**Due diligence legislations**

(by Amandine Moriniere, Focus Association for Sustainable Development)

Companies can have negative impacts all over the world by producing or selling goods and services. The impacts can be from Human Rights violations to destruction of the environment. It is necessary to make them liable for these impacts, in order to put an end to violations.

A due diligence process can be the way to identify and prevent these risks. Indeed due diligence involves the actions taken by a company to both identify and act upon actual and potential Human Rights and environmental risks in its operations, supply chains and the services it uses. The EU is currently working on a legislation that would make due diligence mandatory in Europe. Moreover several legislations close to a due diligence legislation across Europe already exist.

1. An European due diligence obligation?

The European Union is currently working on a legislation that would make companies liable when they are violating Human Rights and harming the environment. Since the market fails in case of social and ecological responsibility, the EU needs a binding legislation to force companies to pay attention to their impacts. The aim is to have a coherent legislative framework applying to every activity (even financial). The EU wants to have the legislation on due diligence on human rights and environment in 2021. On the 1st of December 2020 the European Council has recommended the Commission to make a legislative proposal on mandatory human and environmental due diligence. A public consultation has been launched and was open till 8 February 2021. The point is to determine the rules in an inclusive way and to take into account all the partners (business, citizens, ..)

There are several points of discussion before the legislation will take place:

* To which companies this law will apply to? Will it be for larger companies, do we need a global or sectoral legislation, what about small and medium enterprises …
* What extra-territoriality will the law have? The problem is its international perspective, meaning the legislation should be protecting European and non-European victims. It should be easy to bring the case on EU court in order to have a remedy.
* What concrete obligations for companies? How precise should the due diligence process be? (mapping of the risks, process to evaluate, measure to prevent negative impacts, ..)
* How will the EU control and monitor? Should it be the role of the civil society and NGOs or do we need a supervisory body to control (with what kind of power).
* What sanctions? To be effective the legislation must include sanctions but should it be for every fault, for every violation and should the sanctions be financial or penal?

Some other points are not subjected to debate. For example the due diligence process should take into account additional risks for persons that suffer from discrimination (gender, race, age, …). This is why it must be done in consultation with a wide array of stakeholders and communities affected by the risks.

During the preparation of the legislation, the Commission should take into account the international and national measures existing to avoid a global patchwork of obligation. On one hand some international measures already exists (UN Guiding Principles on Human Rights and Business, The OECD Due Diligence Guidance for Responsible Business Conduct, … but all are non binding). On the other hand there are also national measures that are more limited and mostly sectorial. The EU legislation should fit between those two levels.

1. Existing legislation in Europe close to due diligence

* **SPAIN: lack of Human Rights legislative initiatives**

In Spain there is a lack of Human Rights legislative initiatives and the NAP (national action plan) is on standby. This absence of due diligence is balanced by a very limited number of legislative obligations (regarding health, environment) but supply chains and extra-territoriality are not included in this laws.

All of that makes the companies confused, they don’t know if they have to implement regulation concerning human rights, if they have to report about activities or not. On one side companies don’t have any legal obligation. On the other side companies find themselves challenged by investors to respect Human Rights. Indeed investors ask for specific answers concerning the assessment of the impact of their activities, and the plans to mitigate them. Companies don’t feel obliged to change their ways of doing business so much by the consumers but more and more by investors.

Moreover Legal Departments are starting to understand what is at stake in relation to human rights impacts. There is a law from 2007 about environmental responsibility that implements a duty to prevent, avoid and repair with a system of administrative sanctions, but it is not fully implemented. As there is a lack of links between courts and companies, so no one can really control.

* **ITALY: limited due diligence obligation since 2001**

In Italy, since 2001 there has been a law on administrative responsibility of corporations for crimes. It was aimed at protecting Human Rights but its scope has been extended over the years.

The law includes several Human Rights violations (e.g. slavery, human trafficking,…). To apply the liability, the crime has to be committed in the interest or advantage of the company and committed by a representative of the company.

The liability can be applied for foreign companies operating in Italy, for crimes committed partially In Italy and partially abroad and for offences occurred entirely abroad (only for a close number of serious offences against the national interest).

The strength of this law is that it enables an ongoing due diligence process with extraterritorial effect. Moreover significant sanctions can be applied since the criminal proceedings apply. However some human rights abuses are still not covered. There is a lack of transparency regarding the process and no requirement for stakeholder engagement.

* **SWITZERLAND : a referendum on Responsible Business Initiative**

On 29 of November 2020, the citizens of Switzerland had to vote on the responsible business initiative, a law that would make companies liable in case of human rights violations or harming the environment. This law was supported by a broad coalition and had a very large support. The legislation did not pass, but the result showed its positive side. Indeed a majority of the population said yes (50.7%), but it was rejected by 14 cantons over 26; therefore the law couldn’t pass.

