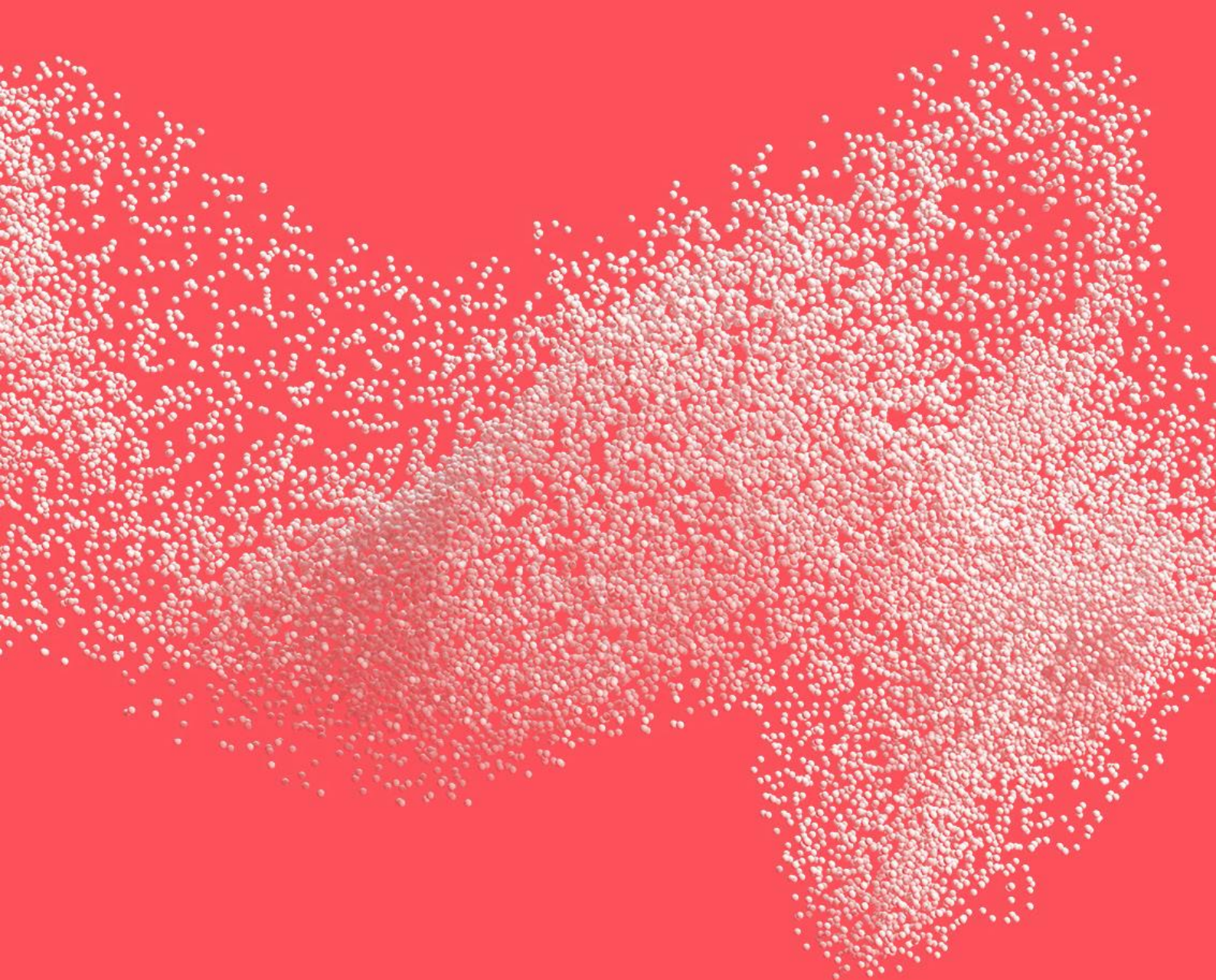


# ESG: Sustainable Business

## Human Rights and Environmental Due Diligence

APRIL 2021



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# Introduction

In 2011, the UN Guiding Principles on Business and Human Rights (**UNGPs**) were unanimously endorsed by the UN Human Rights Council. Although they are voluntary, many businesses have pledged to follow them in their day to day operations. However, we are increasingly seeing legislative pushes towards mandatory human rights and environmental due diligence requirements across the EU and in the UK, including a European Parliament resolution on 10 March 2021 with recommendations to the Commission for drawing up a directive on corporate due diligence and corporate accountability. This article explores some of those developments.

