

Briefing

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EU Human Rights Due Diligence Legislation: Monitoring, Enforcement and Access to Justice for Victims



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EU Human Rights Due Diligence Legislation: Monitoring, Enforcement and Access to Justice for Victims

ABSTRACT

This briefing explores options for monitoring and enforcement of European Union (EU) human rights due diligence legislation, and how such legislation should contribute to access to justice and remedy for victims of human rights abuses linked to the operations of businesses inside or operating from Member States (MS). The briefing reviews existing due diligence and disclosure schemes and considers the feasibility of specific options for monitoring, enforcement and access to remedy within a future EU due diligence law. The briefing recommends that such legislation should require effective monitoring via company-level obligations, national and EU-level measures, including repositories of due diligence reports, lists of companies required to report, information request procedures, monitoring bodies and delegated legislation or guidance further elaborating on due diligence under the law. Regarding enforcement, the law should *inter alia* require MS to determine appropriate penalties for non-compliance and to establish enforcement rights for interested parties. Finally, on remedy, the law should, besides requiring companies to establish complaint mechanisms, provide for national and EU measures, including requirements that MS ensure effective means of remedy and redress for victims and establish or identify bodies to investigate abuses, initiate enforcement and support victims.

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Acronyms and Abbreviations

ACT	Alliance for Corporate Transparency
Aus MSA	Australian Federal Modern Slavery Act 2018
BHRRC	Business and Human Rights Resource Centre
CHRB	Corporate Human Rights Benchmark
COE	Council of Europe
CTSCA	California Transparency in Supply Chains Act 2012
DG	Directorate General of the European Commission
LDV	French Law on Duty of Vigilance
EC	European Council
ECCJ	European Coalition for Corporate Justice
ECFR	European Charter of Fundamental Rights
ECHR	European Convention of Human Rights and Fundamental Freedoms
EIB	European Investment Bank
EP	European Parliament
ESG	Environmental, Social and Governance
EU	European Union
EU NFR	EU Non-Financial Reporting Directive
EU SRD	EU Regulation on Sustainability-Related Disclosures in the Financial Services Sector
FRA	European Union Agency for Fundamental Right
GRETA	Council of Europe Group of Experts on Human Trafficking
ILO	International Labour Organisation
MS	Member states of the European Union
MSA	United Kingdom Modern Slavery Act 2015
NHRI	National Human Rights Institution
NSW MSA	New South Wales Modern Slavery Act 2018
OECD	Organisation on Economic Cooperation and Development
RDR	Ranking Digital Rights Initiative
SDGs	United Nations Sustainable Development Goals
ToR	Terms of Reference
UK MSA	UK Modern Slavery Act 2015
UN	United Nations
UNGPs	United Nations Guiding Principles on Business and Human Rights
US	United States of America
US FAR	United States Federal Acquisition Regulation
WBA	World Benchmarking Alliance
WBCSD	World Business Council for Sustainable Development

1 Introduction

This briefing considers how EU legislation on corporate human rights due diligence should be monitored and enforced, and how such legislation should facilitate access to justice and remedy for victims of business-related human rights abuses. The UN Guiding Principles on Business and Human Rights (UNGPs) (UN, 2011) call for all businesses to undertake due diligence to operationalise their responsibility to respect human rights. Based on States' obligations under human rights treaties, the UNGPs prescribe that states should adopt a 'smart mix' of legislative and other regulatory measures 'to prevent, investigate, punish and redress' business-related human rights abuses (UNGP No 1). The EU and EU Member States (MS) have affirmed their commitment to uphold the UNGPs through numerous policy instruments (e.g. European Commission (EC), 2011; EC, 2015; EP, 2016). Some MS have enacted laws requiring businesses to perform human rights due diligence, including France's *Loi de Vigilance* (LDV) and the Netherlands' Child Labour Due Diligence Law. Other MS are considering adopting such legislation. At the same time, company implementation of due diligence across the EU remains at best uneven (CHRB, 2019; ACT, 2020; EC, 2020), while business-related abuses are not diminishing at home or abroad (FRA, 2019; International Labour Organisation (ILO), 2019; BHRRC, n.d.) and rather continue to manifest on new fronts (RDR, 2019; EP, 2017a, 2019a; COE, n.d.). As observed by the European Parliament (EP) (EP, 2016, 2017b), this suggests a role for EU due diligence legislation, to honour EU human rights obligations and commitments, to secure a 'level playing field' across the EU single market and to advance the accountability of governments and businesses. Furthermore, such legislation should support access to remedy for victims and help protect human rights defenders whilst also supporting the implementation of the Sustainable Development Goals (SDGs) (WBCSD, 2017; ILO, 2019b).

1.1 Purpose and Scope

This briefing aims to support the EP in developing its position on EU human rights due diligence legislation. It considers options for the **monitoring and enforcement** of such legislation, and how it should contribute to strengthening **access to justice and remedy** for victims of human rights abuses linked to businesses operating within or from MS. It assumes that EU human rights due diligence legislation would be horizontal (cross-sectoral), address a broad spectrum of human and labour rights (all internationally-recognised human rights) and cover business-related abuses inside the EU and in non-EU countries by EU-based companies, whether directly through their presence or investments, or indirectly through supply chain or established commercial relations¹.

Under the UNGPs, **monitoring** is an essential dimension of due diligence for individual companies. Outcomes revealed by company monitoring should drive remediation efforts as well as continual improvement in company policies and practice (UNGP 20). At the same time, in the context of EU due diligence legislation, monitoring should refer to steps taken by other parties, at national or EU level, to track companies' compliance with due diligence obligations or the overall effectiveness of a legislative scheme in preventing or addressing corporate abuses. **Enforcement**, whether by MS, EU-level authorities, or at private initiative, secures the fulfilment of legal responsibilities. In the due diligence context, enforcement should seek to fulfil companies' procedural or substantive obligations. It might operate via complaints procedures, civil litigation, or criminal prosecution of individuals or corporations, and should result in the imposition of pecuniary or other penalties. **Access to justice and remedy** refers to judicial, administrative or other mechanisms to ensure that when business-related human rights abuses occur, those affected can avail themselves of an effective remedy (UNGP No 25).

¹ In line with the TOR, it is not assumed for the purpose of this analysis that EU due diligence legislation would extend beyond human rights to environmental and governance risks and impacts.

Parts 2, 3 and 4 of this briefing address monitoring, enforcement and remedy respectively. Each Part identifies and evaluates elements that could feature in an EU corporate human rights due diligence law, on the basis of a review of existing **disclosure-based regimes** and **corporate human rights due diligence laws**. Part 5 makes recommendations for measures that could be included in such a law and addressed to the EU, MS and other actors.

1.2 Methodology

This briefing draws on a desk review of selected legislation; soft laws and policies; judicial decisions; institutional studies; civil society, scholarly and other relevant material (see Bibliography). Annex I summarises, in table form, an evaluation of possible measures that could be included in EU due diligence legislation in relation to monitoring. Annex II presents the same analysis in relation to enforcement measures, and Annex III lays this analysis with regard to remedies. Annexes IV and V respectively review provisions on monitoring and enforcement of selected due diligence and disclosure schemes.

2 Monitoring

Monitoring is intrinsic to the process of human rights due diligence, as the UNGPs and other relevant guidance (e.g. EC, 2017; OECD, 2018) make clear. Where disclosure obligations address due diligence processes, these logically entail that companies will undertake monitoring, albeit this may not be explicitly stated. Companies need to monitor actual and potential impacts of activities across their own operations, business relationships and partners, and the effectiveness of their due diligence arrangements in preventing and redressing harm. Yet external monitoring of human rights due diligence is also essential. Even if human rights reporting practices can trigger positive changes at company level (e.g. McPhail and Adams, 2016; Ethical Trading Initiative and Hult International Business School, 2016; McCorquodale et al, 2017), non-financial reports remain an unreliable guide to companies' sustainability risks, impacts and performance (e.g. Parsa et al, 2018; Doan and Sassen, 2020). Furthermore, disclosure obligations, in isolation, are a weak driver of effective due diligence and remediation (Methven O'Brien and Dhanarajan, 2016; LeBaron and Rühmkorf, 2017; United Kingdom (UK) Government, 2019; CHRB, 2019; ACT, 2020). Companies' internal monitoring processes should, then, involve third parties and be supplemented by external monitoring by governmental and third party mechanisms (EC, 2017).

