



## EXECUTIVE COMMITTEE E-Meeting, 24 November 2020

### Proposed directive on due diligence

#### BACKGROUND INFORMATION

European Commissioner for Justice, Didier Reynders, [announced](#) that the European Commission would introduce legislation in 2021 to make human rights due diligence (HRDD) mandatory for EU companies. The European Commission also indicated that the legislative proposal would also include provisions for corporate liability and that the EU would seek to ensure access to remedy for victims of abuses.

The 29 April 2020 announcement followed the publication in February of a [study](#) undertaken on behalf of the European Commission which concluded that a majority of stakeholders (including the [ETUC](#) and several businesses), were in favour of making HRDD mandatory.

The HRDD concept comes from the United Nations Guiding Principles on Business and Human Rights (UNGPs), which were unanimously endorsed by the Human Rights Council in 2011. In order to meet their responsibility to respect human rights, the UNGPs recommend that business enterprises carry out HRDD to identify, prevent, mitigate and account for actual and potential adverse human rights impacts which the enterprise may cause, contribute or be linked to.

Although the UNGPs are not binding, many businesses expressly commit to applying the principles and they have had widespread influence on the development of corporate policies and risk management processes, as well as the development of other international standards and national legislation.

In 2017, France<sup>1</sup> became the first country to pass a law making HRDD mandatory for large companies and there have since been calls for similar law reforms elsewhere in the EU, including in Germany<sup>2</sup>, Norway,

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<sup>1</sup> French Law on the Corporate Duty of Vigilance: The law, which only applies to the largest French companies, will make the latter assess and address the adverse impacts of their activities on people and the planet, by having them publish annual, public vigilance plans. This includes impacts linked to their own activities, those of companies under their control, and those of suppliers and subcontractors, with whom they have an established commercial relationship.

When companies default on these obligations, the law empowers victims and other concerned parties to bring the issue before a judge. Judges can apply fines of up to € 10 million when companies fail to publish plans. Fines can go up to € 30 million if this failure resulted in damages that would otherwise have been preventable.

<sup>2</sup> The "Supply Chain Law Initiative" (German: *Initiative Lieferkettengesetz*) urges the German government to issue a law by 2020 to make HRDD mandatory for German companies. In February 2019, a draft for a supply chain law was leaked from the ministry of development and it was said that it could be issued should German companies not take the necessary steps themselves. This initial draft foresees penalties of up to 5 million Euros for companies that are not adhering to their human rights obligations. So far, the German government has failed to present a draft law and there are doubts that it will be passed before the next elections, although it was foreseen in the coalition agreement of the ruling parties (CDU/CSU and SPD).

Italy<sup>3</sup>, the Netherlands<sup>4</sup>, the UK and Switzerland. Other example countries exist and in several countries, the discussions are ongoing.

The proposed EU legislation might go a step further by imposing a legal duty to carry out HRDD and imposing sanctions for breach of this duty. Commissioner Reynders indicated that the Commission would also consider the need to include provisions allowing victims of corporate abuse to obtain remedies. It is also possible that the EU will extend the due diligence obligation to cover environmental impacts.

The Commission has also emphasized that any new law would be aligned with existing standards, including the UNGPs and the OECD Guidelines for Multinational Enterprises, meaning that companies with established human rights policies and due diligence processes based on these standards ought to be well placed to comply with any mandatory requirements that the EU may implement.

Germany, which currently assumes the Presidency, has already indicated support for the push towards mandatory HRDD requirements. It is expected that more details of the proposed legislation will be announced before the end of this year.

A formal [consultation](#) procedure by the European Commission is now open until 8 February 2021. The EFBWW will prepare a draft reply for the affiliated members after the meeting of the Executive Committee.

Overall, there is evidence that companies often do not implement adequate human rights and environmental due diligence processes, failing to take the appropriate steps to prevent, mitigate, and remedy human rights abuses and environmental harms in their value chains. Companies rarely communicate the results of the measures they are taking to stakeholders, making it difficult or impossible to gauge whether their processes are having any positive impacts. Overall, the uptake of effective HRDD has been painfully slow.