## What does this mean for businesses?

- Businesses should carefully monitor legislative developments in this area to ensure ongoing compliance and preparedness for enhanced proposals.
- The time to conduct internal due diligence, anticipate risks and put in place robust processes and data management is now. Businesses should consider auditing their operations and their value chains (both up-stream suppliers of products and services and down-stream customers and business relationships).
- Businesses will need to implement quality controls and governance (top down) to ensure that they adhere to any standards adopted, as well as any environment, social and/or governance (**ESG**) related targets they may have, or due diligence or disclosure obligations.
- The increasing responsiveness of the markets to ESG failings considerably increases the visibility of and costs arising from such issues. This will increase both regulatory and litigation risks linked to ESG disclosures and statements.
- The nature of many ESG risks means that, if not managed, they bring the potential for regulatory enforcement, civil claims and criminal sanctions, potentially all at once. Managing this pressure on multiple fronts, including the potential for complex, cross-border and multi-party litigation, may be very familiar to the team at Simmons & Simmons, but is not a prospect which most businesses relish. Discover some of the key issues in parallel proceedings [here](#) or contact us for a discussion specific to you.
- Businesses will also need to consider what reputational risks they are exposed to and what they are willing to accept as part of their model and culture.

Simmons & Simmons can assist you with training and advice in relation to all of the above.

## EU

On 10 March 2021, the European Parliament, by a large majority, adopted a [resolution with recommendations](#) to the Commission for drawing up a directive on corporate due diligence and corporate accountability.

In the European Parliament's opinion, "*voluntary due diligence standards have limitations and have not achieved significant progress in preventing human rights and environmental harm and in enabling access to justice*". According to a [European Commission study published in February 2020](#), only one-third of businesses undertakes due diligence measures and the majority of those due diligence practices only include first tier suppliers. The European Parliament therefore considers that "*the Union should urgently adopt binding requirements for undertakings to identify, assess, prevent, cease, mitigate, monitor, communicate, account for, address and remediate potential and/or actual adverse impacts on human rights, the environment and good governance in their value chain*".

To do so, the European Parliament submitted its recommendations as to the content of the directive that should be submitted by the Commission. The draft proposal aims to transform the voluntary undertakings to respect human rights, the environment and good governance under international standards into a legal, mandatory obligations at European Union level. The European Parliament has highlighted that in order to be effective, these due diligence obligations should encompass the entire value chain (both up-stream suppliers of products and services and down-stream customers and business relationships) and apply to all businesses established in the territory of the European Union or outside the European Union but are active on the internal market. It also provides for Member States to have a liability regime under which businesses can be held liable and provide remediation for any harm arising out of potential or actual adverse impacts on human rights, the environment or good governance caused or contributed to by acts or omissions.

The resolution is in line with and inspired by Member States that have already adopted legislation of their own to enhance corporate accountability by imposing mandatory due diligence frameworks.

## France

In 2017, France introduced into law a duty of vigilance, requiring businesses to draw up, implement and publish a due vigilance plan that must include due diligence measures to identify risks and forestall serious infringements of or harm to human rights and fundamental freedoms, personal health and safety and the environment (see our article on a [new corporate duty of care into French Law](#)). These risks and infringements must be identified with regard to the business' own activities, but also to the activities of directly or indirectly controlled businesses, as well as the activities of subcontractors and suppliers.

Lawsuits are multiplying in France in relation to this duty of vigilance law, particularly in relation to the environment. Total, for example, has been summoned twice in the past two years for not complying with it: in October 2019 for the non-revision of its vigilance plan in order to take into account an oil project in Uganda and in January 2020 for not including enough substantial details in its vigilance plan to curb carbon emissions. More recently, at the beginning of March 2021, a lawsuit has been filed in a French court against the Casino Group, a large supermarket chain, claiming that the business' supply chain practices in Brazil and Colombia are linked to land-grabs and deforestation in the Amazon.



