

**MANDATORY HUMAN RIGHTS  
AND ENVIRONMENTAL DUE DILIGENCE**  
What an EU-level law will mean for business

## INTRODUCTION

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On 29 April 2020, the European Commissioner for Justice, Didier Reynders, [announced his intention](#) to introduce a legislative initiative on mandatory human rights and environmental due diligence ("mHREDD"), and has observed that there is a need for "real regulation, with obligations and with liability".

The proposed mHREDD law will potentially impact a broad range of businesses from all sectors. It is likely that it will apply to EU-domiciled companies, as well as non-EU companies that do business in the single market. However, it is also likely to affect companies that do not do business in the single market, but are in the global value chains of companies required to comply with the law – who will be under increased pressure to demonstrate that they are managing human rights and environmental risks effectively within those value chains. It may also inspire the introduction of mandatory due diligence requirements in other jurisdictions around the world.

Mandatory due diligence requirements have the potential to deliver tangible benefits for companies that are serious about trying to ensure that their business is not involved with adverse human rights

and environmental impacts. For example, some businesses have observed that they would welcome increased certainty regarding government expectations, as well as a more level playing field. Further, a clear and practical law could prove helpful in supporting engagement with senior management and other business colleagues, as well as efforts to drive implementation of effective due diligence processes across the enterprise. A number of companies now have experience of the practical implications of seeking to comply with mandatory due diligence requirements – most notably under the French Duty of Vigilance Law – and some of them are open about the benefits, while recognising aspects of these laws that could be strengthened.

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On 4 November 2020, the Global Business Initiative on Human Rights (GBI) and Clifford Chance hosted a [business dialogue](#) to explore what the proposed mHREDD law is likely to look like and what it will mean for business.

Building on that discussion, this briefing provides a practical overview of the proposed mHREDD law and the processes that will lead to eventual legislation, and shares key considerations for business – as well as other interested stakeholders. It also provides information about the current consultation launched by the European Commission to inform the legislative proposal that it expects to publish this year. The [consultation](#) is open until midnight on 8 February 2021.

## AN OVERVIEW OF THE PROPOSED MANDATORY DUE DILIGENCE LAW

### What's driving the momentum behind mandatory measures on business and human rights?

Since the adoption of the UN Guiding Principles on Business and Human Rights (UNGPs) in 2011, a patchwork of legislative and regulatory developments in different jurisdictions have sought to drive stronger business engagement with human rights risks. Governments have used these measures to encourage the implementation of human rights due diligence processes as set out in the UNGPs. There has been some frustration with the pace of change, and it has often been difficult to demonstrate meaningful improvements for people affected by business' activities.

The ongoing pandemic has once again highlighted that human rights-related risks are endemic in global value chains. Issues highlighted by the pandemic have also prompted an increasing number of investors and companies to join calls for mandatory due diligence. These businesses see a number of potential benefits flowing from mHREDD, including greater certainty, clarity and coherence – and a more level playing field.

Moreover, some States, such as France, have adopted national provisions on mandatory human rights-related due diligence requirements. Other EU Member States, such as Germany and Finland, are currently preparing national laws. This risks causing fragmentation of the legal system and market, and runs counter to the notion of a level-playing field sought after by many business. To avoid these negative consequences, harmonisation at European level is deemed necessary.

### What do we know about the proposed mHREDD law?

The proposed mHREDD law is part of the Commission's Sustainable Corporate Governance initiative that, in turn, forms part of the European Commission's commitment to the European Deal which aims to embed sustainability into corporate governance. It also has the backing of the Council of the European Union and mHREDD is strongly supported by the European Parliament, whose Committee on Legal Affairs has issued recommendations to the European Commission that include proposed draft text for an mHREDD law (the "[JURI proposal](#)"). Other committees of the European Parliament have also endorsed Europe-wide mHREDD.

It is not yet clear to what extent the Commission's eventual proposed text is likely to draw on the JURI

proposal, which includes fairly broad and ambitious provisions and is already subject to numerous proposed amendments. However, Commissioner Reynders has identified some key planned features of mHREDD in recent interviews. These include indicating that the mHREDD obligation could be enforced through civil liability, administrative fines and possibly criminal sanctions for harms suffered as a result from a failure to meet the due diligence obligation.

There are strong indications that the law will take the form of a directive rather than a regulation. A regulation would directly bind all Member States and affected entities or individuals. By contrast, a directive would need to be transposed into domestic law, which may result in Member States adopting different provisions and approaches. The law would be developed through a process known as [Ordinary Legislative Procedure](#).

### Are there other sustainability initiatives that also contain mHREDD elements?

The proposed mHREDD law is one of a number of sustainability initiatives that the EU is pursuing to address human rights and environmental impacts through the lens of due diligence.

