SUMMARY

Originally introduced in the UN Guiding Principles on Business and Human Rights, the concept of human rights due diligence has been gaining traction in recent years as an increasing number of stakeholders have been calling for new binding regulation on the subject. This legal brief aims to explain what human rights and environmental due diligence means, and to outline the current legislative developments in the field both at the national and at the European level.
10 years ago, in June 2011, the Human Rights Council unanimously endorsed the UN Guiding Principles on Business and Human Rights (UNGPs) which represented the first UN-level guidance to both States and companies in relation to business and human rights.

The UNGPs are a soft law instrument which does not create legally binding obligations on either States nor companies, but merely provides guidelines. However, they have been extremely influential, and many States and companies have committed to their implementation. As such, they represent a globally recognized and authoritative framework on Business and Human Rights.

The UNGPs outline differentiated but complementary duties and responsibilities of States and companies which revolve around 3 pillars:

Pillar 1: The State duty to protect human rights - which reaffirms the States’ existing obligations under international human rights law to protect individuals within their territory or under their jurisdiction against human rights abuse, including by third parties such as companies.

Pillar 2: The corporate responsibility to respect human rights - which lays out the expectations for companies to take positive steps to avoid harming people’s human rights through their own activities and through their business relationships.

Pillar 3: Access to remedy - which clarifies the role of both States and companies in ensuring that those whose human rights have been affected by business activities are able to obtain effective remedy.

The UNGPs highlight that business enterprises can have an impact on virtually the entire spectrum of internationally recognized human rights. The corporate responsibility to respect under Pillar 2 therefore covers all internationally recognized human rights understood, at a minimum as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work. The corporate re-

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3 Human rights are basic standards which are inherent to all human beings, regardless of nationality, place of residence, sex, national or ethnic origin, colour, religion, language or any other status. They range from right to life to right to food, and include (but are not limited to) right not to be subjected to slavery, servitude or forced labour, right to privacy, right to freedom of assembly and association, right to education, right work, right to family life, right to an adequate standard of living, and right to health. See United Nations - Human Rights Office of the High Commissioner, What are human rights?. Available at: https://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx

4 The Universal Declaration of Human Rights (UDHR) proclaimed by the UN General Assembly on 10 December 1948 was the first legal document to set out a common standard of achievements for all people and all nations. The UDHR, together with the International Covenant for Civil and Political Rights and the International Covenant for Economic, Social and Cultural Rights form the International Bill of Rights.

5 UNGPs, Guiding Principle 12 and Commentary.
A responsibility to respect human rights exists ‘over and above compliance with national laws and regulations protecting human rights’ and is independent from the States’ abilities or willingness to fulfil their own human rights obligations.6

In addition, the UNGPs establish that companies may need to consider additional standards, and should also pay particular attention to the human rights of individuals from groups or populations that are particularly vulnerable (e.g. indigenous peoples; women, national or ethnic, religious and linguistic minorities; children; persons with disabilities; and migrant workers and their families) where they may have adverse human rights impacts on them.

The UNGPs clarifies that in order to fulfil this responsibility to respect human rights, companies should have in place policies and processes appropriate to their size and circumstances, including:7

1. A policy commitment;

2. A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;

3. Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.8

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6 Comment to Guiding Principle 11.
7 UNGPs, Commentary to Guiding Principle 12.
8 UNGPs, Guiding Principle 15.
Central to the second pillar of the UNGPs, the concept of human rights and environmental due diligence is a core management tool for companies to fulfil their responsibility to respect human rights.

→ What does human rights due diligence refer to?

Human rights due diligence consists in a process - or a set of processes - that all companies should implement in order to identify, prevent, mitigate and account for how they address potential and actual adverse human rights impacts with which they may be involved.⁹

→ How may companies become involved with adverse human rights impacts?