## Germany

On 3 March 2021, the German Federal Cabinet (Bundeskabinett) adopted the draft of a supply chain act, based on the UNGPs, which provides for the establishment of duty of care obligations with regard to internationally recognised human rights (the “SCA”). It is envisaged that the German Federal Parliament (Bundestag) will pass the SCA in the current legislative period.

From 2023, the SCA will apply to partnerships and corporations domiciled in Germany and employing more than 3,000 employees. From 2024, it will apply to smaller businesses, employing more than 1,000 employees.

The aim of the SCA is to allow in-scope businesses to be held responsible for human rights violations within their respective supply chains. The main element of the SCA is the establishment of duty of care obligations for in-scope businesses in relation to human rights. More specifically, in-scope businesses will be required to:

- carry out risk analysis to assess the risk of possible human rights violations;
- take measures to prevent, minimise and remedy identified negative impacts if they identify risks within their supply chain; and
- report publicly on an annual basis on the actual and potential negative impact(s) of their business activities on human rights.

If an in-scope business does not comply with the due diligence obligations set forth in the SCA, the Act provides for sanctions in the form of penalties and administrative fines (*Zwangs- und Bußgeldern*). The Federal Office of Economics and Export Control (*Bundesamt für Wirtschaft und Ausfuhrkontrolle*) will supervise compliance with the SCA.

## Italy

On 15 December 2016, the Italian Government presented the National Action Plan on Business and Human Rights 2016-2021 (the “**Plan**”). The Plan is not legally binding; however, it describes the existing legal framework and identifies a list of measures that the Italian Government plans to take to implement the UNGPs.

According to the Plan, with reference to the protection of human rights, businesses are “required” to:

- define their own human rights policy;
- create and implement corporate due diligence mechanisms to identify, measure and prevent any potential risk of human rights violations in the conduct of their operations and activities, including by partners or suppliers; and
- provide for the necessary compliance mechanisms to remedy any adverse human rights impact they have caused, or contributed to, or which is related to their business operations.

The Plan also highlights that pursuant to Article 41 of the Italian Constitutional Charter, which safeguards free economic activity, such activity may not be conducted in a way that is contrary to the achievement of social objectives or in a way that endangers or violates fundamental rights and freedoms and human security.

As for legally binding provisions, although not explicit requirements for due diligence, the following do necessitate businesses to undertake human rights and/or environmental due diligence:

- Legislative Decree No. 254/2016, which implements Directive 2014/95/EU, provides that businesses must disclose a non-financial statement describing “*respect for human rights, the measures taken to prevent violations thereof, as well as the actions put in place to prevent discriminatory attitudes and actions in any way*” (Article 3(2)(E)).
- Legislative Decree No. 231/2001 introduces a liability for businesses for certain offences committed in their interest or to their advantage. The law requires businesses to undertake an internal self-regulatory process aimed at identifying, preventing, mitigating and remedying those offences. Although not directed specifically at protecting human rights, the scope of Legislative Decree No. 231/2001 has been extended over the years and currently includes certain human rights violations such as slavery, human trafficking, forced labour, juvenile prostitution and pornography, female genital mutilation, racism and xenophobia, as well as serious environmental crimes. In order to avoid incurring liability, a business must demonstrate that it has effectively adopted and implemented compliance programs called “models of organisation, management and control” with the aim of identifying, preventing and mitigating the risk of commission of crimes in relation to business activities.

## Netherlands

On 11 March 2011, four Dutch members of parliament (“**MPs**”) lodged a legislative proposal called the Bill on Responsible and Sustainable International Business, which focuses on the implementation of the OECD Guidelines for Multinational Enterprises that deal with human rights, employment and industrial relations, and the environment. The reason for this is that there is no Dutch legislation yet that makes clear what the responsibility of businesses is with regard to these topics in their international activities. This contrasts with other OECD themes such as anti-corruption, taxation or competition, for which there is existing legislation. The proposed law should, due to its mandatory nature, lead to better compliance with the OECD Guidelines.