2.1 Monitoring: review of current approaches

Company-level due diligence monitoring: Most legislative schemes (see Annex IV refer to or entail the need for companies to undertake monitoring as part of the due diligence process (EU Non-Financial Reporting Directive (NFR); California Transparency in Supply Chains Act (CTSCA); UK Modern Slavery Act (UK MSA); Australia Federal MSA (AusMSA); Dodd Frank Act Final Rule 1502; French Law on Duty of Vigilance (LDV); Dutch Child Labour Due Diligence Act; EU Conflict Mineral Regulation). The LDV makes explicit that each company must establish a monitoring scheme (« *Un dispositif de suivi des mesures mises en œuvre et d'évaluation de leur efficacité* ») as one of five specified 'reasonable vigilance measures' ("*les mesures de vigilance raisonnable*"). In most cases, monitoring is periodic: few schemes establish one-off disclosure requirements (CTSCA; Dutch Child Labour Due Diligence Act).

Non-compliance with company-level monitoring duties does not attract penalties under some schemes (UK MSA). Others are more clearly mandatory (LDV; EU Timber; EU Conflict Minerals). Monitoring requirements generally follow the purpose and scope of obligations under the scheme in question. Thus, where the due diligence duty covers business partners, companies' monitoring duties follow accordingly (e.g. monitoring under the LDV covers subsidiaries and subcontractors/suppliers linked by an 'established commercial relationship'; under the Dutch Child Labour Due Diligence Act it should cover the entire supply chain). Non-financial statements under the EU Non-Financial Reporting Directive (EU NFR) Directive should

cover ‘business relationships, products or services which are likely to cause adverse impacts... and how the undertaking manages those risks’, where ‘relevant and proportionate’ (Art 19a). Some schemes mandate that disclosures cover grievance or early warning mechanisms, implying that monitoring arrangements at company level should integrate these elements (EU Conflict Minerals; LDV). Others mandate board approval of the company’s monitoring scheme and/or reports based thereon (UK MSA; Aus MSA), or internal training for the board and company staff (NSW MSA), in line with international guidance on effective human rights due diligence (e.g. UNGPs; OECD, 2018).

Government monitoring: Legislation may seek to involve government bodies in due diligence monitoring, for instance, by requiring companies to file due diligence reports (Dutch Child Labour Due Diligence Act; NSW MSA), in some cases for subsequent publication (US Dodd Frank; CTSCA; Aus MSA). Certain laws and proposals go further, imposing on national authorities the obligation to monitor individual companies’ fulfilment of due diligence or disclosure obligations (EU Conflict Minerals; Dutch Child Labour Due Diligence Law; Norway Ethics Information Committee, 2019). Independent bodies may be tasked to review the legislation’s overall application and effectiveness (UK MSA; NSW MSA). EU legislation may require MS to appoint competent national oversight authorities (EU Timber), to identify and publish lists of companies subject to due diligence requirements and to undertake checks on company compliance (EU Conflict Minerals). Legislation may also provide for time-bound review of its effectiveness (EU Conflict Minerals; Aus MSA).

Third party monitoring: Theoretically, disclosure obligations ought to permit monitoring and evaluation of individual companies’ due diligence processes, and their effectiveness, by third parties, such as NGOs, investors and business partners. Associated reputational risk could encourage companies to implement and report on due diligence, even where disclosure obligations are imposed on a ‘soft’, or ‘comply or explain’ basis. Yet disclosure regimes have not in themselves been effective drivers of due diligence (Methven O’Brien and Dhanarajan, 2016; CHRB, 2019; Doan and Sassen, 2020; EC, 2020). Even rates of compliance with formal reporting obligations under MSA, CTSCA and EU NFR are lower than 30% (NYU Stern, 2019; ACT, 2018).

This explains the growing interest in mandatory due diligence legislation (LDV; Dutch Child Labour Due Diligence Law) and the spread of initiatives ranking human rights performance of businesses. Some of the latter are horizontal while others target specific sectors (CHRB, 2019; BHRRC, 2018; Ergon, 2018; Terre Solidaire 2019; Know the Chain, 2019a, b and c). Where legislation has failed to establish national repositories of due diligence reports (UK MSA; LDV) civil society initiatives have sought to fill this gap by collecting and publishing such reports².

Complaint mechanisms have both monitoring and remedial functions. They are recommended or required by various schemes which may distinguish early alert or warning mechanisms (LDV) from complaints based on substantiated concerns (EU Timber). The role of third parties in monitoring has been sharpened under later schemes via associated enforcement mechanisms (LDV; Dutch Child Labour Due Diligence Law; see further Section 3 below). Draft legislation on transparency in Norway goes further. This would support monitoring by establishing a right to information on ‘how an enterprise conducts itself with regard to fundamental rights and decent work within the enterprise and its supply chains’, along with an information request procedure, applicable to all businesses, not just to large companies subject to formal reporting requirements (Norway Ethics Information Committee, 2019).

Some regimes require that supply chain audits are undertaken by independent auditors and thus envisage a role for third parties (CTSCA; EU Conflict Minerals; under the EU Timber Regulation, those private entities

² Eg. the Modern Slavery Registry gathers modern slavery statements under the UK MSA, AU Fed MSA and CTSCA (<https://www.modernslaveryregistry.org/>); the Duty of Vigilance Radar likewise collates vigilance plans under the LDV (<https://vigilance-plan.org/>). The NSW MSA establishes an electronic public register.

must be recognised as such by the EU). In practice, third party audit is widely relied on by companies to support monitoring and reporting independently of such laws. Yet the weaknesses of professional audit (often referred to as social audit) in identifying risks and securing remediation are well documented (ILO, 2016; Outhwaite and Martin-Ortega, 2019), leading many NGOs to advocate worker-driven supply chain monitoring instead (Worker Rights Consortium, n.d.; Electronics Watch, n.d.; Worker Driven Social Responsibility Network, n.d.).

2.2 Monitoring: evaluating possible mechanisms

Monitoring provisions of an EU due diligence law will be influenced by the legislation's scope and approach in other areas as well as wider EU legal and policy frameworks. For example, if only larger companies are addressed by a due diligence duty, it should be considered how that class of companies relates to the class of companies addressed by existing (or revised) EU NFR legislation. It would make little sense to oblige companies to report on due diligence (via NFR) but not to monitor its impact under a new due diligence law. On the other hand, the value of a legal due diligence obligation without a corresponding 'hard' reporting obligation can be questioned — as can the value of reporting as an aid to monitoring, where this is not undertaken periodically on a standardised basis and in accordance with adequate reporting formats. While investors' potential monitoring role may be advanced by the recent EU Regulation on sustainability-related disclosures in the financial services sector (EU SRD), it would seem reasonable to expect financial services providers themselves to be included within the scope of EU due diligence law. The same is true for large public entities, given the need for a level-playing field in the context of procurement, and for government to 'lead by example'.

Full consideration of such interdependencies exceeds the scope of the present briefing. It can be said, though, that periodic monitoring should be part of the due diligence process required of companies under any future EU due diligence law. To promote the effectiveness and accountability of their monitoring schemes, companies should be required to ensure adequate worker, stakeholder and board-level involvement in their design and implementation, and to establish early warning and/or complaint mechanisms. Such measures appear feasible, at least for large companies, mirroring requirements of existing schemes; their details could be addressed through delegated legislation or formal guidance. An information request procedure would further strengthen transparency and accountability.

In terms of monitoring by MS or an EU body, this might relate to formal due diligence requirements, such as the publication of due diligence plans. More impactful would be monitoring which would seek to evaluate effectiveness of due diligence efforts through verification measures such as checks, qualitative and thematic analyses. MS repositories and publication of lists of companies subject to and meeting (or not) the due diligence duty would also appear valuable and feasible. Repositories and lists could enhance EU level evaluation, and thus convergence, particularly if supplemented by an EU-wide repository and e.g. regional sector analyses. Costs of the latter might be modest, given the scope to base these on data already collected at MS-level. However, costs associated with establishing and maintaining either MS or EU level monitoring bodies could challenge their feasibility where monitoring duties are more expansive or where independent entities are envisaged. An EU-level recognition procedure for auditing organisations might allow for quality assurance of company-level monitoring processes, but in the context of broad-spectrum human rights due diligence going beyond compliance with technical matters such as chain of custody requirements raises issues requiring further reflection.