The debate within the campaign was incredibly polarized and politicized. The opposition based its critique that this law would weaken Switzerland’s competitiveness and would generate delocalization. A few businesses took positions because of the uncertainty on what the due diligence process would mean for them.

The Responsible Business Initiative wanted to impose a due diligence process to identify risks, act to prevent them and report about the impacts on human rights and the environment. It would have been a law applying to companies larger than 250 employees.

As a reply to this initiative, the Parliament made a counter proposal with some compromises (due diligence obligation limited to companies and activities at risk), but it was rejected.

Since the referendum was rejected the second counter proposal of the Parliament will enter into force. The scope is way less restrictive than the initial proposal. It includes a transparency obligation limited to large companies and a due diligence obligation limited to companies importing conflict minerals or to companies offering goods for which there is a founded suspicion of child labor.

* **UNITED KINGDOM: the anti-slavery Act**

The anti-slavery Act was adopted in 2015, it aims to fight modern slavery. It requires companies to release an annual statement setting out the steps taken to ensure there is no slavery in the business and in its supply chains.

It only applies to companies whose turnover is higher than £ 36 million and that sell goods in the United Kingdom. If there is no statement, the company receives an injunction from the court to comply, then it is possible to receive a fine.

* **THE NETHERLANDS: the Child Labor Due Diligence Act**

The Dutch Child Labor Due diligence Act came into effect in 2020. It requires supply chain due diligence and reporting by a significant number of foreign based multinationals providing goods or services in the Netherlands.

Companies must submit a disclosed statement to a supervisory authority that proper due diligence measures have been put in place. Companies need to evaluate their supply chain to assess if there is a reasonable suspicion of child labor. As sanctions, a company can receive a fine. If there are two offences within 5 years, executive directors could face imprisonment.

* **FRANCE : the Corporate Vigilance Law**

In 2017, the French Corporate Vigilance law came into effect; it is one of the most complete due diligence legislation in Europe.

NGOs had to face a lot of difficulties before this law came into effect. They ran several awareness raising campaigns in order to sensitize and get support from the population and then had to push the law through the Senate and the National Assembly several times.

Now that the law is adopted, the next fight is to make sure that it is really implemented. The Vigilance Law requires French companies to apply due diligence, in order to avoid human rights violations, violations of basic freedoms, negative impacts on health and security of persons and environmental harm. For that companies are obliged to draw up and publish a vigilance plan that contains verifiable measures they have put in place to prevent human rights violations and damage to the environment. This plan must include a mapping of the risks, procedure to assess, measures to prevent and mitigate serious violations, an alert mechanism and monitoring mechanism to evaluate the implementation and effectiveness. This plan concerns activities of the company and in its supply chain and should be elaborated in consultation with a variety of stakeholders.

The judicial aspects: The companies that must apply this law are French companies of more than 5000 employees and international companies with an activity in France with more than 10 000 employees globally. NGOs, victims and trade unions can take legal actions. As for the sanctions, companies receive first an injunction to apply the plan of vigilance and then can have to pay indemnification to victims.

3 years after the law has been put in place, NGOs consider that it is not well implemented. Companies don't apply due diligence, their plans are lacking information and are just some copy-paste of other plans / obligations. Moreover no list of companies required to apply the law has been published, meaning that no one really knows which company should have a plan of vigilance, making it harder to control.

There is currently a first lawsuit on the ground of the Vigilance law, against the company Total for an oil project in Uganda and Tanzania. However the court declared itself incompetent in favor of the commercial court. We still need to wait to see what will happen and how the duty of vigilance will be implemented.

**-> And now?**

As a conclusion we can say that due diligence legislations are emerging and developing in Europe. A European legislative framework is necessary in order to have a more coherent framework and make sure that companies pay attention to their impacts. It is necessary that companies become liable regarding Human Rights and environmental violations.

More on the process on european level

[Due diligence explained by the EC](https://ec.europa.eu/growth/sectors/raw-materials/due-diligence-ready/explained_en)

Due diligence - slovensko.

Civil society victories:

* [A case of the century (France)](https://www.euronews.com/living/2021/02/03/french-government-found-guilty-of-climate-inaction-in-historic-victory) - [people against the state](https://focus.si/s-tozbo-do-podnebnega-ukrepanja-francoski-primer-stoletja/) on climate change inaction
* [Farmers against Shell](https://milieudefensie.nl/actueel/13-jaar-lang-wachten-op-gerechtigheid-is-veel-te-lang) (the Netherlands) - [nigerians farmers and civil society](https://milieudefensie.nl/actueel/milieudefensie-en-4-nigeriaanse-boeren-winnen-rechtszaak-tegen-shell) against destruction in the Niger delta

Awaiting:

* portuguese case - [children against states](https://www.theguardian.com/law/2020/sep/03/portuguese-children-sue-33-countries-over-climate-change-at-european-court) on climate change inaction
* people against the dutch state on climate inaction