There are several ways in which companies may become involved with adverse human rights impacts, which should all be covered by the human rights due diligence exercise. In particular:

- Companies may cause the impact through their own activities.
  - Examples include (amongst others): factory workers being exposed to hazardous conditions without adequate safety equipment, releasing chemical effluents which constitute the main source of pollution of a community’s water supply; or routine racial discrimination in the treatment of customers.¹⁰

- Companies may contribute to the impact, either through their own activities either directly or through a third party (e.g. another company, a security company, a Government, etc.).
  - Examples include (amongst others): having purchasing practices which are conducive to breach of labour standards by suppliers in order to deliver (e.g. changing product requirements for suppliers at the last minute without any adjustments in terms of production deadlines and prices), providing personal data of Internet users to a Government that uses the data to trace and prosecute political dissidents contrary to human rights; targeting high-sugar food and drinks at children, with an impact on child obesity.¹¹

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¹¹ Ibid., at 17.
The adverse human rights impacts may be caused by entities with whom companies have a business relationship and be directly linked to their operations, products or services.\(^{12}\)

Examples include (amongst others): providing financial loans to a company for business activities that, in breach of agreed standards, result in the eviction of communities;\(^{13}\) the use of child labour by a subcontractor of a supplier of a retail company to embroider clothing products in breach of contractual obligations.

→ **What does exercising human rights due diligence consist of for companies?**

The human rights due diligence processes consist of 4 main steps\(^{14}\):

1. **Identifying and assessing** actual and potential human rights impacts;
2. **Integrating** and acting upon the findings;
3. **Tracking responses**;
4. **External communication** and reporting on how the impacts are addressed.

- The human rights due diligence exercise should be proportionate to:
  - the **size of the enterprise** - more complex processes will normally be expected from larger companies than from micro and small enterprises.
  - the **risks of severe human rights impacts** - it allows for prioritisation based on the severity of human rights risks.
  - the **nature and context of its operations** - it should be context-specific.

- It should be an **ongoing process** (and not a one-off exercise)

- It should focus on the **risks to the people and the planet**, and not risks to the company.\(^{15}\)

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\(^{12}\) UNGPs, Guiding Principle 17.


→ **What does environmental due diligence refer to?**

The concept of human rights due diligence has been incorporated to various international standards and instruments such as the OECD Guidelines for Multinational Enterprises and related materials, and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.

In the OECD Guidelines, it was also expanded to cover other areas such as the environment. As a result, companies are also expected to exercise environmental due diligence in order to identify, prevent, mitigate and account for how they address their adverse impacts on the environment, which includes climate change.

In addition, climate change and human rights are intrinsically interrelated as climate change threatens the effective enjoyment of a range of human rights including the right to life, water and sanitation, food, health, housing, self-determination, culture and development. In a 2019 report, the UN Report of the Special Rapporteur on extreme poverty and human rights highlighted that:

‘Climate change threatens the future of human rights and risks undoing the last fifty years of progress in development, global health, and poverty reduction.’

He added that:

‘Even under the best-case scenario, hundreds of millions will face food insecurity, forced migration, disease, and death.’

The report emphasised the crucial role to be played by companies in providing and implementing solutions to climate change. It highlights that:

‘Fossil fuel companies are the main driver of climate change: in 2015, the fossil fuel industry and its products accounted for 91 percent of global industrial greenhouse emissions and 70 percent of all human-made emissions.’

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16 OECD, OECD Guidelines for Multinational Enterprises (OECD Publishing 2011) 25 May 2011 at http://www.oecd.org/daf/inmne/A8006323.pdf The OECD Guidelines for Multinational Enterprises (OECD Guidelines) are recommendations from adhering governments to multinational enterprises on responsible business conduct. They cover issues such as labour rights, environmental protection, human rights, consumer protection, information disclosure and the fight against corruption. To date, 50 states have adhered to the Guidelines: all 37 OECD Member States and 13 non-OECD members.


21 Ibid., at 1.

22 Ibid., at 13.

23 Ibid., at 10.
Why is human rights and environmental due diligence important?

Human rights and environmental due diligence processes have been identified as a core practice of responsible business conduct, key to the fulfilment of the UN Sustainable Development Goals (SDGs).24

Human rights and environmental due diligence aims to protect the people and the planet by setting out the proactive steps that companies must take in order to avoid infringing on the human rights of others and on the environment, and addressing the adverse impacts with which they are involved.