In summary, the present analysis suggests that company-level monitoring should be specified as an element of the corporate duty of due diligence under EU law. This should be supplemented by monitoring by executive authorities and/or independent bodies at MS and EU level and statutory review. Third-party monitoring should be supported by additional mechanisms including complaint mechanisms, public registers and a right to know/information request procedure. All such measures appear feasible at least for large companies.

3 Enforcement

Monitoring mechanisms promote fulfilment of due diligence duties indirectly. Enforcement mechanisms, by distinction, should trigger compliance with procedural or substantive duties, or both, in specific cases³. Enforcement provisions vary across existing regimes. Yet the persistence of weak compliance with both disclosure requirements (NYU Stern, 2019; ACT, 2020; Parsa et al, 2018; Doan and Sassen, 2020) and due diligence obligations (Methven O'Brien and Dhanarajan, 2016; CHRB, 2019) points to the inadequacy of existing enforcement mechanisms.

3.1 Enforcement: review of current approaches

Where powers to initiate enforcement action rest exclusively with executive authorities, their use tends to remain theoretical or marginal (UK MSA; NSW MSA; CTSCA). Under the UK MSA companies can in principle be compelled to publish statements via injunction on the application of the Secretary of State. Yet this mechanism has never been used (UK Government, 2019). Approaches allowing for enforcement at the motion of third parties appear more promising. Under the LDV any interested party can seek a formal notice to comply if a company fails to establish, implement or publish a vigilance plan. If there is no response from the company within a 3-month period, the company may, on the application of a party with standing under French law, be required by a judge to comply, subject to a penalty, by establishing the vigilance plan, ensuring its publication and accounting for its effective implementation or to give an account of the absence of a plan. These provisions have already been relied on by civil society on several occasions (Bright, 2018; Cossart and Chatelain, 2019; Renaud et al, 2019) albeit their ultimate impact is as yet unclear (Conseil Général de l'Économie de l'Industrie, de l'Énergie et des Technologies, 2020; Brabant and Savourey, 2020; Savourey 2020; Claude and Amati, 2020).

Under the Dutch Child Labour Law, failures to comply with requirements to conduct investigations or submit statements may result in administrative orders and fines, at the motion of the supervisory authority identified by the law. If initial fines are set at a "symbolic" level, they may be raised for repeated defaults (MVOPlatform, 2019). Besides, under the Dutch Law, any natural person or legal entity whose interests are affected by the actions or omissions of a company (relating to compliance) may submit a complaint to the supervisory authority, after having first attempted to resolve the complaint directly with the company, or six months after the submission of the complaint to the company without it having been addressed. Norway's draft law on transparency envisages penalties for contravention *inter alia* of right to information requests and, for large enterprises, the annual due diligence reporting duty (Norway Ethics Information Committee, 2019). The NSW MSA provides for administrative sanctions on companies for giving false or misleading information and for failing to prepare or publish an annual modern slavery report.

EU instruments require MS to determine the consequences of non-compliance (NFR) or appropriate penalties (EU Timber; EU Conflict Minerals regulation does not require MS to establish penalties but foresees this possibility after revision of the Regulation from 2023). The EU Timber regulation requires that such penalties as established by MS are 'effective, proportionate and dissuasive' (Art 19), and has included indicative lists of penalties such as fines and suspension of authorisation to trade.

The Dutch Child Labour Law envisages criminal liability in certain cases. Beyond initial fines for failure to submit a due diligence statement, a company director may face a prison sentence when the company has been fined twice within a five year period for not conducting due diligence in line with the legislation. The company may, in this situation, be fined up to EUR 750 000 or 10 % of annual turnover. Under the UK MSA,

³ Though technically enforcement action could also refer to performance by MS of their obligations under EU due diligence legislation, this is not considered further here; neither are the various issues raised by possible EU accession to the ECHR.

failure to comply with an injunction requiring production of an annual slavery and human trafficking statement would be a contempt of court, punishable by a fine through a civil procedure. The French Conseil Constitutionnel declared unconstitutional provisions of the draft LDV which had sought to establish criminal sanctions (in the form of civil fines, '*amende civile*') for failures to develop, publish or effectively implement a human rights due diligence plan on the basis of the principle of legality⁴. Finally, some regimes require government entities (United States of America (US) FAR; AusMSA) or companies (EU Conflict Minerals) to cascade due diligence requirements to business partners via contract clauses.

3.2 Enforcement: evaluating possible mechanisms

Effective enforcement is essential to promote homogeneous application of due diligence nationally (Conseil Général de l'Économie de l'Industrie, de l'Énergie et des Technologies, 2020) but also, through coordination and information sharing, to building common enforcement practice and a level playing field across the EU (Client Earth and Global Witness, 2019). The attribution to MS bodies of the power to initiate enforcement proceedings and impose administrative sanctions in individual cases would be ideal. Still, such activities have resource implications even if undertaken, following appropriate amendments to legal mandates, by existing bodies (e.g. NHRI; FRA). Accordingly, EU legislation should also harness the potential of third-party enforcement action, via rights of complaint for interested parties for breaches of procedural due diligence requirements. Enforcing qualitative due diligence standards would be more resource intensive for third parties as well as administrative or judicial bodies and defendant companies and may for this reason be considered less feasible.

Affording discretion to MS to determine sanctions for non-compliance (subject to the overall requirements of effectiveness, proportionality and dissuasiveness) has the virtue of flexibility. Based on experiences under e.g. the EU Timber Regulation, however, a prescriptive approach may be more likely to secure the EU 'level playing field' desired by business and governments (EC, 2020). Yet, scope for an EU due diligence law to define criminal sanctions appears limited given the EU's restricted competences in this area (Art 4 TFEU).

As for monitoring (Section 2), enforcement measures under an EU due diligence law will be influenced by the scope of corporate obligations established and the class or classes of companies to which due diligence obligations apply, as well as the general division of competences between EU and MS. Leaving such matters aside, based on the evidence considered here, an effective EU human rights due diligence law should combine state-based and third-party enforcement mechanisms. These should relate at least to procedural due diligence requirements such as the adoption and publication of a due diligence plan (and by implication performance of a due diligence process) as well as failure to comply with an information request. A law should also promote consistent standards and approaches to enforcement across the EU, by defining required elements in legislation or guidance, and via periodic reporting by MS on enforcement action. Finally, in line with the 'smart mix' (Methven O'Brien, 2019b) and in light of the US FAR, further consideration should be given to leveraging EU public procurement law to promote compliance with due diligence obligations (Methven O'Brien, Martin-Ortega and Conlon, 2018; Martin-Ortega and Methven O'Brien, 2019) and how to align 'development, governance and diplomatic initiatives' by MS and the EU (EC, 2015) with new EU due diligence legislation.

⁴ Décision no 2017-750 DC du 23 Mars 2017 du Conseil Constitutionnel ; see further Cossart, Chaplier and Beau de Lomenie (2017).

4 Access to justice and remedies for victims

4.1 Remedy

Human rights standards establish a right to effective remedy with substantive and procedural dimensions⁵. What constitutes an effective remedy is context-dependent and may range from prosecution and punishment of perpetrators in case of serious abuses, to compensation for economically assessable damage, orders for restitution of victims, changes in company policies, guarantees of non-repetition or disciplinary action against responsible personnel and public apologies⁶.

Accordingly, the UNGPs provide that 'States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy' (UNGP No25). This formulation highlights that in general current human rights law does not formally oblige states to guarantee the right to remedy 'extraterritorially' (Methven O'Brien, 2019b). Equally, not all kinds of harm to individuals resulting from business activities entail human rights violations (e.g. if adequate remediation is available through existing mechanisms at national level or where interference with rights is insufficient to trigger third party effects).

