

The Duty of Diligence

Cross references between Environmental law and Company

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An intermediation issue: How efficiently can we regulate multinationals?

The early stages of the EU Corporate Sustainability Due Diligence Directive (CSDD)

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1. Context & Text

2. First cases of dispute

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Content

1. Context & Text





LABOUR RIGHTS PROMOTION

Rana Plaza - Bangladesh,
2013

Outrage as a lever for legislative innovations.
The example of the sinking of the oil tanker Erika and
the compensation for ecological damage.



A context of multinational accountability as a result of growing environmental concerns

- LAW no. 2010-788 of 12 July 2010 on the national commitment to the environment
 - the cost of the restorations measures can be charged to the parent company when a subsidiary is insolvent.
 - Condition: “ establish the existence of a serious fault on the part of the parent company that contributed to the subsidiary's shortfall in assets “
 - NB: it is possible to go back up the chain of parent companies if necessary

1. Context & Text

Apr. 24, 2013

Rana Plaza drama, Bangladesh

March, 27, 2017

Loi n°2017-399 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre



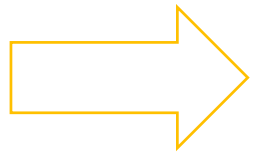
CHANGE IN RULE MAKING: PREVENTION (PLAN) AND (CIVIL) SANCTIONS



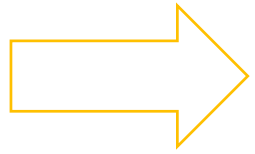
4 YEARS

POWERFUL LOBBYING : threat to businesses and unequal competition....

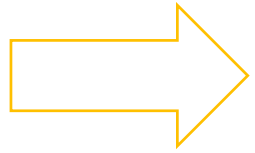
1. Context & Text



Making economic players more accountable



Ensure transparency in trade: economic actors can no longer hide themselves behind their suppliers



Integrating social, governance and environmental impacts into corporate strategy (See EU context: CSRD (2022/2464 EU Dir, Jan. 2024), Regulation 2020/852, June 2020 on the establishment of a framework to facilitate sustainable investment: Taxonomy)

1. Context & Text

WHAT A DUE DILIGENCE PLAN IS NOT:

Extra financial reporting tool

The European Non-Financial Reporting Directive (NFRD) currently governs non-financial performance reporting by European companies, will soon be replaced by a new, more ambitious directive: Directive (EU) 2022/2464, known as the CSRD (Corporate Sustainability Reporting Directive), Jan. 2024

An action for compensation for ecological damage

- Ecological loss is an autonomous ground, which can be claimed in the alternative
- liability action: compensation
- Need to prove damage + fault + causal link = complicated!

A criminal liability system.

No criminal penalties :
no criminal fine (no civil fine either...)
no prison sentence

SCOPE

5000 workers in France

or

10 000 workers Worldwide

OBLIGATIONS

Draw up a due diligence plan mapping the human rights and environmental risks inherent in the activities of the companies concerned, and throughout the production value chain

Implementing risk prevention and mitigation measures

**The entire value chain
Group of companies & suppliers**

THE 5 CORE ELEMENTS OF A DD PLAN

- **Country risk mapping**, designed to identify, analyse and prioritise the risks arising from the activities of parent companies, principals, subcontractors and suppliers.
- Procedures for **regularly assessing** the situation of subsidiaries, subcontractors and suppliers with which the company has an established commercial relationship.
- Appropriate **risk mitigation measures**. Actions must be taken to prevent or mitigate the risks of serious human rights or environmental violations. To this end, social and environmental audits must be carried out at all levels of the value chain.
- A **warning mechanism**. In the event of risk, a prevention and protection mechanism for subcontractors must be presented.
- A system must be in place to **monitor the preventive measures** implemented and evaluate their effectiveness.

