

# Recent Developments in Business and Human Rights Frameworks in Europe

January 12, 2021

Throughout Europe, human rights and sustainability considerations are of growing importance for businesses, both from a reputational perspective and in terms of risk mitigation. In several jurisdictions across Europe, legislation has been enacted requiring, to varying degrees, that businesses carry out due diligence with respect to the human rights and environmental impacts of their business activities.

At the European level, the EU Council on December 7, 2020 adopted [Regulation \(EU\) 2020/1998](#) and [Council Decision \(CGSP\) 2020/1999](#), which establish a sanctions regime for serious human rights violations and abuses by State and non-State actors – including corporations – worldwide. This includes robust sanctions for those providing financial or other support to perpetrators of human rights abuses. These new rules signal the European authorities’ inclination to further strengthen the regulatory framework in this respect.

This alert memorandum provides an overview of the evolving EU framework, as well as recent developments in the laws of various other European jurisdictions, governing human rights considerations for businesses with respect to their supply chains and business activities. It also covers international instruments to which businesses may have regard as they navigate this changing landscape, and indicates the potential consequences of non-compliance. We note that, in certain countries, the concept of human rights is interpreted broadly to include considerations related to sustainability, in particular environmental considerations.<sup>1</sup> Indeed, human rights and the environment are widely considered to be interdependent. National laws and international institutions are increasingly adopting a right-based approach to environmental protection and apply human rights norms to environmental issues.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors

## Authors

**Caroline Petruzzi McHale**  
[cmchale@cgsh.com](mailto:cmchale@cgsh.com)

**Clara Cibrario Assereto**  
[ccibrarioassereto@cgsh.com](mailto:ccibrarioassereto@cgsh.com)

**Ferdisha Snagg**  
[fsnagg@cgsh.com](mailto:fsnagg@cgsh.com)

**Géraldine Bourguignon**  
[gbourguignon@cgsh.com](mailto:gbourguignon@cgsh.com)

**Giulia Checcacci**  
[gcheccacci@cgsh.com](mailto:gcheccacci@cgsh.com)

**Hakima Ben Azzouz**  
[hbenazzouz@cgsh.com](mailto:hbenazzouz@cgsh.com)

**Laura Melusine Baudenbacher**  
[lbaudenbacher@cgsh.com](mailto:lbaudenbacher@cgsh.com)

**Laurie Achtouk-Spivak**  
[Lachtoukspivak@cgsh.com](mailto:Lachtoukspivak@cgsh.com)

**Marc Baldauf**  
[mbaldauf@cgsh.com](mailto:mbaldauf@cgsh.com)

**Marina Zarubin**  
[mzarubin@cgsh.com](mailto:mzarubin@cgsh.com)

**Maurits Dolmans**  
[mdolmans@cgsh.com](mailto:mdolmans@cgsh.com)

**Robert Garden**  
[rgarden@cgsh.com](mailto:rgarden@cgsh.com)

<sup>1</sup> See, e.g., *The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v. Stichting Urgenda*, Supreme Court of the Netherlands, Civil Division No. 19/00135, Judgment (Dec. 20, 2019), ¶ 7.5.1 (noting that the State has a “positive obligation” under Articles 2 and 8 of the European Convention on Human Rights, protecting the right to life and the right to respect for private and family life, “to take appropriate measures to prevent dangerous climate change,” that requires “as an absolute minimum” compliance with emissions targets).  
clearygottlieb.com



## I. The Recent Evolution of the EU Human Rights Framework and Specific Due Diligence Obligations

On December 7, 2020, the EU Council adopted [Regulation \(EU\) 2020/1998](#) and [Council Decision \(CFSP\) 2020/1999](#), establishing restrictive measures to target those engaged in serious human rights violations and abuses worldwide. The Regulation applies to individuals, corporations, and State actors.<sup>2</sup>

The framework is robust, setting stringent sanctions for the perpetrators of serious human rights violations and abuses with regard to customary international law and widely accepted instruments of international law.<sup>3</sup> Possible sanctions under the Regulation may include the freezing of funds and economic resources of entities listed as being in breach, including of persons “who provide financial, technical, or material support for or are otherwise involved” in serious human rights abuses, as identified by the EU Council.<sup>4</sup> On December 18, 2020, the Commission published [guidance](#) on the implementation of the Regulation, noting that “[i]n principle, conducting business with a listed person involves financial transactions,” and would therefore likely be in breach. Further possible sanctions under the Council Decision include the imposition of travel bans on individuals in breach.<sup>5</sup> As the Commission’s recent [guidance](#) confirms, the sanctions regime creates “legal operations for all EU operators, and in respect of any business conducted within the EU.”<sup>6</sup> Businesses incorporated or carrying out business in the EU should monitor the implementation of the regime, including the future list of targeted entities or persons.