Nonetheless, MS, EU and other regional institutions have repeatedly undertaken to uphold effective access for justice and remediation of business-related human rights abuses, inside and outside their territory or technical legal jurisdiction, via both legal and policy commitments (EC, 2020; ECCJ, 2020; COE, 2016). Securing effective remedy would also support realisation of the 2030 Agenda and Sustainable Development Goals (ILO, 2019b).

Yet victims continue to face legal and practical obstacles to access to justice and effective remedy. These include limits on parent company liability (the 'corporate veil'), inequality of arms, access to legal representation, information and evidence, attacks on human rights defenders, victims, witnesses, lawyers, judges and journalists, the risk of counter-litigation, including Strategic Lawsuits against public participation actions (SLAPP suits) as well as the limits of representative and collective redress mechanisms (UN Human Rights Council, 2016; EU FRA, 2017, 2019; EC, 2019; Rubio and Yiannibas, 2017; Bonfanti, 2019). Since 2011, such issues have been only weakly addressed by relevant laws, at EU and MS level, or policy initiatives such as National Action Plans to implement the UNGPs (DIHR, n.d.; ICAR and ECCJ, 2017b).

4.2 Remedy: review of current approaches

Disclosure regimes can support the substantive dimension of remediation, for instance, where reporting requirements encourage the establishment of internal complaints mechanisms (Aus MSA, Norway proposal). However, disclosure regimes are generally more relevant to the procedural aspects of remedy. Under CTSCA and UK MSA, government officers can enforce company reporting obligations; under NSW MSA fines can be imposed for non-compliance with procedural requirements. Information yielded by the operation of such mechanisms can in principle support victims in obtaining remedies. Yet such provisions

⁵ See Methven O'Brien (2019a) for further discussion in relation to the right to remedy under ECHR and ESC.

⁶ Article 8 UDHR, Art 2(3) ICCPR, Art 6 CERD, Art 14 CAT, Art 39 CRC. ICESCR and CEDAW do not explicitly provide for a right to remedy. Article 13 ECHR establishes the right to remedy for violations of Convention rights: 'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity'. Article 47 ECFR establishes the right to remedy for violations of rights guaranteed by EU law. See further UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005).

are rarely used in practice (see Section 3) and overall disclosure regimes' impact on remediation is both indirect and weak.

Enhancing remedies for victims was one goal of the French LDV. The LDV establishes a right of civil action for victims of tortious damage caused by failures of due diligence by a parent company, its subsidiaries, suppliers or subcontractors with an established commercial relationship⁷. In addition, as discussed earlier, the LDV further permits interested parties to seek a formal notice and injunction to comply with its due diligence requirements. This also supports remediation as such measures may be probative of a lack of vigilance during a subsequent civil claim⁸. Further, the LDV allows a court to order publication, dissemination or display of its decision with costs to be paid by the defendant.

The Dutch Child Labour Due Diligence Act does not establish any new basis for claims by victims in tort. Rather it permits complaints by any natural person or legal entity affected by a company's actions or omissions (Art 3), along with administrative fines and, in limited circumstances, criminal convictions for repeated failures to comply with due diligence obligations (see Section 3).

In the UK, courts have established that a duty of care may be owed by the parent company not only to a subsidiary's employees, but also to other persons affected by its operations⁹. Yet, in general, parent company liability for human rights abuses remains restricted (EP, 2019b; FRA, 2019a). Neither do existing schemes shift the burden of proof, a recognised challenge for victims in civil litigation addressing business-related human rights harms (ECCJ, 2018; EP, 2019b; EC, 2020). However, some proposed laws would require a defendant company in civil proceedings to prove that it met its due diligence obligation (e.g. Swiss Coalition for Corporate Justice, n.d.) or that it lacked effective control over a subsidiary (Swiss Parliament, 2018) once a *prima facie* case has been made.

Turning to EU level, the EU Conflict Minerals Regulation requires companies to establish a grievance mechanism (Art 4(e)), which means an early-warning risk awareness mechanism allowing any interested party, including whistle-blowers, to voice concerns regarding the circumstances of extraction, trade and handling of minerals in and export of minerals from conflict-affected and high-risk areas. Besides, proposals have been advanced to revise the Brussels I Recast Regulation (EP, 2019). Firstly, it has been suggested that a new jurisdictional rule specific to business-related human rights claims should extend jurisdiction to MS courts where an EU parent company is domiciled to claims against its foreign subsidiaries or business partners permitting claims against the parent company and the subsidiary to be heard together. A second proposal would establish *forum necessitatis* for MS courts where the right to a fair trial or access to justice so requires and the dispute has sufficient connection with the MS in question (EP, 2019b).

Anti-corruption laws may impose strict liability for compliance failures, subject to a defence based on 'adequate procedures'¹⁰. Some proposals have suggested the adoption of similar approaches in the context of corporate human rights harms (e.g. Pietropaoli et al, 2019). Their viability in the context of an EU human rights due diligence law seems questionable, given *inter alia* requirements for legal predictability, a lack of precedents at national or EU level and the principle of subsidiarity (Art 5(3) TEU).

4.3 Remedies: evaluating possible mechanisms

Effective remediation remains out of reach for most victims, inside and beyond EU borders, and even for victims of the most serious abuses, including human trafficking and modern slavery, violations of ILO Core

⁷ A claimant must still prove the elements of liability while the obligation on companies remains procedural, and not one of result.

⁸ It has also been said that the LDV promotes remediation indirectly by helping victims to overcome hurdles to access to justice because 'it requires companies to identify risks of severe impacts. This makes it easier for victims to argue that a company could have influenced the production of harmful impacts, and that it should have taken appropriate measures to prevent them' (ECCJ, 2017a).

⁹ *Vedanta Resources PLC and another v Lungowe and others*, UKSC 2017/0185, [2019] UKSC 20, Judgment, 10 Apr 2019.

¹⁰ US Foreign Corrupt Practices Act of 1977, 15 USC §§ 78dd-1 et seq, UK Bribery Act 2010, s23.

Labour Standards and serious environmental incidents harming human health (FRA, 2018; OECD Watch, 2015; EP, 2019b; EC, 2019; EC, 2020). At the same time, abuses may have complex root causes: identifying what would be an effective remedy may be straightforward, but in global value chain settings effective remediation may also demand long-term multi-actor solutions (Bangladesh Accord, n.d.; ILO, n.d.; IOE, 2018). In addition, remediation of certain types of abuse (e.g. human trafficking) is already addressed via specific legislative and policy schemes at MS or regional level (Lietonen Jokinen and Pekkarinen 2020).

Nevertheless, in line with obligations under human rights treaties and the UNGPs, an EU due diligence law should aim to contribute to advancing effective remediation for victims. As already highlighted in Section 2, EU due diligence legislation should therefore require company grievance mechanisms as part of human rights due diligence procedures (UNGPs; OECD, 2019). These are relatively low-cost, while also potentially expeditious and effective for victims. Still, concerns remain, including independence, inequality of arms, lack of access to information and evidence for victims, and a weak deterrence effect, especially where they operate subject to non-disclosure clauses. In isolation, such mechanisms are inadequate to guarantee redress for victims.

Administrative sanctions linked to procedural due diligence obligations contribute to certain aspects of remediation. Like internal grievance mechanisms, they should be expeditious, cheaper and more accessible than judicial proceedings. They also appear feasible at MS level. Yet civil liability for the consequences of due diligence failures, at least in relation to abuses that are severe based on their seriousness or extent, is potentially more impactful. The award against companies of significant money damages ought to have a deterrent effect, both on an individual defendant and more widely. On the other hand, civil litigation is slow, expensive, assumes the availability of adequate legal representation and can be burdensome for victims, despite appropriate arrangements for representative or collective claims (FRA, 2019a, 2019b; EC, 2019; UN, 2016; Claude and Amati, 2020). Even if a due diligence law established a duty of care across the 'corporate veil' and hence 'foreseeability', where causation remains linked to the adequacy of a due diligence plan, proving this will not be easy¹¹. Quantifying reparation or achieving restitution can also be difficult where corporate abuses have long-term effects, while designing collective remedies is challenging whether inside or outside a judicial process. Civil remedies should then be supplemented by non-financial reparations when restitution is not possible¹², as well as operational, company- and/or sector-level grievance mechanisms (SER, n.d.), state-based non-judicial remedy mechanisms (e.g. NCPs and NHRIs) and, ideally, MS and EU bodies with powers to support and advise victims, for instance through investigations and legal representation.

