee that urged the Commission to present a law ensuring that companies are held accountable and liable, when they harm or contribute to harming human rights and the environment. It received the support of the majority of MEPs (504 in favour, 79 against, 112 abstention)¹. This legislative proposal comes in accordance with the already established Commission's Action Plan on Financing Sustainable Growth and contributes to the goals of the European Green Deal, which intends to entrench sustainability in EU corporate governance rules².

The imperative of setting standards on business and human rights at the international level has begun since 2011 with the ground-breaking UN Guiding Principles on Business and Human Rights³, the first global framework to establish that States must protect human rights against the adverse impacts of business activity and ensure access to justice and remedy for victims, while companies have a responsibility to prevent and address their adverse impacts. Though, at the forefront since 1976 the OECD has been promoting responsible business conduct and has adopted guidance on due diligence for responsible business conduct in 2018. Also, the ILO Declaration on Fundamental Principles and Rights at Work since 1998 acknowledges universal rights for workers and more recently in 2017 it was adopted the ILO Tripartite Declaration of Principles

¹ <https://www.europarl.europa.eu/news/en/press-room/20210304IPR99216/meps-companies-must-no-longer-cause-harm-to-people-and-planet-with-impunity>

² <https://fra.europa.eu/en/publication/2020/business-human-rights-remedies> p.83

³ https://www.ohchr.org/documents/publications/faq_principlesbusinessshr.pdf

Concerning Multinational Enterprises and Social Policy, providing direct guidance to enterprises.

However, this non-legal binding approach has proven to be insufficient, given the lack of national action plans to hold corporations accountable, mechanisms to ensure their access to justice, and effective remedies for victims, which has resulted in a continuous number of human rights and environment scandals across the globe. As a consequence, in September 2013 Ecuador, supported by the African Group, the Arab Group, Pakistan, Sri Lanka, Kyrgyzstan, Cuba, Nicaragua, Bolivia, Venezuela, Peru, proposed the development of a legally binding instrument under UN auspices⁴ and on June 2014 the UN Human Rights Council agreed to establish an intergovernmental working group mandated to draft a binding instrument⁵.

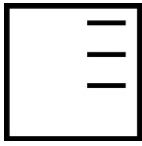
Therefore, negotiations are taking place at UN, in order to accomplish a new binding solution that will ensure the protection of human rights and the environment from the negative impacts of business activities. Nevertheless, it will take time until this international convention sees day light, and in the meantime, the EU decided to come forward and set a standard that hopefully will lead to global change.

At EU level, the starting point for this initiative was the April 29, 2020, when Didier Reynders, the Justice Commissioner, announced the Commission commitment to develop a legislative proposal by 2021 on mandatory human rights and environmental due diligence obligations for EU companies⁶, which would include liability, enforcement mechanisms and access to remedy provisions for victims of corporate abuse. After that announcement followed the commitment on May 19 of Phil Hogan, Trade Commissioner, to collaborate with Didier Reynders, reaffirming that “rebuilding the economy in an even more sustainable way is not just a plus, it is a

⁴ <https://media.business-humanrights.org/media/documents/files/media/document/s/statement-unhrc-legally-binding.pdf>

⁵ <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session1/Pages/Session1.aspx>

⁶ <https://www.business-humanrights.org/en/latest-news/eu-commissioner-for-justice-commits-to-legislation-on-mandatory-due-diligence-for-companies/>



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necessity. The European Union stands ready to maintain its role of global leadership and build stronger partnerships around the world.”⁷ Next, on June 24, the Human Rights Watch sent their recommendations for the new EU legislation. In October, the UN Working Group Working Group on human rights and transnational corporations also send their recommendations and the commission opened public consultations until February 8, 2021, to gather data and to collect the views of stakeholders, civil society and member states. Finally, by the end of January 2021, the European Parliament’s Legal Affairs Committee adopted the draft report on corporate due diligence by 21 votes in favour, one against and one abstention ⁸, ensuring that the Commission follows through on its commitment to present an ambitious framework on this fundamental issue.

Why this initiative is an important turning point

Globally, human rights violations and adverse environmental impacts are often linked to the way businesses operate, and the majority of companies do not address them in their global values chains. Given this reality, we can find a serious number of events that took place recently.

In April 2013, the Rana Plaza building, that housed five garment factories, collapsed in Dhaka, Bangladesh, which lead 1,100 workers to die and left 2,000 severely injured, after the building had been evacuated the previous day by orders of an inspector, due to large cracks in the walls, which were completely denied by company officials⁹. Another recent example is the collapse of Brumadinho tailings dam in Brazil¹⁰ in January 2019, which killed at least 250 people and unleashed a wave of toxic sludge on local communities. Lastly, in Delhi,

India in December 2019, a fire occurred at a factory, which produced school bags, taking the life of 43 people, mostly workers that were sleeping inside the building¹¹. In sum, the importance of goods prevails against human rights respect and protection. These three examples show that a non-binding instrument, merely ‘encouraging’ states and companies to comply with a duty to protect, to voluntarily establish a corporate responsibility and give effective access to remedy, is completely insufficient, because none of that becomes a reality, and violations keep happening non-stop.

Hence, new provisions that mitigate these impacts are on the table for the EU legislative proposal, with mandatory due diligence and civil liability. A study was published by the European Commission in February 2020, which indicated that just one in three companies in the EU takes due diligence measures, even when around 70% of European businesses surveyed support EU due diligence rules.¹² If the EU materialize this binding due diligence rules aligned with European Green Deal and Sustainable Development Goals, it will have notable ramifications.