According to the four Dutch MPs, businesses can, through their economic activities and their role in supply chains, violate human and labour rights, and/or cause environmental damage. However, importantly, they can also contribute to the prevention of those violations and/or to the mitigation of that damage. They further believe that if EU Member States were to make a start with the introduction of national statutory measure that ensure compliance with the OECD Guidelines, this could not only speed up the European process, but influence the content of European legislation as well.

The proposed legislation is applicable to Dutch businesses with activities abroad, to businesses on the Dutch Caribbean islands Bonaire, Sint Eustatius and Saba, and to foreign businesses which qualify as ‘large companies’ (see below) and which are active in the Dutch market.

According to the four Dutch MPs, the principle of due diligence must become the starting point for the actions of businesses as this is a basic principle in the OECD Guidelines. The Bill describes ‘due diligence’ as the process by which businesses assess the actual and potential adverse impacts of their actions, and account for how they deal with the identified risks.

It consists of the following six distinct steps, adopted from the OECD Guidelines:

- 1) Integrating Corporate Social Responsibility (CSR) into the policy and management systems of the enterprise.
- 2) Identifying actual or potential adverse impacts on CSR issues.
- 3) Eliminating, preventing or mitigating these adverse impacts.
- 4) Monitoring the practical application and results.
- 5) Communicating how the consequences are addressed.
- 6) Enable or assist recovery where applicable.

However, this process will only apply to ‘large companies’, which are businesses that on the balance sheet date exceed at least two of the following three criteria:

- an average number of 250 employees during the financial year;
- a balance sheet total of € 20 million;
- a net turnover of more than € 40 million.

Businesses which do not meet these criteria will only be subject to a general duty of care, provided that they are doing business abroad (where their actions could have an adverse impact on human rights, labour rights or the environment).

Violations of the general duty of care will only be dealt with through civil law actions (grievance mechanisms and civil claims of stakeholders). In contrast, violations of the mandatory due diligence process will be dealt with through the regulatory enforcement system. Repeated violations followed by regulatory sanctions within 5 years will be enforced through criminal law, as an economic offence.

## UK

Following Brexit, it is unclear whether the UK will implement a law similar to the European Parliament's resolution detailed above. However, we do expect developments in this area given the increasing focus on whether a business is conducting its operations in a sustainable way, and without violating human rights.

The UK is by no means a 'follower' in this regard. Under the [Modern Slavery Act 2015](#) ("**MSA**"), commercial organisations that supply goods or services, carry on business in the UK and (together with their subsidiaries) meet the annual turnover threshold of £36 million or more must publish an annual slavery and human trafficking statement. At its implementation, the MSA was considered 'first-of-a-kind', going further than any legislative initiatives in the EU. However, the MSA has recently been [criticised](#) for being out of date and lacking 'teeth'.

In September 2020, the UK Government announced that "*when Parliamentary time permits*" it will introduce "*an ambitious package of measures to strengthen and future-proof the Modern Slavery Act's transparency legislation*" – see our commentary [here](#). That package may well be influenced by the European Parliament's resolution, which goes further than the MSA in certain regards (for example, including down-stream customers and business relationships, rather than just up-stream suppliers), as well as the national legislative developments described above. On 11 March 2021, the UK Government launched a free online modern slavery statement registry to enhance transparency and accessibility by bringing modern slavery statements together in one place so that they may be accessed and compared. Although adding a published statement to the registry is currently voluntary, the accompanying Government guidance notes that proposed changes to the MSA will make it mandatory.

Another proposed initiative is the [Environment Bill](#), described by the UK government as a "*vehicle for delivering the bold vision set out in the 25 Year Environment Plan*". It sets public environmental governance targets which will undoubtedly translate into obligations for private entities, and will bring changes to planning laws. Proposed amendments include a mandatory environmental and human rights due diligence obligation; and a prohibition on using illegally produced forest risk commodities or embedded products. Following several delays, the Bill is due to return to Parliament at the next parliamentary session, with royal assent expected in Autumn 2021.



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