Separately, in the context of the Green Deal,<sup>7</sup> the EU is proposing new legislation to prioritize climate goals in EU policy-making, including with respect to supply chains.<sup>8</sup> Building on this momentum and following the outbreak of COVID-19, calls from business leaders, advocacy groups and NGOs have underscored the importance of placing sustainability considerations at the heart of the pandemic recovery. Over the course of the last year, the Commission has also committed to introduce legislation for mandatory human rights and environmental due diligence on global supply chains by 2021.<sup>9</sup> A United Nations working group also issued a second revised draft of an instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.<sup>10</sup>

To date, two regulations have been adopted at the EU level dealing explicitly with human rights and environmental due diligence obligations incumbent on businesses, setting out obligations for businesses in relation to particular commodities. The Conflict Minerals Regulation ([Regulation \(EU\) 2017/821](#)), requires that, from January 1, 2021, EU importers of tin, tantalum, tungsten, their ores, and gold carry out due diligence on their supply chain, to ensure that the minerals and metals have been mined and processed responsibly,<sup>11</sup> in particular to prevent links between their supply chains and the funding of armed conflict. Separately, businesses that place timber and timber products on the common market are required to comply with the EU Timber Regulation ([Regulation \(EU\) No 995/2010](#)), which prohibits illegally harvested timber or timber products and requires operators to exercise due diligence when placing

<sup>2</sup> [Regulation \(EU\) 2020/1998](#), Article 2(3).

<sup>3</sup> [Regulation \(EU\) 2020/1998](#), Article 2.

<sup>4</sup> [Regulation \(EU\) 2020/1998](#), Article 3.

<sup>5</sup> [Council Decision \(CFSP\) 2020/1999](#), Article 2.

<sup>6</sup> See also [Regulation \(EU\) 2020/1998](#), Article 19.

<sup>7</sup> See Cleary Gottlieb Alert Memorandum, “[A Sustainable Recovery for Europe: The EU’s Green Deal](#)” (July 9, 2020).

<sup>8</sup> See Cleary Gottlieb Alert Memorandum, “[Navigating COVID-19: Supply Chain Considerations](#)” (July 15, 2020).

<sup>9</sup> See European Parliament, Briefing, [Towards a mandatory EU system of due diligence for supply chains](#) (October 2020).

<sup>10</sup> See United Nations Open-Ended Intergovernmental Working Group on Transnational Corporations and [Other Business Enterprises with Respect to Human Rights, Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises](#) (Draft of August 6, 2020).

<sup>11</sup> [Conflict Minerals Regulation](#), Article 5. See also European Commission, [The EU’s new Conflict Minerals Regulation Guidance](#) (March 2017).

timber products on the common market.<sup>12</sup> The aforementioned regulations have, or will have, direct effect in EU Member States.

In addition, since 2017, under the Non-Financial Reporting Directive (the “NFRD”) ([Directive 2014/95/EU](#)), large listed companies, banks and insurance companies that qualify as public-interest entities are required to publish reports on the policies they implement in relation to certain sustainability-related matters, including respect for human rights, as set forth in further detail in the Commission’s 2017 [Guidelines on non-financial reporting](#). In its 2019 Guidelines, the Commission issued further guidance on disclosure of climate-related information.<sup>13</sup> The NFRD is currently under review and is expected to be turned into a Regulation in 2021.

## II. Recent Evolutions in Domestic Legislation across Selected EU Member States

### 1. France

In 2017, France enacted its Duty of Care Law, which modifies provisions of the French Commercial Code and requires corporations with their headquarters and 5,000 employees in France, or 10,000 employees worldwide, to publish a vigilance plan, including risk assessment, prioritization, evaluation, mitigation efforts and effectiveness checks for violations of human rights and fundamental freedoms, as well as health, safety and environmental impact.<sup>14</sup>

Violations of these provisions may result in penalty payments for delays. The law covers actions of parents and “connected companies.” Violations abroad are within the scope of the law, while it is still

<sup>12</sup> [EU Timber Regulation](#), Article 4.