Three EU measures illustrate this:

- First, the main focus of the European Commission's approach to environmental and climate change issues has been reflected in the EU's Green Deal. The Green Deal notes some specific actions that relate to prevention, monitoring and remedy – issues that are also relevant especially to the environmental side of mandatory due diligence requirements.
- Second, the EU Conflict Minerals Regulation was adopted in 2017 and became effective on 1 January 2021. It establishes a due diligence obligation that seeks to stem the trade of tin, tantalum, tungsten and gold (so-called "conflict minerals") which are sometimes used to finance armed conflict or are mined using forced labour.
- Third, under the more recently adopted Taxonomy Regulation which entered into force in July 2020, certain economic activities can only be considered sustainable if they have a positive effect on the environment and do no significant harm with regard to social aspects. Importantly, they must align with the OECD Guidelines for Multinational Enterprises ("OECD Guidelines") and the UNGPs in order to be characterised as sustainable.

These initiatives are linked to a certain extent, but they also each target different goals and issues. Coherence, coordination and consistency between these initiatives would clearly be helpful but should not be presumed.

## KEY CONSIDERATIONS FOR BUSINESS (AND OTHER INTERESTED STAKEHOLDERS)

### Will the proposed mHREDD law align with existing standards?

It is likely that the proposed mHREDD law will refer to existing standards that provide frameworks for corporate human rights and environmental due diligence.

The consultation seeks views on several options for a due diligence duty, all of which are intended to rely on existing due diligence standards, such as the OECD Guidelines and UNGPs.

The European Commission also seeks input on a proposed definition of "due diligence duty" crafted for the purposes of the consultation. This definition refers to a legal requirement for companies to establish and implement adequate processes with a view to prevent, mitigate and account for human rights (including labour rights and working conditions), health and environmental impacts, including relating to climate change, both in the company's own operations and in the company's supply chain. It also states that the due diligence duty is inherently risk-based, proportionate and context specific. The central components of this proposed definition closely align with the UNGPs and the OECD Guidelines.

However, it is unclear at this stage how far this definition will be reflected in the mHREDD proposed by the European Commission and whether the European Commission will seek to establish a legal obligation that incorporates, in full, each component of the due diligence envisaged by existing standards for human rights and environmental due diligence. Emerging regulatory requirements on human rights and environmental issues can play a powerful role to drive uptake of the UNGPs and the OECD Guidelines without fully replicating them. The challenge for legislatures is to define the contours of legal duty and consequences for breach so as to deliver the intended objectives of the policies underlying the laws.

### Is the proposed mHREDD law likely to drive meaningful due diligence and reduce adverse impacts?

Key considerations include the following:

- **Application:** The proposed law is likely to apply to EU-domiciled companies of any sector, as well as companies domiciled elsewhere that engage in business within the internal market. It is also expected to apply to companies of all sizes, including SMEs. While smaller companies may need support to comply, or might benefit from simplified requirements that take account of their proportionate size and resources,

including them within the scope of the general mHREDD requirements may help reinforce the message that all businesses have a responsibility to operate with due diligence in the areas of human rights and the environment.

- **Clarity:** Legal obligations need to be articulated with a sufficient level of clarity and specificity, given that there will be legal consequences and exposures for failures to comply. This does not mean prescribing what would be required in every circumstance, which would likely be impossible, but ensuring sufficient clarity to enable a business to assess with reasonable confidence that it has met its obligations. The European Commission's consultation asks various questions that invite feedback on the level of clarity that stakeholders may prefer in terms of detail and specificity. Non-binding guidelines may help illustrate how businesses in different contexts could meet expectations, but should not be relied on to address deficiencies in the clarity of the law. There is a risk that they may come to be perceived as an 'official' reference point for assessing compliance.
- **Practicality:** Legislation needs to be practical and reasonably implementable in order to drive meaningful due diligence and increase accountability. As is recognised in the UNGPs, companies will not necessarily have the resources to address every potential impact across their global operations. For a law to be effective, it needs to acknowledge this reality and impose obligations in a way that supports companies to prioritise their focus, efforts and resources. In terms of lessons from practice, the French Duty of Vigilance Law models one approach that some companies now have experience implementing.
- **Transparency and dialogue:** It is critical that mandatory due diligence requirements be designed in a way that encourages transparency and supports businesses to engage in dialogue with a view to addressing identified human rights and environmental risks in a way that achieves meaningful outcomes. If not designed carefully, legislation could create perverse incentives that have a counter-productive effect on business disclosure and engagement – for example, where the legal risks of disclosure limit options to collaborate with relevant stakeholders to find solutions, or to share lessons learned with peers.
- **Liability and sanctions:** Care will be needed to ensure that liability and sanctions provisions recognise and reinforce the responsibilities of all entities involved in a human rights harm. Provisions that might operate to create legal liability beyond situations in which an entity has caused or contributed to a harm (for example, in situations of direct linkage) should be considered carefully. Further, it is important to recognise that litigation tends to polarise parties' positions – and can in some situations undermine efforts to achieve meaningful outcomes for affected people. While recognising the need to improve paths to remedy for affected people, legislators will need to consider carefully how best to balance these tensions. There may be ways for legislation to complement existing

standards, such as the UNGPs, as well as other approaches to improving access to remedy – for example, those considered through the Office of the High Commissioner for Human Rights’ [Accountability and Remedy Project](#).