Stakeholders participation

Article L. 225-102-4 of the French Commercial Code provides that the **development of the plan** must be done “in association with the stakeholders”

Q&A

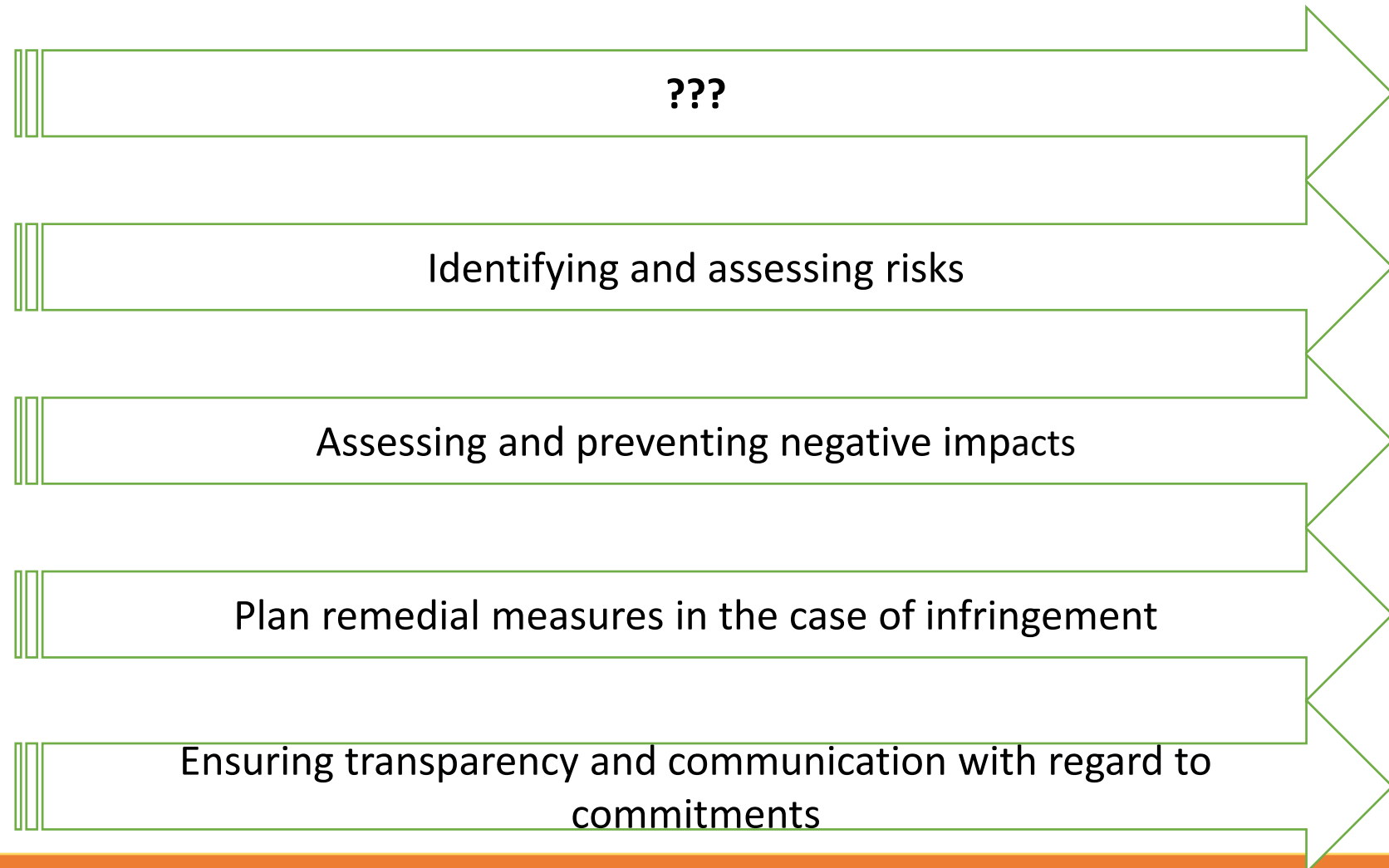
What is Due Diligence?

- For the purposes of this Directive, due diligence means the obligation of a business to **take all proportionate and adequate measures and to make efforts, within its means, to prevent adverse human rights, environmental or good governance impacts from occurring in its value chains, and to address those adverse impacts appropriately** when they do occur. In practice, due diligence is a process put in place by a company to identify, assess, prevent, mitigate, halt, monitor, disclose and address potential or actual adverse impacts on human rights - including social, labour and trade union rights, on the environment, including the contribution to climate change, and on good governance, arising from its own activities and business relationships in the value chain. Companies covered by this Directive should not transfer due diligence obligations onto suppliers".

What is Due diligence?