The legislative proposal shall be cross-sectoral and applicable to all size businesses established in the EU territory and operating in the internal market, ensuring that all companies that want to access the EU internal market, including those established outside of EU, comply with human rights and environmental due diligence obligations.

It will evolve a legal mechanism of mandatory due diligence, “a legal standard of care”, which entails identification, prevention and remediation of aspects on the value chains that could or do infringe human rights (fundamental, social and labor rights) and the environment (exhaustion of resources, destruction of biodiversity). The draft report even purposes a

⁷ https://ec.europa.eu/commission/commissioners/2019-2024/hogan/announcements/introductory-remarks-commissioner-phil-hogan-oecd-global-forum-responsible-business-conduct_en

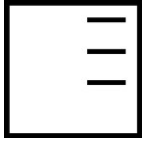
⁸ <https://www.europarl.europa.eu/news/en/press-room/20210122IPR96215/meps-hold-companies-accountable-for-harm-caused-to-people-and-planet>

⁹ <https://www.hrw.org/news/2013/04/25/bangladesh-tragedy-shows-urgency-worker-protections>

¹⁰ https://www.bbc.com/news/world-latin-america-47096011?ocid=socialflow_twitter

¹¹ <https://www.bbc.com/news/world-asia-india-50703659>

¹² <https://www.europarl.europa.eu/news/en/press-room/20210122IPR96215/meps-hold-companies-accountable-for-harm-caused-to-people-and-planet>



company's due diligence strategy publicly available and reviewed once a year¹³. The duty of care defined in law, will be determined by the facts and specific circumstances, so that the judge can decide¹⁴, if on the given facts, that conduct met the standard that was expected. In other words, if the undertakings carry out the due diligence process according to what the circumstances demand, outcome-based, no liability will be imposed on them.

Furthermore, the existence of civil liability is the cherry on the top, because it materializes the basic principle: if there is a right, there is a remedy, as explained by the specialist Lisa Smit. The duty to not cause harm to others is finally enforceable, which is a key element, due to the fact that sometimes there are many barriers, even in substantive law, jurisdiction, financial or practical obstacles, especially in transnational cases. The civil remedy is not only financial compensation, but other forms such as preventive orders, stop the company for continuing to harm, clean-up orders, restitution of land. It opens a way for victims to fulfill their right. Ultimately, these provisions will allow a judge to decide normatively on the given facts, and victims can finally win against companies, because they have a law on their side¹⁵, that never existed before.

Finally, a great accomplishment is the legal recognition of the link between human rights and environment that is essential to achieve the sustainability our future and global commitments demand. Acknowledging that the greenhouse gas emissions are increasingly affecting populations negatively, and businesses and corporations are increasingly responsible for them. For example, a group of 100 fossil fuel companies is the source of 70% of green gas emissions¹⁶, the fashion industry is

responsible for more than 10%¹⁷ and agriculture contributes to massive deforestation.¹⁸ As a consequence, the frequency of natural disasters and climate disruption is increasing, food poverty and lack of water is forcing people to migrate, and novel diseases are propagating as a result of loss of biodiversity.

What to expect

The pandemic has exposed even more the vulnerabilities of our economic model and underlined the precarious nature of global value chains, demanding us to create better solution. We reached the point, where there is no other option, besides changing the system, meaning that EU has a major responsibility to stop importing human rights and environment violations through the consumption of goods hailing from areas where European standards/values are not respected, and this proposal is a recognition of that reality.

On that account, several EU Member States are already taking the first steps in their national legislations to comply with this paradigm shift. For example, France has adopted in 2017 a "duty of vigilance" for companies and its subcontractors to assess the impacts of their activities¹⁹. Germany has finally agreed on a due diligence act enter in to force in 1st January 2023, establishing a new duty of care to protect human rights²⁰. The Netherlands finished their consultation in October 2020 to renew their policy for responsible business conduct, in order to include mandatory measures, given that voluntary ones proved insufficient.²¹ In general, Member-States seem to recognize the importance of this issue and be on board to adopt new legislation accordingly, of course there will be challenges along the way, but

¹³ https://www.europarl.europa.eu/doceo/document/JURI-PR-657191_EN.pdf

¹⁴ <https://novabhre.novalaw.unl.pt/importance-civil-liability-corporate-human-rights-duty/>

¹⁵ <https://novabhre.novalaw.unl.pt/importance-civil-liability-corporate-human-rights-duty/>

¹⁶ <https://climateaccountability.org/pdf/CarbonMajorsRpt2017%20Jul17.pdf>

¹⁷ <https://unfccc.int/news/fashion-industry-un-pursue-climate-action-for-sustainable-development>

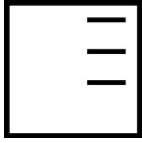
¹⁸

<https://www.theguardian.com/environment/2019/jul/02/revealed-amazon-deforestation-driven-global-greed-meat-brazil>

¹⁹ <https://corporatejustice.org/news/393-france-adopts-corporate-duty-of-vigilance-law-a-first-historic-step-towards-better-human-rights-and-environmental-protection>

²⁰ <https://novabhre.novalaw.unl.pt/german-supply-chain-due-diligence-act-what-to-expect/>

²¹ <https://www.bmz.de/en/issues/virtual-forum-sustainable-supply-chains/>



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that's part of wanting to cooperate to create a global change.

In conclusion, this initiative represents a small, but nonetheless important piece of the larger puzzle of redrawing the world along more sustainable lines both in terms of environmental and humanitarian impact. Hopefully, it will lead to a new standard at the international level, towards a more green and human rights compliant society.



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