<sup>13</sup> See Official Journal of the European Union, [Guidelines on non-financial reporting: Supplement on reporting climate-related information](#), 2019/C 209/01.

<sup>14</sup> See [Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre](#).

<sup>15</sup> See [Loi n° 2015-992 du 17 août 2015 relative à la transition énergétique pour la croissance verte](#).

<sup>16</sup> See [Décret n° 2015-1850 du 29 décembre 2015 pris en application de l'article L. 533-22-1 du code monétaire et financier](#).

disputed whether the law is applicable for French subsidiaries of non-French corporations abroad.

Separately, Article 173 of the 2015 French Energy Transition Law requires mandatory evaluation, reporting and addressing of financial risks related to climate change of listed companies and asset managers.<sup>15</sup> Disclosures are subject to review by the applicable French regulatory authorities (the *Autorité des marchés financiers* for listed companies and asset managers and the *Autorité de contrôle prudentiel et de résolution* for insurance companies), which may impose sanctions in the case of misleading or incomplete disclosure.<sup>16</sup>

### 2. Germany

The German Minister for Economic Cooperation and Development has expressed his intention to introduce mandatory human rights due diligence in supply chains as part of the “Economy and Human Rights” [national action plan](#). A draft proposal of a law on sustainable supply chains, including a new due diligence law, was published in 2020, proposing fines and criminal liability for non-compliance.<sup>17</sup> The draft proposal, including the scope of liability, is still being debated.

Prior to any such law being enacted, German companies must nevertheless comply with the EU Conflict Minerals Regulation discussed above, which has been implemented in German law and entered into force on January 1, 2021.<sup>18</sup>

Further, various proceedings have been commenced before the regional courts, for example claiming compensation for damages caused by company’s

<sup>17</sup> See Federal Ministry of Labour and Social Affairs, [Entwurf für Eckpunkte eines Bundesgesetzes über die Stärkung der unternehmerischen Sorgfaltspflichten zur Vermeidung von Menschenrechtsverletzungen in globalen Wertschöpfungsketten \(Sorgfaltspflichtengesetz\)](#) (March 11, 2020).

<sup>18</sup> See [Law implementing Regulation \(EU\) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down obligations to comply with supply chain due diligence obligations for union importers of tin, tantalum, tungsten, their ores and gold from conflict and high-risk areas](#).

activities in relation to climate change and labor rights violations.

### 3. Italy

In Italy, Legislative Decree no. 231/2001, which first introduced quasi-criminal corporate liability, requires firms to establish policies and internal procedures for the identification, redress and prevention of specific crimes, which include human rights violations (including, among others, acts of slavery, racism, as well as environmental crimes).<sup>19</sup>

In 2016, Italy adopted a five-year [national action plan](#) for the local implementation of the United Nation's Guiding Principles on Business and Human Rights (or "UNGPs," discussed below), including setting out the government's expectations with respect to the compliance by Italian corporations with human rights and corporate due diligence standards. Although these expectations are not technically binding on companies, they are presented by the government as both an explanation of the principles set forth under Article 41 of the Italian Constitution (according to which "[private enterprise] may not be carried out against the common good or in such a manner that might damage safety, liberty and human dignity"), and the provisions of Decree 231/2001.

### 4. The Netherlands

Prospective human rights due diligence laws have been proposed in the Netherlands, with the decision regarding the adoption of such law initially planned for 2020.<sup>20</sup>

Further, the Dutch Child Labour Duty of Care Act was enacted in October 2019, requiring that companies

selling goods and services to Dutch end-users must lay out a plan of action on how to eliminate instances of child labor in their supply chains, and issue a due diligence statement on their investigations to this end.<sup>21</sup> The law also shall put in place a duty of care and introduce criminal sanctions for failure to perform due diligence. The law is unlikely to enter into force before 2022.

Various proceedings have also been commenced before the Dutch courts in relation to the global human rights and environmental impacts of Dutch corporations, including bringing claims under tort law.

### 5. Belgium

Belgium has not adopted a legal framework on human rights or sustainability due diligence specifically. Some of the principles are, however, partly covered in other legislation or principles.