As such, robust EU legislation is especially important in the context of the commitments made by the European Commission, in particular the actions and commitments linked to the European Green Deal. Requiring business enterprises to align their operations with the goals of the COP21 Paris Agreement on climate change seems especially pressing, because many companies, including financial institutions, bear responsibility for enormous emissions of greenhouse gases.

In light of these considerations, the EFBWW prepared a draft statement on the proposed EU Directive for a mandatory due diligence in the supply chain. As there is no formal legislative proposal, the EFBWW can only issue a statement.

The members of the Executive Committee are requested:

- to take note of this information
- to discuss the attached EFBWW draft statement

Annex:

EFBWW draft statement on the European legislative proposal for a mandatory due diligence in the supply chain

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<sup>3</sup> The Italian Legislative Decree 231/2001 establishes corporate liability for crimes committed in the interest or to the benefit of a legal entity, which includes specific human rights violations such as slavery, human trafficking, forced labour, juvenile prostitution and pornography, female genital mutilation, serious bodily harm resulting from a breach of health and safety standards, and environmental crimes

<sup>4</sup> The Dutch Child Labour Due Diligence Law was passed in May 2019

# EFBWW statement on the European legislative proposal for a mandatory due diligence in the supply chain

## Introduction

The COVID-19 crisis has demonstrated the growing dichotomy of the European labour market. Within the supply chains of the construction, building materials and wood-based industries, we observe a growing number of posted workers, bogus self-employed, zero hour contracts, on-call contracts, temporary agency workers, mini-jobs and freelancers. The fundamental principle of equal treatment does not apply to these workers employed under precarious working conditions.

The COVID-19 pandemic has also exposed the over-dependence on and the fragility of international, global value chains.

For these reasons, the EFBWW calls for a more sustainable industrial policy at EU and national level by launching the campaign: [“NO MORE BUSINESS AS USUAL”](#). In this campaign, the EFBWW focuses on the following messages: “health before profit”, “economic recovery through sustainable jobs” and “better protection for posted workers”.

At global level, the Building and Wood Workers’ International (BWI), has exposed and denounced slavery-like circumstances within subcontracting chains on building sites in e.g. the Persian Gulf, in stone quarries in India and in forests worldwide. In some of these cases, EU-based multinational companies were involved.

Existing international guidelines recommend that companies make every effort to avoid contributing, in any way, to human rights violations and environmental pollution (general principle of due diligence). Often, such guidelines count on the goodwill of companies. In the absence of a binding legal framework (except in some countries), there are no guarantees that companies will ensure full respect of high due diligence standards in their supply chain. For example, CSR reporting has become part of the business model of multinational companies, without there being any clear, transparent and binding criteria regarding the quality of these reports.

Within the construction, building materials and forest/wood sectors the application of due diligence is particularly relevant:

- to combat slavery-like situations and human and labour rights abuses on building sites and in forestry, organized by manpower agencies and labour suppliers;
- to counteract the import and use of (non-certified) timber and wood products;
- to prevent the use of materials and products that are excavated, produced and manufactured by workers employed under poor/low human and labour standards (examples could be natural stones cut/processed with child labour, processed raw and semi-finished products for the cement production which do not meet the EU environmental standards, non- environmental/sustainable furniture manufacturing, ...)
- to prevent the export of construction waste, without any form of follow-up on the waste and recycling process.

Due diligence could contribute to more reliable and trustworthy corporate social responsibility reporting. In that sense, it could contribute to the aim of more sustainable international supply chains. However, due diligence should never be considered as an alternative approach to mandatory enforceable legislation. The EFBWW considers that the wellbeing of all workers in the construction and forest/wood sectors be organized via enforceable legislation and a constructive dialogue between the concerned sectoral social partners at national level.