Such measures are not just desirable, but essential to ensuring effective remedy for victims of abuses both intra- and extra-EU. Yet addressing them in a single EU instrument establishing due diligence duties for companies would appear challenging in feasibility terms, given *inter alia* the subsidiarity principle and restricted EU competences. On this basis, it seems more likely that an EU due diligence law could support effective remedy for victims by requiring the establishment of effective grievance mechanisms as an element of due diligence and by requiring MS to provide not only for effective, proportionate and dissuasive penalties for breaches but also effective means of remedy and redress for victims. Guidance could then address more specific issues surrounding civil and criminal liability of companies or responsible officers for harms caused by failures of human rights due diligence and other forms of remediation for victims.

¹¹ *Vedanta*: fn 10.

¹² Including rehabilitation, satisfaction, verification of facts and full and public disclosure of the truth, official declaration or a judicial decision restoring the dignity, reputation and rights of the victim and of persons closely connected with the victim; public apology, including acknowledgement of the facts and acceptance of responsibility; and guarantees of non-repetition.

5 Recommendations

As noted in earlier sections, provisions on monitoring, enforcement and remedy in a future EU due diligence law will be influenced by the legislation's scope in other areas, for instance, the class of companies to whom a due diligence duty is addressed. The latter is beyond the scope of this briefing. However, for the purpose of advancing recommendations, this briefing will assume that the due diligence duty applies at least to a fixed class of large companies, requires that the due diligence process address those companies' own operations and supply chains, and also conform to nationally or internationally recognised due diligence frameworks, such as the OECD Guidelines on Due Diligence for Responsible Business Conduct (OECD, 2018).

5.1 Monitoring

Taking due account of considerations including size, an EU due diligence law should require that companies:

1. Undertake periodic monitoring to address *inter alia* their business' structure, activities, actual and potential human rights risks and impacts, complaints received, and effectiveness of remediation, as a required element of human rights due diligence and in line with the scope of due diligence duty prescribed by the legislation.
2. Establish an alert/complaint mechanism open to workers and third parties.
3. Adequately involve stakeholders, including workers, in the design and operation of monitoring arrangements under the due diligence process.
4. Periodically disclose information on company monitoring and its outcomes; and publish this, in a standardised format, based on an adequate reporting framework, using appropriately prominent and accessible media (e.g. homepage).
5. Secure board-level approval for monitoring schemes and reports.

An EU due diligence law should require that MS:

6. Provide for a right to know/information request procedure.
7. Establish a repository of due diligence reports that is publicly accessible without charge.
8. Publish lists of companies within the law's scope and identify on a regular basis those that have complied with procedural obligations and those that have not.
9. Establish/identify national monitoring bodies, ideally independent, with *inter alia* duties to report on procedural compliance but also substantive effectiveness at national level.

Under an EU due diligence law, the EU should:

10. Establish a repository of due diligence reports that is publicly accessible without charge.
11. Publish lists of companies within the law's scope and identify on a regular basis those that have complied with procedural obligations and those that have not.
12. Undertake periodic monitoring of procedural compliance but also substantive effectiveness at EU level.
13. Further elaborate on due diligence required under the law via delegated legislation and/or formal guidance.

Further analysis is required before recommendations can be advanced in relation to:

- Certification or assurance by third-party organisations of company monitoring and accreditation of such organisations at EU level.
- Specific arrangements for involvement of workers, human rights defenders and other stakeholders in monitoring under an EU due diligence law.

Finally, while these matters exceed the current briefing, including financial actors and relevant regional financial institutions (e.g. EIB), as well as large public entities in the scope of due diligence requirements could contribute further to promoting effective due diligence monitoring.

5.2 Enforcement

An EU due diligence law should require that MS:

1. Determine effective, proportionate and dissuasive penalties for non-compliance by companies with due diligence obligations, including in relation to the making of false or misleading statements regarding due diligence.
2. Establish rights to enforce at least procedural aspects of due diligence requirements for interested parties.
3. Establish/identify national bodies with competence *inter alia* to enforce at least procedural aspects of due diligence requirements.
4. Periodically report at EU level on national enforcement procedures, actions and outcomes.

Under an EU due diligence law, the EU should:

5. Publish guidance addressing effective enforcement action at MS level.

Further analysis is required before recommendations can be advanced in relation to:

- Leveraging EU public procurement law to promote compliance with due diligence obligations and securing policy coherence and a level playing field as between the public and private sector.
- Steps required to align EU development, governance and diplomatic initiatives with new EU due diligence legislation, in line with 'policy coherence' as directed by the UNGPs.

5.3 Remedy

Taking due account of considerations including company size, an EU due diligence law should:

1. Specify adequate remediation as a required element of human rights due diligence in line with the scope of due diligence duty prescribed by the legislation.
2. Require companies to monitor and disclose information relating to due diligence and its outcomes and to establish, monitor and report on the operation of alert/complaint mechanisms, in line with recommendations made above in Section 5.1.

An EU due diligence law should require that MS:

3. Provide for effective, proportionate and dissuasive penalties for breaches (see above, point 5.2.)
4. Provide for effective means of remedy and redress for victims, to include state level judicial and non-judicial remedies, for human rights abuses caused by due diligence failures.
5. Establish/identify bodies competent to investigate abuses, initiate enforcement actions and support victims, for instance through legal advice and representation.

Under an EU due diligence law and/or other EU legislation and policy initiatives, the EU should:

6. Publish formal guidance on securing effective remedies for victims via civil and criminal liability of companies or responsible officers for harms caused by failures of human rights due diligence and in relation to broader mechanisms by which effective remediation can be secured for victims inside and beyond MS jurisdiction.
7. Continue to cooperate with MS towards removing barriers to access to judicial and non-judicial grievance mechanisms as well as legal and other threats to human rights defenders, civil society organisations and other actors or participants in the justice system inter alia via SLAPP suits.

Further analysis is required before recommendations can be advanced in relation to:

- The feasibility of reviewing the Brussels I regime in the context of an EU due diligence law.

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Annex I: Monitoring - evaluation of potential measures

Mechanism	Strengths	Weaknesses	Impact	Feasibility*
Due diligence law/formal guidance mandates internal company monitoring scheme including complaint mechanism, board approval; periodic public reporting e.g. via website.	Effective internal monitoring critical to identification of material risks, effective due diligence and remediation processes. Reliability of monitoring can be increased through stakeholder involvement in monitoring and specification of required elements.	In isolation, internal monitoring may not identify material risks or provide a sufficient basis for accountability to stakeholders. Resource implications for small companies.	High	High
MS/EU bodies to: establish repository of companies' due diligence monitoring reports; promote and review legislation's effectiveness, e.g. by checks, analysing reports.	Enhances third party access to information on company due diligence reports. Promotes availability of information, homogenous implementation of monitoring duties, early recognition of risks and timely responses.	Limited capacity of third parties to review and evaluate company reports; does not guarantee quality of reports. Costs and coordination issues.	High	Medium
Law/guidance requires company to involve stakeholders in monitoring, including trade unions and workers' representatives.	Worker and rights-holder involvement in monitoring demonstrated to enhance effectiveness of due diligence and remediation.	Detailed legislative provisions may not attract cross-jurisdictional support.	Medium	Medium
Establishment of formal right to information / request procedure for parties affected by non/compliance with monitoring.	Enhances accountability and effectiveness of due diligence legislation and process.	Requires body competent to deal with complaints / where right to know is not complied with; running costs could be high.	High	Medium
Due diligence law requires external audit/certification of companies' due diligence process.	Independent third party assessment providing further information and understanding of supply chains and risks and identification of actual and potential harms.	Concerns regarding impartiality and conflict of interest of social audits.	Low	High
EU recognition of private bodies as recognised monitoring organisations.	Independent third party assessment providing further information and understanding of supply chains and risks and identification of actual and potential harms following a homogeneous approach and guarantying quality and independence of monitor organisation.	Cost and organisation of the network of monitoring organisations.	Medium	Medium

* Feasibility refers to the likelihood of adoption of the measure or mechanisms given the legal, political and institutional context and costs and investment needed.