For companies, exercising human rights and environmental due diligence can help manage reputational risks as well as emerging legal risks and improve their relations with stakeholders, such as consumers and investors. In a recent study for the European Commission which surveyed over 300 companies across Europe, nearly 70% of companies considered that the introduction of an EU-level legislation on mandatory human rights and environmental due diligence legislation would be beneficial for companies insofar as it would level the playing field, increase legal certainty by providing a single harmonised standard and facilitate leverage with business partners on human rights issues.25

In relation to the COVID-19 pandemic, preliminary studies have suggested that companies who had solid human rights due diligence processes had more resilient and human-rights compatible responses to the COVID-19 pandemic, and were more likely to cope better with the long term negative effects of the pandemic.26

How has due diligence been implemented by companies in practice?

A growing number of companies have adopted policies and processes in an attempt to meet their corporate responsibility to respect human rights. However, there is still much room for improvement. The 2020 Corporate Human Rights Benchmark assessment assessed the human rights disclosures of 230 of some of the biggest companies in the world. It revealed that nearly half of the companies assessed (46.2%) failed to score any points on the human rights due diligence part of the assessment.

In the study for the European Commission, only about one-third of companies stated to have due diligence processes in place taking into account all human rights and environmental impacts, with the majority of those limited to first-tier suppliers.

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In Portugal, the first National Enquiry on Responsible Business Conduct in Portugal revealed that less than one in five companies had human rights due diligence processes in place, with the percentage falling to 12% for micro and small enterprises of up to 50 employees.27

Against the backdrop of these low levels of implementation of human rights due diligence expectations by companies, new laws are being developed in many countries which are turning the expectations for companies to respect human rights in their operations and through their global value chains into a legal duty.

→ Current national and European developments regarding HREDD

Over the past few years, a shift towards more stringent approaches in relation to human rights and environment due diligence expectations has started to take place.

A first wave of laws have sought to encourage companies to exercise human rights due diligence through reporting requirements. Examples include:

- The UK Modern Slavery Act 2015, according to which large companies carrying on a business or part or a business in the United Kingdom are required to publish a yearly statement on the steps that they are taking, if any, to ensure that slavery and human trafficking is not taking place in any of its supply chains and in any part of its own business.28

- The EU Non-Financial Reporting Directive,29 which requires certain large companies to disclose certain information on the way they operate and manage notably ‘environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters’.

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In a second step, a number of jurisdictions have sought to go beyond mere reporting requirements to impose to require (and not merely encourage) companies to exercise human rights due diligence. Examples include:

- The French Duty of Vigilance Law adopted in 2017, which requires large French companies to establish, effectively implement and disclose a vigilance plan setting out the due diligence measures taken to identify and prevent severe violations of human rights and the environment resulting from their operations or the operations of their established business relationships.

- The Dutch Child Labour Due Diligence Act of 2019 (which has not yet entered into force), which requires companies that supply goods or services to Dutch end-users to exercise human rights due diligence in relation to the risks of child labour being used in their supply chains. In particular, companies must investigate whether there is a reasonable suspicion that a product or service in its supply chain has been produced with child labour and should that be the case, implement a plan of action. They should also issue a statement declaring that it exercised due diligence.

At the EU level, there are already a number of initiatives which impose certain due diligence obligations to companies in relation to certain sectors or issues such as the EU Timber Regulation and the EU Conflict Minerals Regulation.

In addition, campaigns in support of the adoption of a legislation on mandatory human rights and environmental due diligence have been taking place across Europe and have received increasing support from civil society as well as by a growing number of companies, and business organisations. Draft legislative proposals in that respect have

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30 French Duty of Vigilance Law, 27 March 2017 (LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre), Article 1. Available at: https://www.legifrance.gouv.fr/loda/id/JORFTEXT000034290626/


already been made public in Switzerland,\textsuperscript{35} Norway,\textsuperscript{36} in Germany\textsuperscript{37} and in the Netherlands.\textsuperscript{38}

At the European level, on the 29th of April 2020, on the basis of the findings of the study on due diligence through the supply chains,\textsuperscript{39} EU Commissioner for Justice Didier Reynders announced that the European Commission will introduce a legislative initiative on mandatory human rights and environmental due diligence at the EU level in 2021. The text of the Commission is expected in June 2021. In the meantime, a draft report from the European Parliament with recommendations to the European Commission was made public.\textsuperscript{40} On the 10th March 2021, the European Parliament adopted a revised version of the draft report by a very large majority. The report calls on the Commission to impose on Member States to ensure that companies exercise effective due diligence ‘with respect to potential or actual adverse impacts on human rights, the environment and good governance in their operations and business relationships’.\textsuperscript{41}