### **EFBWW statement**

Within the construction, building materials, wood and forestry sectors the (international) supply chains are very lengthy and complex. The exploitation of vulnerable workers and the non-respect of fundamental labour rights and standards mostly take place at the lowest levels in the chain. In all its publications and communications on the issue, the EFBWW stresses the importance of direct employment and stable jobs. For this reason, as an intermittent step towards more sustainable business models, the EFBWW pushes the EU and all Member States to impose a limit to the number of subcontracting levels.

In order to tackle the massive social and climatological challenges in the construction and wood/forestry industries, we need more resilient and sustainable supply chains. Therefore, the EFBWW **welcomes the European legislative initiative for a robust mandatory due diligence in the whole supply chain for all companies**, regardless their size. In any initiative, the role of the social dialogue at sector and company level and the active involvement of trade unions in the whole supply chain will be crucial.

The concept of supply chains should not only cover the subcontractors in the chain, but also the suppliers of goods and services, as well as all insourced work.

We need to reinforce the accountability of our business on how they arrange, monitor and enforce their environmental, health, economic and social responsibility in the whole supply chain. The accountability implies that the main contractor is ultimately responsible and that exoneration options are reduced to a minimum. In addition to the civil responsibility, there is also a need for dissuasive sanctions and penalties. Due Diligence policies should be accompanied by more operative regulations or other types of requirements that are tailor made for the specific type of production/trade (e.g. the EU-Timber Regulation). This should be done in consultation with the social partners of the industries concerned.

Crucial for the EFBWW is that all companies, regardless their size and activity, have a mandatory obligation to carry out regular checks on their supply chains and ensure that the social and environmental risks are properly prevented. Therefore, the focus of due diligence should be on prevention. The EFBWW stresses the need for a mandatory duty of parent companies to prevent and control the presence of letter-box companies and illegal/shame labour suppliers in their supply chains<sup>5, 6</sup>.

By publicly monitoring and reporting on these risks and on what has been done to tackle them, companies must demonstrate in a transparent way all their actions to ensure that social and environmental risks are prevented, controlled and put to an end. The monitoring practices should be done by an external monitoring body, which in no manner can be subordinated to the parent company or one of its daughter companies.

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<sup>5</sup> Article 4 of Directive 2014/67/EU (the 'Enforcement Directive') includes an assessment of genuine establishments based on a number of elements, with the test designed to identify where the core activities of an enterprise actually take place. See also judgment in case C-29/10 Koelzsch, paras. 47-49

<sup>6</sup> Art 4(5)126 of Directive 2006/123/EC (the 'services Directive'), defines an establishment as 'the actual pursuit of an economic activity (...) for an indefinite period and through a stable infrastructure from where the business of providing services is actually carried out.' This definition is fairly broad and (too) difficult to apply in practice.

The due diligence policy measures and actions of each company, must be determined, implemented and monitored with the involvement of workers' representatives of the parent company. For this, the parent company should also make the required human, technical and logistical resources available to the workers' representatives to fulfil their role, involving all workers' representatives of the whole supply chain.

The individual workers should have the right to report to external institutions or authorities, if they have complaints regarding the companies' practices and need to be protected against possible negative treatments because of having informed external institutions. The same protection shall apply to whistle blowers.

The EFBWW considers that infractions and wrongdoings should be ended immediately. Therefore, besides the civil and criminal liability, adequate administrative procedures should be put in place to take immediate protective and precautionary measures: e.g. closing a workplace, confiscating evidence, ...

In order to ensure that due diligence is effectively applied, the burden of proof should be reversed. This implies that, in case of an infraction, a company should deliver irrefutable evidence that they have taken all appropriate actions to prevent the infraction and that all due diligence measures were taken. Arguments, such as lack of knowledge, limited possibilities, ... should not be allowed if a company cannot prove it has taken all appropriate measures to prevent any infringement. A company should be considered as a professional actor, able to act, applying the highest due diligence standards.

The EFBWW considers that a mandatory European due diligence concept should cover at least the existing international standards, such as the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.