In June 2017, Belgium implemented the UNGPs discussed below by adopting a non-binding Belgian "National Action Plan for Enterprises and Human Rights."<sup>22</sup> A Belgian National Baseline Assessment is currently ongoing.<sup>23</sup> Intermediate findings were presented in October 2020 and a stakeholder consultation is scheduled to take place in January 2021. In that context, one action point consists of incorporating the principle of due diligence into company management, in particular with respect to human rights, through an amendment of the corporate governance codes applicable to Belgian companies.<sup>24</sup>

As for supply chain due diligence requirements, Belgian law was amended in 2011 and 2014 to include criminal sanctions for violations of the rules set out in the Timber Regulation, but only limited action has

<sup>19</sup> Although liability under Legislative Decree no. 231/2001 is labelled "administrative," it has in practice a criminal nature since infringements are investigated by public prosecutors and adjudicated by criminal courts, in parallel with the prosecution of the individuals' related crimes and in accordance with the code of criminal procedure.

<sup>20</sup> See Government of the Netherlands, [International Corporate Social Responsibility](#) (2020).

<sup>21</sup> See [Law of 24 October 2019 introducing a duty of care to prevent the supply of goods and services created through child labour \(Child Labour Duty of Care Act\)](#).

<sup>22</sup> See [National Action Plans on Business and Human Rights – Belgium](#) (June 23, 2017).

<sup>23</sup> See [Belgian National Baseline Assessment on business and human rights](#) (2020).

<sup>24</sup> Specifically, the Belgian Corporate Governance Code 2020 applies to Belgian listed companies on a comply-or-explain basis and already places an emphasis on sustainable value creation.

been taken so far with respect to the Conflict Minerals Regulation.<sup>25</sup>

Further developments are expected in the near future. The new Belgian federal government, appointed in October 2020, has earmarked a number of human rights related initiatives in its coalition agreement. For example, the government committed to actively participate in the negotiations on the future United Nations Convention on Business and Human Rights. The government also intends to take a leading role in the further developments of a European legal framework on the duty of care, and will likely develop a national supporting framework to this end.

### III. Recent Evolutions in Domestic Legislation in Other European Jurisdictions

#### 1. United Kingdom

After the precise scope of the UK's Brexit arrangements has been determined,<sup>26</sup> the UK is beginning to develop its own post-Brexit framework with respect to human rights matters, for example through the establishment in July 2020 of its own human rights sanctions regime with the introduction of The Global Human Rights Sanctions Regulations 2020, listing designated persons against whom sanctions are imposed for human rights abuses, including asset freezes and bans on entering the UK. UK persons are prohibited from dealing with funds or economic resources owned, held or controlled by such designated persons, or from making funds available to or for the benefit of designated persons.

UK corporations and their directors are subject to various duties under general corporate law requiring that due regard be paid to issues of human rights and

sustainability. In addition to the general duties of directors to have regard to “the impact of the company’s operations on the community and the environment,”<sup>27</sup> directors of UK companies must prepare a strategic report for each financial year, which must disclose, where appropriate, information relating to environmental matters and employee matters, unless the company falls within a small companies exemption. Further requirements are in place for listed companies, the reports of which shall include, where appropriate, information about environmental matters (including the impact of the company’s impact on the environment), employee matters, and social, community and human rights issues, including information about any policies in place in relation to these matters.<sup>28</sup>

The United Kingdom was the first state to implement the UNGPs by publishing a national action plan, which resulted notably in the introduction of The Modern Slavery Act 2015, requiring all organizations supplying goods or services in the UK with worldwide revenue of at least GBP 36 million to publish an annual transparency statement describing any steps they have taken in the last financial year to ensure their business and supply chains are free from modern slavery and human trafficking.<sup>29</sup> As set out in our prior [alert memorandum](#), the obligation to publish a transparency statement may be enforced through an injunction, and failure to comply with such injunction may lead to an unlimited fine. In September 2020, the UK Home Office published its response to a consultation on amendments to The Modern Slavery Act 2015, with further proposals including the

<sup>25</sup> [See Law of December 21, 1998 on Product Standards to Promote Sustainable Production and Consumption Patterns and to Protect the Environment, Public Health and Workers](#), Article 15 §5 and Article 17 §1, 15°.