Annex II: Enforcement - evaluation of potential measures

Measures and mechanism	Strengths	Weaknesses	Impact	Feasibility
Government enforcement of failure to comply with procedural DD requirements	Relatively fast and low-cost process. Precedents in existing schemes.	Does not address quality or impact of due diligence process. May not be effective where penalties are minimal.	Medium	High
Government enforcement relating to quality of DD scheme/process	Addresses quality and effectiveness of due diligence process. Precedents in existing schemes.	Resource intensive. Potentially requires investigative powers with extraterritorial reach.	High	Medium
Third party enforcement of failure to comply with procedural DD requirements	Relatively fast and low-cost process. Precedents in existing schemes.	Does not address quality or impact of due diligence process. Resources and potentially legal representation needed. Assumes third-party resources and capacities to utilise. May not be effective or used where penalties are minimal.	Low	Medium
Penalties for false/misleading information	Precedents in existing schemes. Extends beyond procedural obligations to limited extent.	May not be effective where penalties are minimal.	Medium	High
Third party enforcement relating to quality of DD scheme/process	Message of importance of the issue and relevance of the offence. Potential deterrence effect. May generate wider lessons learned.	Resources and legal representation potentially needed. Resource-intensive for civil/judicial authorities; predictability/legal certainty issues.	Medium	Low
MS bodies with enforcement mandates	Promote convergent practice at national /EU level. Independence would enhance perceived legitimacy by civil society, stakeholders and victims.	Dependant on government support and resources. Potential conflicts of interest if not independent. Potential obstacles to access to information.	Medium	Medium
Criminal sanctions relating to due diligence failures	Potential deterrence effect and symbolic value.	Duration of legal processes. Evidentiary requirements for complex offences. Limited EU legal competence.	Medium	Low
Integration of due diligence requirements into EU-public procurements / state-support for investments / development aid / IFI lending conditions	Policy coherence. Potential deterrence effect Governments lead by example / level playing field across public and private sectors.	Requirements for other regulatory and/or policy reforms at EU/MS level. Capacity constraints in public buyers and possible higher procurement costs.	Medium	Medium

Annex III: Remedy - evaluation of potential measures

Mechanism	Strengths	Weakness	Impact	Feasibility
Require companies to establish or participate in internal grievance mechanisms as part of HRDD.	Low cost for victims and MS. Potentially fast access to grievance process and remediation. May be preventive.	Concerns regarding independence including potential lack of access to evidence by victims. Weak deterrence effect, especially if confidentiality clauses attached.	Low	High
Require companies to monitor and disclose DD information.	Can support procedural dimension of right to remedy by making information accessible; may contribute to prevention.	Quality of DD information and relevance to specific cases.	Low	High
Right of civil action for harm due to due diligence failures for victims/representative third parties.	Guarantees access to judicial mechanisms. Provides compensation to victims. Potential deterrence effect.	Cost and resource intensive for MS and victims. Burden of proof on victims. <i>Ex-post</i> rather than preventive. Subsidiarity.	High	Medium
Criminal procedures against companies, directors or personnel linked to serious abuses caused by failures of due diligence.	Serious abuses may require criminal accountability against perpetrators. High deterrence effect.	Limited EU competences; proceedings cost and resource intensive for MS and victims. Low number of cases to reach court and end in conviction.	High	Low
National supervisory authorities can advise potential victims (e.g. NHRI, Ombudsperson or dedicated body).	MS seen to support victims of harm. Resources invested in supporting access to remedy.	Need to revise competences of existing bodies or create new bodies - resources and capacities. Access to corporate information and evidence of harm if no specific executive powers are provided.	High	Medium
Require MS to prohibit companies from launching SLAPP suits against complainants under HRDD legislation and/or other judicial or non-judicial remedy mechanisms.	Strong commitment to victim redress. Addresses the imbalance of power between corporations and victims and their representatives and civil society.	Prescriptive approach to EU due diligence law decreases chance of enactment.	Medium	Medium
Require MS to extend legal aid to complainants under HRDD legislation.	Strong commitment to victim redress. Guarantees access to judicial procedures.	Costs to MS. Competence; prescriptive approach to EU due diligence law decreases chance of enactment.	High	Low
Require MS/EU to publish lists of companies subject to DD duty / complying with procedural aspects / defending / held liable under legal DD proceedings.	Access to information and transparency. May support victims' further actions against a company.	Competence; prescriptive approach to EU due diligence law decreases chance of enactment. Conformance with confidentiality and libel provisions (for defendants).	High	Medium

Annex IV: Human rights due diligence instruments – monitoring provisions

EU legislation			
Monitoring approach	EU NFR Directive	EU Timber Regulation 2010	EU Conflict Minerals (2017)
Company monitoring of implementation of DD duty	Statement to include information on policies and due diligence processes of the entity and where proportionate its supply chains, to the extent necessary for understanding its development, performance and position and impact (on HR).	Operators shall exercise due diligence when placing timber or timber products on the market. Each operator shall maintain and regularly evaluate the due diligence system which it uses, except where the operator makes use of a due diligence system established by a monitoring organisation. [Article 4]	Implied by requirement that companies must conduct DD (develop management systems / identify and assess risks, implement a strategy for risk management, carry out third party audits and report annually on policies and practices for responsible sourcing) on their supply chain (Art 4(c)). Companies required to establish chain of custody or supply chain traceability system (Arts 4(f) and (g)).
Company to publish HRDD report	Statement to be provided in management report on non-financial matters and made publicly available.		Companies required to report on due diligence on their supply chain.
Rights-holder or third party involvement in monitoring /verification		The regulation creates the figure of ‘monitoring organisations’. A monitoring organisation shall:(a) maintain and regularly evaluate a due diligence system as set out in Article 6 and grant operators the right to use it; (b) verify the proper use of its due diligence system by such operators; (c) take appropriate action in the event of failure by an operator to properly use its due diligence system, including notification of competent authorities in the event of significant or repeated failure by the operator. An organisation may apply for recognition as a monitoring organisation if it complies with the following requirements: (a) it has legal personality and is legally established within the Union; (b) it has appropriate expertise and the capacity to exercise the functions referred to in paragraph 1; and (c) it ensures the absence of any conflict of interest in carrying out its functions.	Companies required to undertake independent third party audits of their due diligence practices (unless show source only from approved sources). Competent authorities may undertake <i>ex-post</i> checks on importers’ effective compliance based on ‘substantiated concerns by third parties’ (Art 11(2)). Regulation provides for recognition as equivalent of due diligence schemes (Art 8(1): ‘1. Governments, industry associations and groupings of interested organisations having due diligence schemes in place (‘scheme owners’) may apply to the Commission to have the supply chain due diligence schemes that are developed and overseen by them recognised by the Commission. Such applications shall be supported by adequate evidence and information’); EC to adopt delegated acts on methodology and criteria for assessing if schemes facilitate fulfilment of the requirements of the Reg (Art 8(2)).
National monitoring	Member States shall ensure that undertakings publish within a reasonable period of time, which shall not exceed 12 months after the balance sheet date, the duly approved annual financial	Each Member State shall designate one or more Competent Authorities (CA) responsible for the application of this Regulation. Competent Authorities (CA) are tasked with performing checks on operators, traders and monitoring organisations to ensure that they fulfil their obligations under the regulation (they should monitor that operators effectively fulfil the obligations laid down in this Regulation. For that	EU MS required to adopt measures to identify national mineral and metal importers and to access data on their economic activities and DD checks and reporting. Regulation requires Member States’ competent bodies to ensure that a list of all Union importers within their country is publicly available (cf. objections by Member States’ Customs Agencies).

