

## Mandatory Human Rights Due Diligence Regimes

### Some Key Considerations

#### June 2020

1. Human rights due diligence is a critical part of fulfilling the “**corporate responsibility to respect**” as defined in the UN Guiding Principles on Business and Human Rights (UNGPs). It is an **ongoing, cyclical process** that takes account of the dynamic nature of human rights situations.
2. It is also a key tool in the global efforts to Build Back Better, since it enables companies to focus their attention on the most severe human rights risks and identify the human rights impact of their response to the Covid-19 pandemic.
3. A number of governments (of EU and EEA member states in particular) have recently introduced, or have announced their intention to consider the introduction of, legislative regimes to require companies and corporate groups to carry out human rights due diligence. These kinds of regimes are referred to as “**mandatory human rights due diligence**” (mHRDD) regimes.
4. Momentum is building within the European Union for an **EU-wide approach to mandatory human rights due diligence**. Work has begun within DG Justice on a new legislative initiative which would require companies to carry out human rights due diligence as a legal duty or standard of care.
5. mHRDD regimes have a potentially vital role to play as part of a “**smart mix**” of measures to effectively foster business respect for human rights, as called for in the UNGPs.
6. Working towards more **harmonised approaches** to mHRDD is potentially useful, to reduce the potential for overlapping and inconsistent regulatory requirements, to address the problem of gaps between regimes, and to facilitate business compliance.
7. However, **there is not one, single model for mHRDD regimes**. On the contrary, when it comes to translating the ideas set out in the UNGPs into a legally binding regime, there are many different variants, meaning that when people are discussing mHRDD regimes they are potentially discussing a wide range of legal and regulatory possibilities.
8. For a productive and meaningful discussion on mHRDD regimes to take place, all actors – policy-makers, legislators, businesses, trade unions, civil society organisations and other stakeholders – **need to be clear about the different design options available** and the trade-offs between different choices, and be prepared to analyse each of these options carefully in light of the specific underlying policy goals.
9. In developing mHRDD regimes, decisions need to be made about
  - the **types of companies** to which the mHRDD obligations will apply;
  - the **nature of the legal obligations** which will apply (e.g. whether companies will be judged by standards of conduct, standards of outcome, or both; whether liability will be automatic, or based on proof of fault);
  - the **scope** of these obligations (e.g. the entities and activities to which the due diligence obligations extend);
  - subject-matter coverage (e.g. whether **comprehensive or prioritising specific sectors**);
  - the **human rights themes** and risks targeted (i.e. some may focus on a narrower range of issues and impacts, such as child labour, modern slavery, or sourcing from conflict zones);

- the way in which, and the mechanisms through which, compliance with legal obligations are to be **scrutinised, monitored and enforced**;
  - the **types of liability** that will result from non-compliance (e.g., civil and/or criminal liability), the **sanctions** that may be imposed, and/or the remedial steps that may be required in the event of non-compliance; and
  - the **supporting regulatory architecture** and services that may be needed (e.g. guidance, consultations, regulatory effectiveness reviews, education, etc.).
10. In order to arrive at a robust and effective regime, that is implementable by business enterprises and which achieves the desired goals, policy-makers and legislators will need to **consult widely with affected stakeholders** on the different design choices that may be available, and their **advantages and disadvantages** from the standpoint of fostering business respect for human rights (particularly as regards preventing and addressing business-related human rights harms, including by facilitating access to remedy for business-related human rights abuses), communicating clearly the **trade-offs** that may exist as regards different design choices.
11. In order to ensure “policy coherence” with respect to mHRDD, policy-makers and legislators will need a **thorough understanding of the “regulatory ecosystem”** in which the mHRDD regime sits. Policy-makers and legislators should conduct a **thorough review of surrounding legislation and policy initiatives** in order to identify the amendments or adjustments that may be needed to ensure
- a **smooth, mutually reinforcing interface** between the mandatory human rights due diligence regime and other legal regimes;
  - that **the new regime is capable of meeting its regulatory objectives**, that the risks of any negative unintended consequences are identified and addressed, and that businesses are not subjected to any compliance dilemmas (e.g. in the form of conflicting requirements); and
  - that the regime is able to take **full advantage of any opportunities** that may be presented by regulation in other areas (e.g. in the form of leverage or incentives to **enhance the commercial or reputational drivers** for carrying out human rights due diligence activities to a high standard).
12. “Surrounding legislation and policy initiatives” is likely to be considerably wider than existing mandatory due diligence regimes under EU law (e.g. the Conflict Minerals Regulation and the Timber Regulation) or existing EU legislation on non-financial corporate reporting. It **potentially encompasses many other areas of EU and domestic law and policy** such as corporate governance, competition law, privacy, consumer law, environmental law, access to environmental information, laws on the protection of labour rights, taxation, corporate liability and conflict of laws, as well as policy areas such as trade and public procurement schemes and other agencies that may provide support and services to business activities, such as export credit agencies, official investment insurance or guarantee agencies, development agencies and development finance institutions.
13. Given that mHRDD obligations are highly likely to extend to cover subsidiaries and suppliers in other, non-EU jurisdictions, EU policy-makers and legislators should be mindful of the strong possibilities for overlaps and inconsistencies between EU mHRDD requirements and the laws and policies of non-EU jurisdictions. Thus, **extensive consultation with non-EU stakeholders** (e.g. civil society organisations, trade unions, businesses, regulatory agencies) will be necessary.
14. Policy-makers and legislators should also give attention to the various ways in which implementation of mHRDD may be supported by **education, technical assistance and capacity building activities** (e.g. of lawyers, judges, regulators, civil society organisations, trade unions, etc.).