While a mHREDD law has the potential to drive more widespread uptake of human rights due diligence by business, it is important that it drives meaningful, rather than checkbox, due diligence. It will be important that due diligence obligations and the potential consequences of non-compliance are framed carefully and informed by emerging insights from practice in order to ensure business efforts are not wasted and achieve meaningful outcomes for affected people. With regard to environmental due diligence, it is still unclear whether there will be any added value. As of today, many environmental laws across the EU already require risk assessments and mitigation or remediation measures.

## OPPORTUNITIES FOR BUSINESS TO ENGAGE WITH THIS PROCESS

### Why is it important for businesses to engage with this process?

Many business practitioners – particularly those leading their companies’ human rights and environmental risk management programmes – have accumulated valuable insights about what works (and what doesn’t) from their experience implementing due diligence processes and managing human rights and environmental risks associated with the business. These insights can help ensure that mandatory due diligence requirements are practical and drive meaningful due diligence and open communication.

Business practitioners’ insights on potential unintended consequences could also be critical to ensuring that mandatory due diligence requirements are effective and achieve positive outcomes for affected people.

### How can businesses engage with this process?

There are a number of opportunities for business to engage with this process. These include:

- Completing the consultation survey before the consultation closes at midnight on 8 February 2021.
- Engaging with peers and through industry organisations to promote thoughtful and constructive engagement with and input into the process.
- Sharing views directly, including through conversations with relevant Member State policymakers, participating in webinars and panel discussions, and through published statements.

Businesses should consider engaging with this process sooner than later; once the European Commission has developed proposed text, opportunities to input into the content and design will be more limited.

### What does the current consultation seek input on?

As noted above, the European Commission has recently launched a public consultation on the proposed mHREDD law – and has expressly encouraged businesses to input.

Relevant to mandatory due diligence measures, the consultation seeks input on:

- The need for and objectives of EU interventions on sustainable corporate governance, including the need for and objectives of an mHREDD law.
- The proposed definition and framing of a mandatory due diligence obligation.
- The likely impact for business and other stakeholders of the proposed mHREDD law – including ways to reduce the burden, particularly for smaller companies.
- Enforcement options and insights from practitioners’ experience engaging with efforts to improve paths to judicial remedy for people affected by companies’ activities, as well as those of their subsidiaries, suppliers and sub-contractors.

The consultation also seeks input into proposed measures to expand directors’ duties.

### What steps should businesses take to get ready for an EU mHREDD law?

The direction of travel towards mandatory due diligence is clear – and it is likely that new laws at the EU and national levels will be developed with reference to the expectations set out in the UNGPs.

Businesses that have not yet started to implement human rights and environmental due diligence processes would be well-advised to do so. Developing and implementing effective due diligence processes takes time, and the more progressed a business is, the better placed it will be to meet mandatory requirements when they are introduced.

It is likely we will see increased focus on processes to measure the effectiveness of human rights and environmental due diligence (and other actions businesses take to identify and manage human rights and environmental risks and issues). Sophisticated and costly due diligence processes are of little value if they do not enable companies to know and show that risks are being managed effectively.

## ENGAGE WITH THE CONSULTATION ON SUSTAINABLE CORPORATE GOVERNANCE

You can access a copy of the consultation questions and complete the survey here:  
<https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance/public-consultation>



### Further resources

Feedback received as part of the ongoing consultation on sustainable corporate governance can be accessed [here](#).

### European Parliament resources

The European Parliament's Committee on Legal Affairs published its [draft report](#) with recommendations to the Commission on corporate due diligence and corporate accountability, which included proposed text for a directive. Amendments to the draft report from members of the Committee on Legal Affairs are currently being tabled, further information on the process is available [here](#).

The Committees of the European Parliament on [International Trade](#), [Development](#) and [Foreign Affairs](#) have also published opinions supporting mHREDD.

This work is at the Parliament's own initiative.

### Business support for mandatory measures

A growing number of companies and business associations have declared their support for mandatory human rights due diligence. Their statements can be accessed [here](#).

### GBI and Clifford Chance resources

Information about the business dialogue jointly organised by GBI and Clifford Chance, which took place on 4 November 2020, can be found [here](#).

Clifford Chance and GBI jointly produced a [practical overview](#) of key human rights-related regulatory developments around the world, which was last updated in May 2020. Clifford Chance has also more recently published an [update](#) focusing on the proposed EU mHREDD law.



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