EU legislation			
Monitoring approach	EU NFR Directive	EU Timber Regulation 2010	EU Conflict Minerals (2017)
	statements and the management report, together with the opinion submitted by the statutory auditor or audit firm.	purpose, the competent authorities should carry out official checks, in accordance with a plan as appropriate, which may include checks on the premises of operators and field audits, and should be able to require operators to take remedial actions where necessary). Member States shall inform the Commission of the names and addresses of the CA by 3 June 2011. Member States shall inform the Commission of any changes to the names or addresses of the competent authorities.	Competent authorities must undertake appropriate <i>ex-post</i> checks, including on the spot inspections, to 'ensure that Union importers of minerals or metals comply' . Such checks to examine at minimum importers' implementation of obligations; documents and records; audit obligations. Checks can be initiated based on substantiated concerns by third parties.
Supranational monitoring (procedural)		Member States shall submit to the Commission, by 30 April of every second year following 3 March 2013, a report on the application of this Regulation during the previous two years.	MS required to inform EC of name/address of competent authority; to obtain information on annual import volumes per importer; identify all importers in their jurisdiction. Regulation/delegated Regulation ¹³ establishes methodology and criteria that EC will use to assess whether DD schemes (industry-led responsible sourcing initiatives) can be recognised as facilitating company's compliance with the Regulation (currently based on policies and standards of schemes). MS have to submit annual reports on the implementation of the regulation, and, in particular, on notices of remedial action issued by their competent authorities and on the third-party audit reports made available by union importers.
Supranational monitoring (effectiveness)		On the basis of reports (above) the Commission shall draw up a report to be submitted to the European Parliament and to the Council every two years. In preparing the report, the Commission shall have regard to the progress made in respect of the conclusion and operation of the FLEGT VPAs pursuant to Regulation (EC) No 2173/2005 and their contribution to minimising the presence of illegally harvested timber and timber products derived from such timber on the internal market.	In 2023 and triannually thereafter, EU shall determine based on Member States' reports, the effectiveness of the regulation and assess whether Member States should have competence to impose penalties on entities 'in the event of persistent failure to comply' (Article 17(3)). EU may also review legislation before 2023. EC to publish handbook for competent authorities (Art 11) and handbook for economic operators (Art 14).

¹³ Delegated Regulation (EU) 2019/429.

National legislation / initiatives			
Monitoring approach	LDV France	Dutch Child Labour Due Diligence Act	Norway proposed law ¹⁴
Company monitoring	Art 1 / Art L.225-102-4 Vigilance includes: i) establishing procedures regularly to assess subsidiaries and subcontractors and suppliers with established commercial relationship; ii) monitoring scheme to assess efficiency of measures implemented; iii) alert / whistleblowing mechanism to collect reports.	<p>Requirement that companies declare that they exercise due diligence per Art 5 to prevent goods or services from being produced using child labour (Art 4(1)).</p> <p>Due diligence includes investigation of whether there is reasonable suspicion of use of child labour, and in that case adoption and implementation of an action plan</p> <p>An Order in Council will establish further requirements for the investigation and the plan of action.</p> <p>However, not an annual but a one-off requirement.</p>	<p>Enterprises producing goods for consumers must publish information on the production site (s6) [so must monitor production sites].</p> <p>All enterprises obliged to know salient risks that may impact adversely on human rights and decent work in own business and supply chains (s5).</p> <p>Larger enterprises shall report on structure, area of operations, supply chains (including management systems and early warning channels) for preventing/ reducing adverse impacts; on due diligence and adverse impacts/salient risks of such impacts and results of due diligence (s10(2)).</p>
Company publish HRDD report	Companies must disclose DD processes, including Vigilance Plan and report (can be integrated into e.g. annual financial report; not required to be a stand-alone document).	Companies must register declarations in trade register and send them to the superintendent (Art 4(2)) – but on one-off rather than annual basis.	<p>Production sites to be published on enterprise's website or otherwise made easily accessible (s6(2)).</p> <p>Larger enterprises' report may be included in annual report on social responsibility or publicly disclosed in another manner.</p>
Rights-holder or third party involvement in monitoring /verification	<p>Company's representative trade unions to be consulted on design/implementation of alert mechanism / 'to be developed in working partnership'.</p> <p>The vigilance plan shall be drafted in association with the company's stakeholders and where appropriate within multiparty initiatives that exist in the subsidiaries or at a territorial level (Art 1); however, this is not a mandatory requirement.</p>	<p>Any natural person or legal entity whose interests are affected by the actions or omissions of a company relating to compliance [under this Act] may submit a complaint to the superintendent (Art 3(2)) on basis of a concrete indication of non-compliance (Art 3(3)) only after the complainant has attempted to work with the company directly or if having attempted to do so the company has not addressed the issue in six months (Art 3(4)).</p> <p>Minister may approve joint multi-stakeholder plans of action.</p>	<p>Draft law establishes 'right to information' on 'how an enterprise conducts itself with regard to fundamental human rights and decent work within the enterprise and its supply chains' (s7).</p> <p>Also establishes an information request procedure extending to how enterprise manages any adverse impact or risk (s7).</p>

¹⁴ Norway Ethics Information Committee (2019), Report from the Ethics Information Committee, 28 November 2019, available at: <https://nettsteder.regjeringen.no/etikkinformasjonsutvalget/norwegian-ethics-information-committee/> (accessed 10 March 2020).

National legislation / initiatives			
Monitoring approach	LDV France	Dutch Child Labour Due Diligence Act	Norway proposed law¹⁴
National monitoring (procedural)		Superintendent shall publish all declarations in a public register on its website (Art 4(5)).	The Consumer Authority and the Market Council conduct monitoring to ensure compliance with the provisions of this Act (s13).
National monitoring (substantive)		Superintendent is charged with supervision of compliance with the provisions of the Act (Art 3(2)). Within five years of entry into force of Act, Minister to send a report on effectiveness and practical effects of the Act (Art 10).	The Consumer Authority and the Market Council conduct monitoring to ensure compliance with the provisions of this Act (s13).

Disclosure-based regimes

Monitoring approach	Dodd Frank Act Final Rule 1502 (2012)	CTSCA 2012	UK MSA 2015	Aus MSA 2018	NSW MSA 2018
Company monitoring	<p>(If company determines itself high risk on basis of country of origin inquiries) company must do due diligence on the source and chain of custody that conforms to nationally or internationally recognised DD framework in good faith and reasonably designed.</p>	<p>Ongoing monitoring not implied as disclosure is one-time.</p>	<p>Companies to report annually on 1) nature and structure of the business; 2) human rights supply chain risks associated to the business; 3) The implemented due diligence procedures; 4) Effectiveness of due diligence procedures; 5) Training made available to staff (S54 MSA).</p>	<p>Annual MSA statements must detail against mandatory criteria i) identity, structure, operations and supply chains; ii) MS risks identified; iii) actions taken to assess and address risks including DD and remediation; iv) effectiveness of the actions v) consultation process with other entities owned or controlled.</p> <p>Statements must be approved by Board or equivalent.</p>	<p>Described in regulations / formal guidance.</p> <p>May include management steps and training for employees.</p>
Company publish HRDD report	<p>Company must include description of measures taken to exercise due diligence on conflict minerals' source and chain of custody in an annual special disclosure report to SEC.</p> <p>If low risk, then company only required to disclose determination and description of enquiry and results on 'reasonable country of origin' inquiries and to make information available on website.</p> <p>If high risk, company must do due diligence on the source and chain of custody that conforms to nationally or internationally recognised due diligence framework'; depending on outcome, company may be required to submit a 'Conflict Minerals Report' in addition, identifying non-conflict free products, facilities used to process</p>	<p>Company must disclose to what extent if any it 1) verifies its product supply chains to evaluate and address risks of human trafficking or slavery; 2) audits its suppliers to evaluate compliance with company standards; 3) requires certifications from direct suppliers confirming materials comply with local laws; 4) maintains internal accountability for employees and contractors; 5) trains employees and management with direct responsibility for supply chain management on HTS.</p> <p>Disclosure via conspicuous and easily understood website or by timely email response.</p>	<p>Reporting entities required to produce annual Slavery and Human Trafficking Statement and publish on their own homepage; report to be signed by a Director and approved by Board.</p>	<p>Reporting entities must file annual MSA statement within six months of end of reporting period.</p>	<p>Reporting entities must file annual MSA statement; method of reporting and prescribed reporting content to be defined in statutory regulations.</p>