- In common law, the duty of care “refers to the circumstances and relationships giving rise to an obligation upon a defendant to take proper care to avoid causing some form of foreseeable harm to the claimant in all the circumstances of the case in question”
- Include due diligence measures for companies to **identify and address adverse human rights and environmental impacts**. This encompasses the **following steps: (1) integrating due diligence into policies and management systems, (2) identifying and assessing adverse human rights and environmental impacts, (3) preventing, ceasing or minimising actual and potential adverse human rights, and environmental impacts, (4) assessing the effectiveness of measures, (5) communicating, (6) providing remediation.**(PropDir20)

1. Context & Text: What is a good plan of vigilance ?



1. Context & Text: What is a good DD plan?



Identify and involve all stakeholders in the development (and monitoring?) of the project

Identifying and assessing risks

Assessing and preventing negative impacts

Plan remedial measures in the case of infringement

Ensuring transparency and communication with regard to commitments

What is a « stakeholder »?

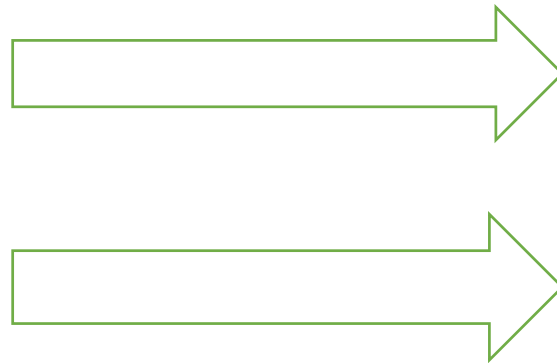
- Different ways :
- 2015 LAW proposal : *all those who take part in its economic life and the players in civil society who are influenced, directly or indirectly, by its activities(...)*
- **UE CSSD proposal** : *«employees of the company, employees of its subsidiaries, trade unions and workers' representatives, consumers and **other persons, groups, communities or entities** whose **rights or interests are or could** be adversely affected by the products, services and activities of the company, its subsidiaries or its **commercial partners.** »*
- *People who have suffered damage could be, for example, Human rights and environmental defenders within the meaning of the United Nations Declaration on Human Rights Defenders.*
- *The groups or communities affected could be, for example, the indigenous peoples protected by the United Nations Declaration on the Rights of Indigenous Peoples.*
- *The aggrieved entities could be, for example, civil society organisations, national human rights institutions or environmental protection institutions."*

What is a « supply chain »?

M. PORTER includes all the activities of a targeted operation, depending on whether they are principal (or operational functions) or support (or support functions).

“Chain of activity” vs
"value chain"?

What about financial
activities?



Chain of activity focuses on the supply chain of companies and **restricts the downstream part**

Included in the scope of the duty of care /excluded in the EU proposal / limited obligations

It is important to break down the value chain when seeking to establish liability: procurement, manufacturing or production, marketing, sales and services

What if an organization doesn't meet the legal requirements ?

Dual basis for action



Action for injunctive relief :
Inadequate or not available due diligence plan



civil liability claim:
Breach of duty of vigilance
Proof of prejudice

Content

2. First cases of dispute

2.1. Constitutional Case law

- The 2017 law was referred to the Constitutional Council in an *a priori* constitutionality review : Decision no. 2017-750 DC of 23 March 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre
- It ruled several points in accordance with the constitution:
 - The obligation to draw up a due diligence plan
 - The formal notice mechanism
 - The possibility for the judge to impose an injunction on the company concerned
 - The possibility of holding the company liable in the event of failure to meet its obligations
- These provisions are therefore validated

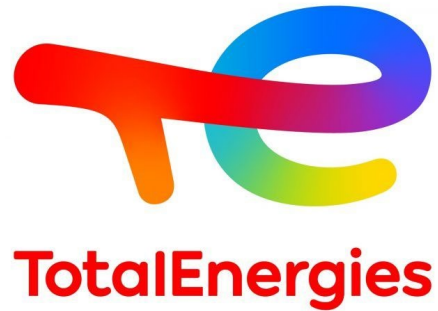
2.1. Constitutional Case law

- Decision no. 2017-750 DC of 23 March 2017 - relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre
- But given the vagueness of the terms used by the legislator to define the obligations it was creating, the Constitutional Council invalidated the provisions instituting a fine.
 - NB: initial law provided that it may be ordered to pay two kinds of civil fines
 - The first one of a maximum of **ten million euros** in the event of a breach of the obligation to draw up a due diligence plan.
 - The amount of the fine was to be set in proportion to the seriousness of the breach, taking into account the circumstances of the breach and the personality of the offender.
 - The second one of a maximum of **thirty million euros** when the breach of obligations causes damage that could have been avoided by the respect of these obligations.
 - The amount of the fine was to be set depending on the seriousness and circumstances of the breach and the damage.