As the proposed legislation will be adopted at EU- level, at least the following existing EU-Regulations should be included explicitly in the EU concept of due diligence:

- The whole European social acquis<sup>7</sup>, as laid down in primary and secondary EU laws, as well the EU Charter<sup>8</sup>
- The EU non-financial reporting Directive, which indicates that "climate-related information can be considered to fall into the category of environmental matters";
- The EU Timber Regulation ("EUTR"), which is part of a broad set of measures introduced by the Forest Law Enforcement, Governance and Trade ("FLEGT") to tackle illegal logging in the world's forests;
- The EU Regulation on disclosures, which includes disclosure obligations for financial market participants and financial advisers on their approaches to the integration of sustainability risks and the consideration of adverse sustainability impacts;

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<sup>7</sup> Some examples are equal treatment in the workplace, reconciling family and professional life, awareness of conditions of employment, equal treatment regardless of type of contract, limitation of working time, protection of health and safety, posted workers and enforcement, third country nationals, protection in the event of termination of employment, organisation, information and consultation of workers, the prohibition of child labour and protection of young people at work, social security coordination, equal treatment in social security and social integration ...

<sup>8</sup> Such as the prohibition of forced labour (Article 5), respect for private and family life (Article 7), freedom of association (Article 12), the freedom to choose an occupation and right to engage in work in any Member State (Article 15), the right not to be discriminated (Article 21), the equality between men and women in all areas, including employment, work and pay (Article 23), the right to information and consultation within the undertaking (Article 27), the right of collective bargaining and action (Article 28), the right to a free placement service (Article 29), the right to protection in the event of unjustified dismissal (Article 30), the right to fair and just working conditions, to maximum working hours, breaks and holiday (Article 31), the prohibition of child labour and protection of young people at work (Article 32), and the entitlement to social security and assistance (Article 34)

- The EU Environmental Liability Directive, which requires companies to take all practicable steps to immediately control, contain, remove or otherwise manage the relevant contaminants and/or other damage factors in order to limit or to prevent further environmental damage and adverse effects on human health. The Directive also obliges companies to take all necessary remedial measures.

The EFBWW considers that the EU-concept of due diligence should also explicitly cover the compliance of the EU environmental ambitions and standards as set in the “European Green Deal”.

In order to prevent market competition distortion, non-EU based companies should demonstrate in a transparent manner that, when they provide services or goods within the EU, they have fulfilled the EU social and environmental standards that are applicable to all EU-companies. In case of failure, these companies must be excluded from offering their goods or services on the EU market. For this, the existing market surveillance tools must be strengthened.

The EFBWW notes that the proposed Directive should clearly allow all Member States to extend the concept of due diligence at national level.

The EFBWW underlines that there is a fundamental and intrinsic difference between “due diligence” on the one hand and “chain liability”<sup>9</sup> and “joint and several liability”<sup>10</sup> on the other. These liability tools are explicitly and exclusively linked to the organization and regulation of the labour market (and in particular the respect of workers’ wages, working conditions, professional training, health and safety and social protection of the workers). For this reason, the EFBWW considers that “chain liability” and “joint and several liability” schemes should remain the exclusive competence of the Member States, in consultation and agreement with the concerned sectoral social partners.

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<sup>9</sup> *“this applies not only in relation to the contracting party, but also to the whole chain. In this case, the Inland Revenue may address all parties in the chain for the entire debt of a subcontractor”*, Liability in subcontracting processes in the European construction sector, Eurofound, Mijke Houwerzijl and Saskia Peters, 2008

<sup>10</sup> *“this only applies at one level of the employment relationship, that is, when a subcontractor does not fulfil its obligations regarding payments, for example, to the Inland Revenue; in such instances, the contractor, together with the subcontractor, can be held liable by the Inland Revenue for the entire debt of the subcontractor”*, Liability in subcontracting processes in the European construction sector, Eurofound, Mijke Houwerzijl and Saskia Peters, 2008