\textsuperscript{35} In Switzerland, the Responsible Business Initiative was launched in 2016 seeking to impose on Swiss companies a duty to respect internationally recognized human rights and environmental standards and to carry out appropriate due diligence. Although the initiative obtained a majority of the popular vote on the 29th of November 2020, it was rejected as it failed to obtain a majority of cantons (12 of 20). As a result, the indirect counter-proposal which was adopted by the Swiss Parliament in June 2020 will most likely enter into force. It provides both reporting obligations for large Swiss companies and due diligence obligations in relation to child labour and conflict minerals. See Robert McCrorquodale, “Some Concluding Remarks on Business and Human Rights in Switzerland”, NOVA BHRE Blog (01 March 2021) at https://novabhre.novalaw.unl.pt/concluding-remarks-bhr-switzerland/; Nicolas Bueno, “Human Rights Due Diligence Legislation in Switzerland: The state-of-play after the Swiss Responsible Business Initiative”, NOVA BHRE Blog (01 February 2021) at https://novabhre.novalaw.unl.pt/human-rights-due-diligence-switzerland/

\textsuperscript{36} In Norway, the Norwegian Draft Law relating to transparency in supply chains, was published in 2019. It encompasses a duty to know of ‘salient risks that may have an adverse impact on fundamental human rights and decent work, both within the enterprise itself and in its supply chains’, a duty of transparency and a duty to exercise due diligence and to report on the due diligence exercised. See Business & Human Rights Resource Centre, \textit{Norway: Govt.-appointed committee proposes human rights transparency and due diligence regulation}, 3 December 2019, at https://www.business-humanrights.org/en/latest-news/norway-govt-appointed-committee-proposes-human-rights-transparency-and-due-diligence-regulation/

\textsuperscript{37} On the 12th of February 2021, three German Ministers announced that an agreement had been reached on the details of a due diligence act which would introduce a new duty of care for large German companies to respect human rights and exercise human rights due diligence. See R. Grabsch, “The German Supply Chain Due Diligence Act in the Making – What to Expect”, NOVA BHRE Blog (15 February 2021) at https://novabhre.novalaw.unl.pt/german-supply-chain-due-diligence-act-what-to-expect/


\textsuperscript{40} European Parliament, Committee on Legal Affairs, Report with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)). Available at: https://www.europarl.europa.eu/doceo/document/JURI-PR-657191_EN.pdf

Announcement by EU Commissioner for Justice of the introduction of an EU-level legislative initiative on mandatory human rights and environmental due diligence in 2021.

The Council of the European Union approved conclusions on Human Rights and decent work in global supply chains calling on member states and the Commission to promote human rights in global supply chains and decent work worldwide and calling on the European Commission to table ‘an EU legal framework on sustainable corporate governance, including a cross-sectoral corporate due diligence obligations along global supply chains’

Adoption of the European Parliament Resolution with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL) by a vast majority (504 in favour, 79 against).

What is the role of the Portuguese Presidency of the Council of the EU?

In light of the legislative developments on mandatory human rights and environmental due diligence that are currently taking place at the European level, the author of the UNGPs, John Ruggie recently highlighted the crucial role to be played by the Portuguese presidency of the Council of the EU.42

The Portuguese Presidency of the Council of the EU emphasized its commitment to work on three major priorities:43

- To promote Europe’s recovery, leveraged by the climate and digital transitions.
- To implement the Social Pillar of the European Union as a key element for ensuring a fair and inclusive climate and digital transition.
- To strengthen Europe’s strategic autonomy while keeping it open to the world.

In order to fulfill these priorities, the Portuguese Presidency set out a number of ‘action lines’ which include inter alia ‘promoting the EU as a leader in climate action’, and prioritising the implementation of the European Green Deal, with a view of fostering a sustainable economic recovery and supporting all efforts to make Europe the first carbon-neutral continent by 2050,44 and ‘enhancing and strengthening the European social model’ towards a stronger, fairer and more inclusive social Europe. Mandatory human rights and environmental due diligence is a key element of such a sustainable transition. In its Human Rights Priorities Paper, the Portuguese Presidency highlighted that:

“Business & human rights” and its relationship with the environment are key issues to achieve a fair and green recovery.