2.1. Constitutional Case law

- Decision no. 2017-750 DC of 23 March 2017 - relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre
- According to the constitutional council:
 - “Taking account of the general nature of the terms used by it (it was about “due diligence measures” or “appropriate risk mitigation actions”), the broad and indeterminate nature of the reference to “human rights” and “fundamental freedoms” and the perimeter of the companies, enterprises and operations that fall within the scope of the oversight plan established by it, **the legislator could not stipulate that any company that has committed a breach defined with such inadequate clarity and precision may be required to pay a fine of up to ten million euros** without violating the requirements resulting from Article 8 of the 1789 Declaration, notwithstanding the objective of general interest pursued by the law referred.”
 - He concluded that there had been a breach of the principle of no punishment without law
 - Consequently, the provisions providing for civil fines have been cancelled.

2.2 Private Case law

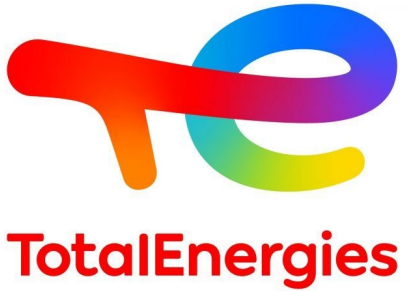


2 actions



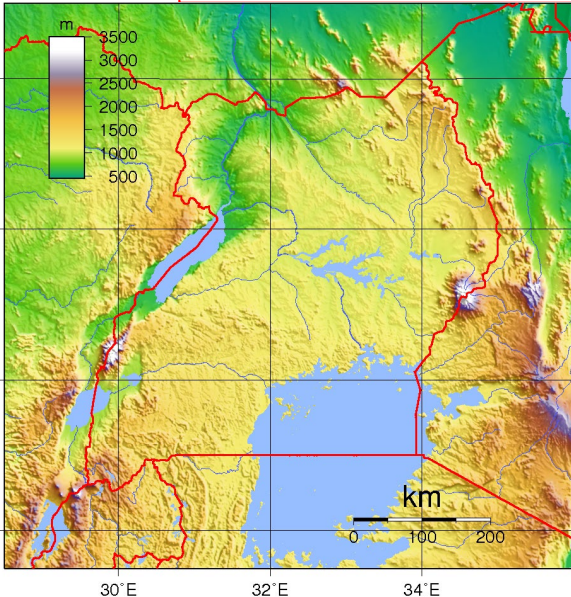
BNP PARIBAS





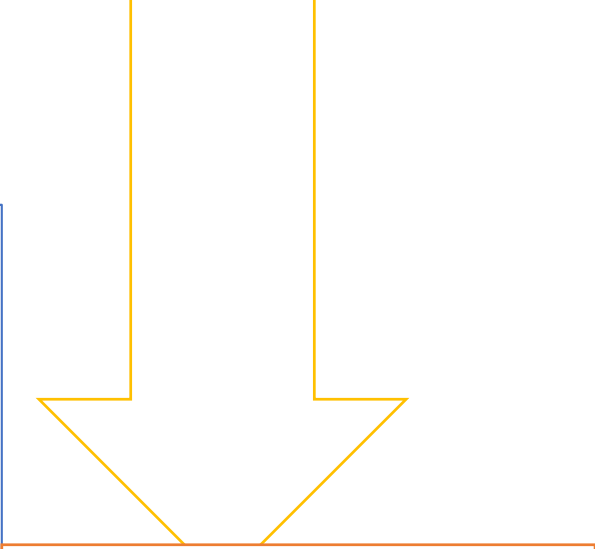
Eacop/Tilenga oil project in Uganda & Tanzania

At stake is the construction of a heated pipeline (1,500 kilometres) and the drilling of 400 wells, crossing a protected area (Murchison Falls National Park) with the displacement of tens of thousands of people (mostly farmers). From an environmental point of view, the carbon footprint of the project is estimated at 33 million tonnes of CO₂ per year.



