

Corporate responsibility to respect human rights vis-à-vis legal duty of care

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Question: What is the role of civil liability in the context of the introduction of mandatory human rights and environmental due diligence?

Any human rights and environmental due diligence legal obligation will have implications for corporate civil liability, unless such implications are explicitly ruled out. Thus excluding civil liability from a human rights and environmental due diligence legislation would have to be done deliberately and intentionally.

Denying civil liability by establishing such artificial barriers would go against the purpose of the United Nations Guiding Principles for Business and Human Rights, which make it very clear that victims must have access to judicial remedy and that it is a duty of the States to redress abuse of human rights through effective policies, legislation, regulations and adjudications, including by removal of barriers to access to remedy.

The importance of civil liability in the context of due diligence legislation is spelled out clearly in the (draft) report of the European Parliament on human rights and environmental due diligence, which states that a main objective is to facilitate access to judicial remedy for harm occurring in global value chains. To this end the report assumes civil liability for contribution to harm across value chain.

Victims must have recourse to judicial remedy, and civil liability and tort specifically, is the most appropriate and flexible instruments that is best suited to the business and human rights context. Alternatives such as criminal and administrative liability have their place, but

they are too inflexible and rely too much on public authorities to ensure access to remedy for affected people.

Question: *How does liability actually work in the context of tort law?*

There are different forms of civil liability that vary in terms of the strictness of the liability.

The twin concept of corporate responsibility to respect human rights and perform human rights due diligence bear similarity to the duty of care in tort law, which requires a person that is found liable of having acted with negligence thereby causing harm to another, to compensate the victim of such harm. A breach of the corporate responsibility to respect human rights can, therefore, amount to a breach of the duty of care. A corporation (or indeed any person) is liable if several conditions are met, including in particular that it failed to act with a reasonable care, that the harm was foreseeable, and that there was a causation between acts and omissions linked to the human rights due diligence and harm. In this regard, human rights due diligence requirements can help to determine if the corporation has acted with reasonable care, taking into account company's leverage and other aspects elaborated in the UN Guiding Principles.

The corporate due diligence legislation, however, needs to clarify how the requirement of 'causation' should be applied in the context of business relationships.

First, in case a company is able to control another entity, whether by ownership, contractual means or decisive economic influence, the liability of the controlling entity for the harm caused by the controlled one should be of a strict character, as recommended by the European Parliament's (draft) report on human rights and environmental due diligence.

Second, a more nuanced approach is needed where a company tolerates, facilitates, or otherwise contributes to the abuse of human rights or environmental standards by its business partners. This may take a form of not taking appropriate action regarding the well-known or severe impacts by a supplier, thus not following through the human rights due diligence, or proactively contributing to the problem, for example by implementing a purchasing policy and practices that take advantage of insufficient labour rights protection. In these cases, a contribution by failing to carry out human rights due diligence offers a more appropriate test for liability, subject to further criteria.

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