THE NEXT FRONTIER FOR EUROPE: CORPORATE MANDATORY DUE DILIGENCE

How can it lead to more sustainable supply chains?

CONTEXT

Over the past years several countries have introduced legislation on mandatory due diligence processes and reporting. The most known are the UK Anti-Slavery Act, the Dutch Child Labour Due Diligence Law or the French Duty of Vigilance Law. Several other initiatives have been discussed or adopted by 13 states worldwide, of which 11 are EU member states, Germany included.

The recent “Study on due diligence requirements through the supply chain”, published by the European Commission, provides a detailed examination of the existing due diligence regulations and proposals. The report also analyses different regulatory options and how they are perceived by different stakeholders. The Commission is welcoming companies’ feedbacks at: just cg-op@ec.europa.eu.

According to the study:

- Only one in three businesses in the EU are currently undertaking due diligence on human rights and environmental impacts
- Businesses and stakeholders alike largely agree on the lack of effectiveness, efficiency and coherence of the current voluntary schemes and laws on due diligence requirements
- Most stakeholders in the study prefer a cross-sectoral EU regulation. They expect effective harmonisation, legal certainty, a level playing field, and non-negotiable standard for business in relation to their supply chain.
The key question is how effective this regulatory mechanism will be?

CSR Europe with its wide experience in supply chain sustainability (see Drive Sustainability; Better Trucking; Management of Complaints Assessment; Upgraded and Sustainable Value Chains for Europe & Africa; Global Platform for Sustainable Natural Rubber) will play a key role in this EU policy debate.

In this EU Insight we will highlight the key topics and questions raised by the study. We will also indicate our approach to due diligence.

View our 2020 Agenda on “Beyond Due Diligence”.

THE ISSUES AT STAKE

Three major topics can be highlighted.*

1. THE SCOPE OF DUE DILIGENCE IS BROADENING TO INCLUDE ENVIRONMENT, CLIMATE AND ETHICS

Companies are increasingly expected to carry out not only human rights due diligence in their supply chain. They also have to take into account the environmental and climate impact of their supply chain, in line with the Paris Agreement.

At the same time, the EU Action Plan on Sustainable Finance is calling for an assessment of measurable sustainability targets. It seems that – “even where there is no agreed methodology yet – companies are expected to set internal measurable targets for the purpose of environmental due diligence in accordance with OECD Guidelines” (p.38).

This broadening scope of due diligence adds up to the extension previously made by the “OECD Guidelines for Multinational Enterprises”. According to John Ruggie, former UN Special Representative for Business and Human Rights, the OECD Guidelines were “the first instrument to take the concept of risk-based due diligence to all major areas of business ethics” including conflict, labour rights and bribery and corruption, disclosure and consumer interest (p.24). In other words, the report suggests that materiality has extended to include all the effects that the supply chain has on people, communities, environment and climate.

2. THE TYPE OF REGULATION ENVISAGED

| A) NO POLICY CHANGE | Regulatory development will continue only at national level. |
| B) NEW VOLUNTARY GUIDANCE | Outlining only the expectation towards companies. |
| C) NEW REGULATION REQUIRING REPORTING - BEYOND MATERIALITY | Requiring reporting on the steps taken in their own operations and third party (supply/value chain) relationships. The difference with the EU Non Financial Reporting Directive might be the need to focus on risk for the people and planet and not on what is material for businesses. |
| D) NEW REGULATION REQUIRING MANDATORY DUE DILIGENCE AS LEGAL DUTY OF CARE | Companies will be required to carry out due diligence to identify, prevent, mitigate and account for actual or potential impacts and infringements in their own operations or supply chain. |

*Page numbers refer to the EC Report Executive Summary.
The four option, “new regulation requiring mandatory due diligence as legal duty of care” brings along several relevant questions for the design of a future regulation:

**Scope:** Will it apply only to specific sectors or to all industries? If applicable to all sectors: does the regulation envisage only large companies or also SMEs?

**Implementation:** Should there be an oversight and/or enforcement mechanism that could include judicial and non-judicial remedies? Is there need for a State-based oversight body and sanctions for non-compliance? In the remedies approach there is also the option for civil liability as in the French law.

### 3 ACHIEVING IMPACT THROUGH A SMART POLICY MIX?

A key element in discussing a regulatory approach to due diligence is the level of factual influence and leverage by the company (p. 53) as it might lead to disengagement instead of a proactive engagement. Especially when legal liabilities come into play – as in the recent case of Apple, Google and other tech-companies - a company might choose to avoid the risk and not engage in the practical improvement.

The study focuses almost uniquely on companies’ individual approach to due diligence, including individual pathways for remediation like financial compensation, restoration, injunction or interdictions on potential harmful actions. When these individual actions are taken, the single company can reach the desired sustainability outcome.

To a smaller extent, the study also outlines that mandatory due diligence legislation would need to be part of a broad package of measures which should be implemented by the EU and its Member States (p. 57). To foster compliance, a mix of measures is needed, like bilateral agreements, the provision of financial and capacity-building assistance to achieve the standards, aligned public procurement practices, changes in the competition law that allow businesses greater freedom to collaborate. These are only some of the measures that could contribute to establish the smart policy mix required to achieve impact.

This last topic should be at the core of the current policy dialogue on mandatory EU regulation.

A smart policy mix would allow for better compliance while moving beyond due diligence. Individual companies – even very large ones – do not always have the leverage, capacity and opportunities for impact, especially when it comes to the deeper tiers in the supply chain.

**How to link the due diligence practices to a human rights action plan?**

1. **Invest in more European and international collaborations** within industry sectors and across sectors, in the value chain, with investors, development agencies and policy makers as to make sure a due diligence law can serve its purpose, namely, to contribute to a more sustainable and inclusive society.

2. **Support Industry Sector Dialogues** to empower companies, industry federations and stakeholders to:
   1. **Develop a common understanding and agreement on due diligence in their industry,** including priority areas to collaborate and ways to track individual and collective progress;
   2. **Enhance performance and work together** to create shared value throughout the supply chain;
   3. **Create visibility and continuous peer to peer learning.**
WHAT’S IN IT FOR YOUR COMPANY

The current discussion at EU level on the mandatory due diligence framework will affect the way companies address the impact of their value chain and its transparency. Engagement in this policy dialogue— at national and at EU level - is crucial at this stage.

Our proposal for European Industry Sectors Dialogues and aligned collaborative efforts aimed at ensuring continuous improvements, will be crucial for the design and effectiveness of any future European action plan and regulation.

Members interested in supply chain due diligence have the opportunity to engage in CSR Europe’s:

1. Community of Practice (CoP) “Beyond Due Diligence”

2. Collaborative Platform “Upgraded and Sustainable Value Chains for Europe & Africa”

3. Policy Dialogue with the European Commission

NEXT APPOINTMENTS

- **23 MARCH - WEBINAR**  
  “Due Diligence Regulations and Change”

- **21 APRIL - WEBINAR**  
  “Collaboration Beyond Compliance”

- **6 MAY - WEBINAR**  
  “Sector Approaches to Supply Chain Sustainability”

- **11 JUNE - WORKSHOP**  
  “Beyond Due Diligence”

- **8 JULY - WORKSHOP**  
  “Acting for Change”

- **6-8 OCTOBER - CONFERENCE**  
  “German Presidency Conference on Human Rights and Decent Working Conditions”

- **15 DECEMBER - WEBINAR**  
  “Technologies for Due Diligence”