6 French and Ugandan NGOs (Friends of the Earth France, Survie, AFIEGO, CRED, Friends of the Earth Uganda/NAPE and NAVODA) sued TotalE before A French (Nanterre) court

Jan. 2020 to dec. 2022
Pretrial: Mise en Etat (« MEE »)



Janvier 2023 : 1st audience
Decision: Délibéré : 28 feb.

**MANQUEMENTS GRAVES
À LA LOI SUR LE DEVOIR
DE VIGILANCE : LE CAS**

TOTAL EN OUGANDA

 **Les Amis
de la Terre
France**

 **SURMIE**

V. Magnier & A. Farinetti

ATTEINTES AUX DROITS HUMAINS, AUX LIBERTÉS FONDAMENTALES ET À LA SANTÉ ET SÉCURITÉ DES PERSONNES DANS LE CADRE DU PROJET TILENGA





Eacop/Tilenga oil project in Uganda & Tanzania

NGOs require:

- Compliance of the plan with reality of the projects:
identification of all risks of serious harm associated with the projects
- Effective implementation of these vigilance measures +
emergency measures (compensation)
- Project Suspended as long as none of the above requests
has been met





Eacop/Tilenga oil project in Uganda & Tanzania

1. The judge' complaint :

No implementing decree exist, nor master plan on which to rely:

*"Nothing is provided for in the law on **how to monitor** the effectiveness of the measures
"this legislation assigns too monumental goals of protection of human rights and the
environment"*

*"the law does not directly target **any guiding principle, nor any other pre-established
international standard**, nor does it include a classification of the duties of vigilance imposed
on companies".*



Eacop/Tilenga oil project in Uganda & Tanzania

1. The judicial complaint :

No implementing decree exist, no other charter on which to rely";
*"Nothing is provided for in the law on the effectiveness of the measures
"this legislation assigns the responsibility of human rights and the
environment to certain entities, but the means that must be*

*"the law does not provide for the established
international law on the duties of*

JUSTICE DENIED?



Eacop/Tilenga oil project in Uganda & Tanzania

2. The seised judge has no jurisdictions over the duty of vigilance:

*“Grievances and breaches alleged against TotalEnergies on the basis of its duty of vigilance, in the present case, must be the subject of **an in-depth examination** of the elements of the case **exceeding the powers of the judge of summary proceedings** (...) being observed that **no illegality, as it stands**, is characterized with the evidence required in summary proceedings or in a manifest manner”.*



Eacop/Tilenga oil project in Uganda & Tanzania

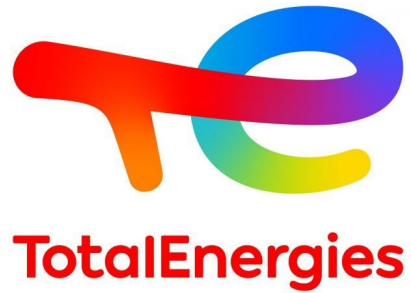
2. The seised judge has a duty of vigilance:
“Grievances and breaches of the duty of vigilance, in the presence of the elements of the offence, with examination of the evidence required being observed”

JUSTICE DELAYED ?



Eacop/Tilenga oil project in Uganda & Tanzania

3. According to the court, the NGOs were not compliant with the procedure, on the grounds that they would have presented at the December 2022 hearings "*substantially different*" grievance from those they had alleged in the 2019 procedure;
-> no possibility to better document or update the facts related to the group's activity, **even when justice is delayed!**



Eacop/Tilenga oil project in Uganda & Tanzania

The judge reproaches NGOs for having produced new documents during the course of the trial, after the initial formal notice was delivered.

Indeed, NGOs have already communicated (2 Y ago) their grievances with regard to the criticized vigilance plan, the requests they underlie and the documents for their support when the court proceedings begin.

