Adopting EU Mandatory Human Rights Due Diligence: Scope and enforcement

Notes for an ETUI/ETUC Webinar 13 January 2021

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The EU has committed to introducing legislation requiring companies to undertake human rights due diligence (HRDD) to prevent, mitigate and account for how they address their actual and potential adverse human rights impacts. We expect a proposal to be tabled by the European Commission in 2021. I will briefly touch on the scope of application of the EU instrument, as well as the questions of liability and enforcement.

Scope of application

There is an important question about the threshold at which the new due diligence requirements will apply, and here it is useful to review the existing rules in other EU instruments. The Non-Financial Reporting Directive, which requires disclosure of any HRDD that companies voluntarily undertake, only applies to large publicly traded and/or special interest companies such as insurers. The Conflict Minerals Regulation, which obliges importers of certain minerals/metals to conduct due diligence on the smelters and refiners in their supply chains, sets its threshold based on the volume of metals/minerals imported into the EU. Lastly, the Timber Regulation, which requires due diligence to reduce the risk of illegally harvested wood being placed on the EU market, applies to all operators irrespective of their size and whether they are EU-based or not. Both the Conflict Minerals and the Timber Regulation apply only to the importer; the failure to impose obligations on other actors in the supply chain creates the possibility of enforcement loopholes.

At the national level, the French devoir de vigilance law (which is the only Member State law that creates a generalised obligation to conduct HRDD across all sectors) is limited to large French companies. Thus, the law applies to only about 150-200 French companies with either 5,000 employees in France or 10,000 employees worldwide including subsidiaries.

In January 2021, the European Parliament Committee on Legal Affairs adopted a Draft Directive that aims to provide guidance to the European Commission regarding its position on business and human rights. Since the European Commission has exclusive competence to initiate legislative proceedings, it is rather unusual for European Parliament to publish a draft text and it is therefore worthwhile to read the Parliament's proposal with some care. The Draft Directive would apply to all business enterprises incorporated, established or domiciled in the EU, as well as non-EU incorporated enterprises operating in the EU through the sale of goods or services, irrespective of size and ownership structure, although it leaves open the possibility of exempting micro-enterprises. Importantly, the application of the Directive to non-EU companies would avoid creating incentives to move companies outside of the reach of the EU.

In addition, the Draft HRDD Directive uses a horizontal approach that applies across all sectors – like the French Devoir de Vigilance law – leaving the Commission to publish sector-specific guidance (e.g. for the garment industry) or thematic requirements (e.g. measures to

stop child labour). Finally, this proposal would have broad application to privately held, publicly traded and state-owned enterprises.

Liability and enforcement

The creation of an obligation to conduct human rights due diligence necessarily raises the question of when companies can be held liable for gaps, and how these obligations will be enforced. On the issue of liability, it is important to distinguish between liability for the failure to properly implement and report on human rights due diligence as compared with liability for harms that may result from this failure. Thus, the French law provides for liability for the failure to properly implement HRDD *and* for the damage that would not have happened if a proper HRDD plan was in place. It is worth noting that the French law gives extremely broad standing to actors to challenge the violation of standards in court, including trade unions and NGOs.

As with much EU regulation, the European Parliament's proposal leaves the issues of liability and enforcement to national authorities in Member States, requiring States to adopt "effective, proportionate and dissuasive" penalties. Compliance with the draft directive would not prevent a company from being held civilly liable under national law but no new cause of action is foreseen by the directive. The traditional starting point in EC law is to leave the question of remedies to Member States, provided that they are effective and roughly equivalent. In practice, the penalties set out in national law often vary widely across the EU and may do little to promote compliance. For example, the EU Timber Regulation, which requires Member States to impose 'effective, proportionate and dissuasive penalties', has been criticised for being unevenly applied across Member States, with inadequate information published on enforcement action. Even worse, the Conflict Minerals Regulation does not currently provide any basis for Member States to impose penalties for infringement.

There are several ways that the EU could ensure that adequate sanctions are adopted across Member States. For example, in the area of consumer protection, the EU now requires Member States to apply "common criteria" when deciding on financial penalties, with a maximum penalty of at least 4% of the company's annual turnover. And for certain environmental offences, the EU requires that Member States use criminal law penalties in addition to administrative sanctions and compensation mechanisms under civil law. Indeed, the EP proposal provides that repeat violators should be charged with criminal offences if they were seriously negligent or acted intentionally.

The UN Guiding Principles on Business and Human Rights, which introduced the corporate responsibility to conduct human rights due diligence to international human rights law, distinguish between *causing* human rights violations and *contributing* to them. The Principles say that companies should take measures to prevent both. The EP proposal foresees that companies will prevent both causing and contributing to any human rights, environmental or governance risks. It will be left to Member States to integrate the concept of contributory harm into national law, which may be challenging for sectors with complex value chains.

The question of assigning liability is particularly thorny for companies whose supply chains lie outside the EU, which is increasingly the case for large EU enterprises. The EP Proposal would require Member States to extend the jurisdiction of EU courts to business-related civil claims brought against EU undertakings for violations of human rights caused by their subsidiaries or suppliers in third countries. This would necessitate the modification of Brussels I Regulation, which contains rules regarding the jurisdiction of EU courts in civil and commercial matters, and which is provided for in the EP proposal.

Next steps

The Commission has indicated it will table its legislative proposal in mid-2021, following the close of a related consultation on sustainable corporate governance in February 2021. We can expect the questions of scope and extent of liability to be fiercely debated between the EU institutions and Member States as this legislative project moves forward.