Disclosure-based regimes					
Monitoring approach	Dodd Frank Act Final Rule 1502 (2012)	CTSCA 2012	UK MSA 2015	Aus MSA 2018	NSW MSA 2018
	them, country of origin of minerals and efforts to determine origin ¹⁵ .				
Rights-holder or third party involvement in monitoring /verification	For high risk: Independent private sector audit (i.e. certification) of Conflict Minerals Report and identify auditor.	Implication that supplier audits are performed by independent entities. Act's requirements not extended to subcontractors.			
National monitoring of individual compliance (procedural)		Office of the Attorney-General is responsible for determining whether companies (on list composed by Tax Board) are in compliance with Act's requirements.		MSA statements published on free government-run online public register – but no central list published of companies required to report.	Free public electronic register listing companies disclosing risks of linkage to modern slavery. Anti-Slavery Commissioner has mandate to monitor reporting concerning risks of modern slavery occurring in supply chains of government agencies and commercial organisations.
National monitoring (Substantive)	Third party annual review (Responsible Sourcing Network's Mining the Disclosures — yearly evaluation of companies' activities to address conflict minerals, including risk management, human rights impact, and reporting quality).		Civil society and academic review of reports (Repository held at the NGO Business, Human Rights Resource Centre).	Home Affairs Minister required to prepare annual report on compliance and non-compliance and table before Parliament Operation of Act reviewed after three years. No MSA Commissioner.	Anti-Slavery Commissioner required to monitor effectiveness of due diligence procedures to ensure that goods and services procured by government agencies are not produced with modern slavery.

¹⁵ National Association of Manufacturers, et al. v SEC 800 F.3d 518, final judgement No.13-CF-000635 (D.D.C. 3 April 2017) struck down requirement for chain of custody report (specifically requirement that business identify minerals in supply chain with the phrase 'have not been found to be 'DRC conflict free' under s1.01(a) of final rules as violation of First Amdt to Constitution.)

Annex V: Human rights due diligence instruments – enforcement provisions

EU regulation			
Enforcement approach	EU NFR	EU Timber	EU Conflict minerals
Competent authority for enforcement	<p>Each EU MS to determine the consequences of non-compliance in national legislation.</p> <p>The penalties provided for shall be effective, proportionate and dissuasive.</p>	<p>Each MS shall designate one or more Competent Authorities (CA) responsible for the application of this Regulation.</p> <p>MS shall notify the provisions on penalties established to the Commission and shall notify it without delay of any subsequent amendments affecting them.</p>	<p>The implementation is based on a system of recognised due diligence schemes (art. 8): governments, industry associations and groupings of interested organisations having due diligence schemes in place ('scheme owners') may apply to the EC to have the supply chain due diligence schemes that are developed and overseen by them recognised by the Commission. Where the EC identifies a failure to comply with the Regulation or deficiencies in a recognised supply chain due diligence scheme, it may grant the scheme owner an appropriate period of time to take remedial action. Where the scheme owner fails or refuses to take the necessary remedial action, the EC may withdraw the recognition of the scheme (art. 8 and 15.2).</p>
Administrative /procedural		<p>MS shall lay down the rules on penalties applicable to infringements of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented.</p> <p>The penalties provided for must be effective, proportionate and dissuasive and may include, inter alia: (a) fines proportionate to the environmental damage, the value of the timber or timber products concerned and the tax losses and economic detriment resulting from the infringement, calculating the level of such fines in such way as to make sure that they effectively deprive those responsible of the economic benefits derived from their serious infringements, without prejudice to the legitimate right to exercise a profession, and gradually increasing the level of such fines for repeated serious infringements; (b) seizure of the timber and timber products concerned; (c) immediate suspension of authorisation to trade.</p>	<p>MS may issue a notice of remedial action to be taken by Union importer.</p> <p>The regulation foresees its review in 2023, when the Commission will assess whether MS should have competence to impose penalties upon importers in the event of persistent failure to comply.</p>

National due diligence laws / initiatives			
Enforcement approach	LDV France 2017	Dutch Child Labour Due Diligence Act) (2019)	Norway proposal
Administrative /procedural	<p>Formal notice to comply (<i>mise en demeure</i>), if company fails to establish, implement or publish a vigilance plan; company has three months to comply, whereafter judge can order publication of a plan; judge can also rule on whether VP is complete and appropriately fulfils obligations described in the law.</p> <p>Periodic penalty payments (daily or event basis pending fulfilment of defendant's obligation) [<i>astreintes</i>].</p> <p>Any person with standing/concerned parties (includes NGOs, victims and unions) can seek formal notice and injunction to comply.</p>	<p>Superintendent may issue binding instruction with time limit.</p> <p>If binding instruction not complied with superintendent may impose an administrative fine for:</p> <ul style="list-style-type: none"> violation of Art 4(2) (sending statement to Superintendent/trade register) to level set by Dutch Criminal Code, failure to comply with duty to conduct investigations or define an action plan under Arts 5(1) or 5(3), <p>Any natural person or legal entity whose interests are affected by the actions or omissions of a company relating to compliance [under this Act] may submit a complaint to the superintendent (Art 3(2)) on basis of a concrete indication of non-compliance (Art 3(3)) only after dealt with by company or if the latter has not responded within six months after submission (Art 3(4)).</p>	<p>The Consumer Authority and the Market Council conduct monitoring to ensure compliance with the provisions of this Act (s13).</p> <p>Enforcement penalties may only be determined for contravention of disclosure requirements relating to:</p> <ul style="list-style-type: none"> transparency about production sites, right to information requests, (for larger enterprises) annual due diligence reporting. <p>Any person can request information of any enterprise on its work, system, steps taken to prevent or reduce adverse impact on HR and working conditions and how enterprise manages specific risks or impacts: (s7).</p>
Civil	<p>Art 2/Art L.225-102-5 Ordinary civil action for tortious damage under Arts 1240/1241 French Civil Code (victim bears burden of proof) caused by default of obligations under Art 2 by parent, subsidiaries or suppliers/subcontractors with established commercial relationship (i.e. lack of reasonable vigilance); notices to comply and alerts may be probative of lack of vigilance.</p> <p>Victims include stakeholders (associations, NGOs as well as individuals, communities, unions whose rights and obligations are affected).</p>	<p>California Attorney-General has exclusive authority to lead civil action for injunctive relief to take specific action (S3(d)).</p>	
Criminal	<p>Draft law provided for fine for non-compliance; found unconstitutional on grounds of legal certainty/Art 8 Declaration Rights of Man.</p>	<p>Criminal offence established under Economic Offences Act for repeat offending on grounds that same violation committed by order of or under the <i>de facto</i> leadership of the same manager within five years of the preceding violation (Art 9).</p>	<p>Infringement penalty may be established for repeated wilful or negligent infringement of sections 6, 7 and 10, to be paid by infringing person or entity (s13).</p> <p>Ministry may be regulation lay down more detailed rules governing imposition of enforcement penalties and assessment of infringement penalties (s 13(4)).</p>

Disclosure-based regimes

Enforcement approach	Dodd Frank Act Final Rule 1502 (2012)	California TSCA 2012	UK MSA 2015	Aus Fed MSA (2018)	NSW MSA (2018)
Administrative /procedural	<p>Reporting company is liable for misleading and false statements unless it can be shown that it acted in good faith and did not know the report is misleading or false (Securities Exchange Act of 1934 s13(p) 15 USC 78m.</p> <p>(SEC Division of Corporation Finance held that it would not recommend enforcement against companies that only file reports on country of origin inquires and on whether conflict minerals may/originate from relevant country.)</p>	No fines; Attorney General may file civil action for injunctive relief.	<p>Secretary of State may seek injunction from High Court requiring production of annual slavery and human trafficking statement.</p> <p>Failure to comply with injunction is contempt of court punishable by unlimited fine.</p>	No penalty for failing to report.	<p>Anti-Slavery Commissioner in the course of exercising her functions (which include monitoring company disclosure) may refer any information to law enforcement and government agencies.</p> <p>Failure to prepare and publish annual MSA statement or giving false or misleading information leads to fines (the law does not specify the procedure).</p> <p>Financial penalties up to AUD 1.1million.</p>

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