According to the usual procedural practice and the requirements of the Code of Civil Procedure (CPC), additional documents may be relevant



Eacop/Tilenga oil project in Uganda & Tanzania

4. The missing Stakeholders:

According to art. L. 225-102-4, the legislator firmly expressed his intention to see the DD plan drawn up within the framework of ***a co-construction and a dialogue between the company's stakeholders and the company***

➤ *the amicable negotiation phase prior to referral to the judge would be **mandatory** and the effectiveness of this negotiation would only be ensured by a "firm and precise" formal notice to identify the breaches attributed to the plan*



Eacop/Tilenga oil project in Uganda & Tanzania

- Does it mean that the judge should intervene only **once the dialogue has failed between the parties?**
- The risk in this redesigning it to empty the trial of an important part of its substance while **leaving the "stakeholders" with no other solution than to confine their requests to the initial grievances,** some are "obsolete" or about to be.



Eacop/Tilenga oil project in Uganda & Tanzania

- Does it mean that the judge should intervene only **once the dialogue has failed between the parties**?
- The risk in this regard is that of an important part of its substance being lost with **no other solution than the one proposed by the State**, some argue. **Advances,**

A DAVID AND GOLIATH CASE?

Limits of the DD Plan when facing climate change issues

LIMITED SCOPE OF COMPANIE

TOO LONG PROCEDURES IN COURT (DELAYS)

**NO INFORMATION REGARDING THE RELEVANT
SCOPE OF COMPANIES**

BAIL PROCEDURES

A VERY FEW COMPANIES ARE COMPLIANT

Content

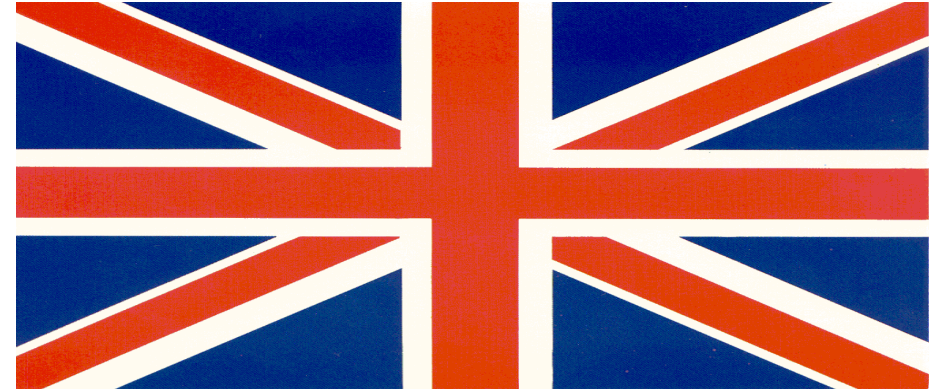
3. Perspectives : comparative and EU perspective: the EU Corporate Sustainability Due Diligence Directive (CSDD)

3.1. Comparative perspectives



Since Jan. 2023

- Companies with + 3000 employees (1000 in 2024)
 - About 900 enterprises
 - independent third party organization of control
 - Fine : 2% WW turnover



Modern Slavery Act (2015)

- Focus on Human rights and workers' rights
- Nothing regarding the Environment!
 - Punitive sanctions (prison)
- Objectives: Mainly aims to fight against slavery and human trafficking, as well as child labor

3.2. EU perspectives



On February 23 2022, the European Commission published a proposal of the **Corporate Sustainability Due Diligence Directive** (CSDD)

On 1 June 2023, the European Parliament has agreed on its position on the Directive

-> It would require both EU and non-EU companies operating within the EU to conduct due diligence on, and take responsibility for, human rights abuses and environmental harm throughout their global value chains

- > Take responsibility for their environmental and social impact – as well as the impact of their supplier



3.2. EU perspectives



Věra Jourová, Vice-President responsible for values and transparency, said:
*"This proposal aims to achieve **two objectives**. Firstly, to respond to the **concerns of consumers** who do not wish to buy products that have been produced using forced labour or that destroy the environment, for example. Secondly, to **support businesses** by providing legal certainty as to their obligations within the single market. This legislation will promote European values in value chains, in a fair and proportionate way."*

3.2. EU perspectives



The proposed Directive was set to affect:

EU incorporated companies with a two sector-based threshold :

500+ employees average, with a net turnover of more than €150 million within the last financial year

250+ employees average, with a net turnover of more than €40 million in the last financial year – IF at least 50 percent of this was generated in **a high-impact sector**. Such high-risk sectors include **textiles, clothing, mineral extraction, agriculture, forestry, fishing or metal manufacturing**.