The Human Rights Priorities Paper further affirms that:

Human rights will also remain at the centre of our foreign policy during the Portuguese Presidency of the Council of the EU. Under the motto: “Time to deliver: a fair, green and digital recovery” we will be actively engaged in the advancement of the human rights agenda, including at the EU level as well as at UN human rights fora, to ensure that we build back better and leave no one behind.

42 John Ruggie, ‘Transcript of the Keynote Speech delivered at the webinar on Corporate Due Diligence and Civil Liability’, organised by the Nova Centre on Business, Human Rights and the Environment with the support of the Portuguese presidency of the Council of the EU, 28 January 2021, available at: https://novabhr.novalaw.unl.pt/transcript-keynote-speech-john-ruggie/


The Presidency has been co-hosting, together with the NOVA Centre on Business, Human Rights and the Environment, a cycle of webinars entitled “Business, Human Rights and the Environment in Europe: Connecting the Dots”.

In the opening episode, the Portuguese Secretary of State for Internationalisation, Eurico Brilhante Dias, highlighted that the trio of presidencies comprising Germany, Portugal and Slovenia ‘is committed to drive forward efforts to achieve an EU wide implementation of the UNGPs’.

At the domestic level, the Secretary of State for Commerce, Services and Consumer Protection, João Torres, affirmed the commitment of the Portuguese Ministry for the Economy and Digital Transition to implement the UN Guiding Principles of Business and Human Rights through the adoption of the National Action Plan on Business and Human Rights.


46 urico Brilhante Dias, 'Transcript of the opening speech delivered at the webinar on Corporate Due Diligence and Civil Liability', organised by the Nova Centre on Business, Human Rights and the Environment with the support of the Portuguese presidency of the Council of the EU, 28 January 2021, available at: https://novabhre.novalaw.unl.pt/transcript-opening-speech-secretary-of-state-for-internationalisation/
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THE PROJECT

#GoEAThical – Our Food. Our Future

European youth stand up for sustainable food supply chains that respect migrant workers’ rights and reduce climate change, hunger and poverty as key drivers of migration.

As global citizens of the EU, it is our responsibility to take on the challenges that the world faces. Migration and climate change are at the top of EU citizens’ shared concerns (of development).

Our food system has an enormous influence and impact on climate change and causes of migration (poverty, hunger, etc.). To guarantee a sustainable change in attitudes and behaviours by more than 30 millions young Europeans, we will start from the analysis of food production and consumption systems and show glocal interconnections, established between themes and that demonstrate, plainly, that we all have a starring role in the promotion of more just, dignified and inclusive world.

OUR GOALS

In an active and innovative manner, we will seek to commit European youth to European development policies that contribute to the mitigation of global challenges of migration and climate change and sustainable food production and consumption. We will strengthen the promotion of fundamental European values of human rights and solidarity, as well as the capacity to analyse interdependent relationships established at a glocal level.

OUR IMPACT

To increase the knowledge and engagement of young Europeans in the promotion of values of solidarity and human rights, as well as their ability to face the global challenges of migration, climate change and promote a sustainable food system.

In accordance with the pillars, “People” and “Planet” of the New European Consensus on EU Development and the 2030 Agenda, the #GoEAThical” campaign will mobilize young Europeans to adopt sustainable consumption patterns and actively support sustainable networks of supply of food products, fair trade chains, respect for human and workers’ rights and sustainable development, through improved institutional and business policies at EU and member states level.
About NOVA BHRE:
The NOVA Centre for Business, Human Rights and the Environment (NOVA BHRE) is an academic centre within the Nova School of Law. The main goal of the centre is to contribute to fostering responsible business conduct that upholds respect for human rights, decent work and environmental standards throughout their entire global value chains, thereby also advancing the UN Sustainable Development Goals.

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Because we advocate for gender equality as an intrinsic value to Human Rights, any reference to the masculine form shall also include the feminine where applicable, in order to guarantee respect for gender equality also in writing.