Non-European companies with

A net turnover of more than €150 million generated within the EU in the last financial year

A net turnover of more than €40 million (but not more than €150 million) generated within the EU – provided at least 50% of its net worldwide turnover was generated in one high-risk sector.

Réduction du champ d'application par rapport au texte de la Commission de février 2022 !

Companies	Generated global (net) turnover	Employees
EU-based companies	Exceeding EUR 40 million	More than 250 employees
EU-based parent companies	Exceeding EUR 150 million	More than 500 employees
Non-EU companies	Exceeding EUR 150 million, provided that at least EUR 40 million is generated from within the EU	N/A
Non-EU parent- companies	Exceeding EUR 150 million, from which at least EUR 40 million was generated in the EU	More than 500 employees

3.2. What are the CSDD requirements ?



- **Conduct due diligence** : to identify and prevent environmental and human rights risks by assessing the potential impact of their operations and their supply chains on the environment and human rights.
- **Mitigate risks** : Organizations must take steps to mitigate any risks identified during due diligence. This may include developing and implementing policies and procedures to address identified risks, as well as engaging with suppliers to address any issues if they arise.
- **Report publicly** : Organizations must be transparent about their due diligence processes and publicly report their efforts to address environmental and human rights risks. This may include publishing an annual sustainability report or making information available on their website.
- **Establish grievance mechanisms** : Organizations must have functional reporting channels for workers and stakeholders to raise concerns, as well as processes to address and follow up. This may include setting up a hotline or email address to report, as well as a process for investigating and addressing those concerns.



3.2 Due diligence procedures should include:

- **Conducting site visits** to assess the supplier operations, environmental and social impact. For example, to check they are operating in line with anti-slavery and health and safety regulations.
- **Reviewing supplier policies and procedures** to check environmental and human rights risks are addressed in your third parties' written processes – and in a way that can be reconciled with information collected in audits.
- **Reviewing regulatory compliance** to ensure the supplier is acting in line with regulatory requirement. This should review any past incidents that might fall under non-compliance with the CSDD as part of the due diligence process, understanding and confirming what actions were taken to fix any issues.
- **Evaluating internal management and processes** both from a regulatory and ethical perspective, and ensuring environmental and human rights risks are handled appropriately, and the business is equipped to deal with issues brought to its attention. This might include checking health and safety policies, policies around working conditions, and means for employees to report issues internally.

3.2. What if an organization doesn't meet the CSDD requirements?



The CSDD includes provisions for **enforcement and penalties** for non-compliance through fines and other sanctions. Failure to address environmental and human rights risks in operations and supply chains can result in **legal action** via national supervisory authorities, as well as **reputational damage**, loss of business and damage to brand value.

Another major risk is being **excluded from public procurement processes** or being subject to additional monitoring and reporting requirements to have access. **Civil liability** may be considered in instances where preventative measures could have avoided any damages.



EU Directive ≠ French procedure

- › *Can NGOs represent victims?* In France, the Constitutional Council has made it clear that an NGO cannot represent a victim in France. However, the EU directive currently **allows for the possibility of representation**. The law may therefore evolve on this point.
- › *Who bears the burden of proof?* Initially, the company would have to prove that it had fulfilled its duty of diligence obligations. However, the regulator reverted to a traditional distribution of the burden of proof (placing it on the claimant).
- › *Who should be sued?* You can sue **the company** bearing the duty of vigilance. The company can **in turn sue its directors**, whether executives or non-executives. The draft Directive covers directors directly.



3.2. What is next?

- The CSDD is closely interlinked with the Corporate Sustainability Reporting Directive (CSRD) from 2021, which outlines more detailed requirements for setting up processes and reporting around due diligence and sustainability.
- On February 9, 2023, the environment committee of the European Parliament voted to reinforce current requirements for climate and environmental protections. On the same date, the committee also voted to include an obligation for organizations within **particular sectors** to assess risk in their value chains for additional environmental risks, including oil spills and pollution.
- Overall, climate change and a tense geopolitical climate marking the first months of 2023 mean the next few years are likely to see tightening laws and regulations around corporate responsibilities. Whether or not an organization operates within the EU, **it's likely corporations across the globe are likely to feel pressure from customers, the press and their respective regulators and governments to take responsibility for their actions as a business**