<sup>26</sup> On the basis of the provisions of the EU (Withdrawal) Act 2018 and following the end of the transition period on December 31, 2020, the EU Charter of Fundamental Rights no longer applies. The European Convention on Human Rights, which the UK remains a party to and has been implemented in the UK via the Human Rights Act 1998,

continues to apply. For further information regarding the framework applicable following the Brexit transition, *see*, e.g., Cleary Gottlieb Alert Memorandum, [“The UK’s Post-Brexit Financial Services Regulatory Framework – Details Emerge”](#) (June 26, 2020).

<sup>27</sup> Companies Act 2006, Section 172.

<sup>28</sup> Companies Act 2006, Section 414C.

<sup>29</sup> The Modern Slavery Act 2015, Section 54; The Modern Slavery Act 2015 (Transparency in Supply Chains) Regulations 2015, Section 2.

identification of group companies in group annual transparency statements.<sup>30</sup>

Many have called, however, for stronger measures on human rights and business supply chains. On February 11, 2020, the British Institute of International and Comparative Law published a report examining the legal feasibility of introducing into UK law a corporate duty to prevent human rights harms.<sup>31</sup> The report was based on the recommendation of a UK Joint Committee on Human Rights to introduce a new legal duty on all companies, including parent companies, to prevent human rights abuses, with failure to do so becoming an offence.

Further requirements with respect to environmental sustainability are also likely to be introduced for businesses, including under the Environment Bill currently before parliament. The scope of the bill is wide-reaching, including – on the bill’s current wording – requiring certain businesses creating a deforestation risk internationally in their supply chains in relation to their UK business activities to implement a due diligence system.<sup>32</sup> Regulators have also called for the staggered introduction of mandatory climate risk disclosure requirements by 2025, beginning with certain financial institutions and premium listed companies.<sup>33</sup>

In addition to statutory duties, existing common law frameworks of tort and contract have been used to bring claims in England relating to human rights or environmental issues arising overseas.<sup>34</sup>

## 2. Switzerland

Switzerland, which is not an EU Member State nor a member of the EEA, has recently seen important developments in the area of human rights and corporate governance reporting.

On November 29, 2020, a referendum tabled by the popular “Corporate Justice Initiative,” seeking to introduce mandatory due diligence requirements and parent liability for international violations of human rights and environmental standards, was rejected by the majority of Swiss cantons.<sup>35</sup> However, following the initiative’s rejection, the Swiss Parliament’s “Indirect Counterproposal”<sup>36</sup> is expected to come into force in the first half of 2021, assuming no successful referendum in opposition is launched. If the Indirect Counterproposal is introduced, the reporting obligations will enter into force as of the first financial year that begins one year after the entry into force.

The Indirect Counterproposal would introduce non-financial reporting obligations and due diligence obligations for certain companies and / or sectors, as well as sanctions for violations of these reporting obligations. The new rules mirror the EU’s NFRD. If enacted, large public-interest companies with more than 500 employees, and either total group assets exceeding CHF 20 million or group revenues exceeding CHF 40 million in two consecutive financial years,<sup>37</sup> shall be required to provide an account of Human rights issues (in addition to environmental, social, employment and anti-corruption issues).

<sup>30</sup> See Home Office, [Transparency in supply chains consultations, Government response](#) (September 22, 2020).

<sup>31</sup> See British Institute of International and Comparative Law, [“A UK Failure to Prevent Mechanism for Corporate Human Rights Harms”](#) (February 11, 2020).

<sup>32</sup> Environment Bill, Schedule 16.

<sup>33</sup> HM Treasury, [Interim Report of the UK’s Joint Government-Regulator TCFD Taskforce](#) (November 2020), Chapter 2.

<sup>34</sup> See, e.g., J. Brady, S. Haddad, H. Whitney, [Managing Risk in Multinationals: Parental Responsibility](#), PLC Magazine (2019).

<sup>35</sup> The rejection by the cantons took precedence over the popular vote in favor of the initiative by 50.7%, against 49.3%.

<sup>36</sup> See [Indirekter Gegenvorschlag zur Volksinitiative «Für verantwortungsvolle Unternehmen – zum Schutz von Mensch und Umwelt, Änderung vom 19. Juni 2020](#).

<sup>37</sup> An exemption applies to companies controlled by an entity already underlying the above-mentioned reporting obligations or to companies underlying similar reporting obligations in another jurisdiction.

The Indirect Counterproposal, if enacted, would also introduce new supply chain due diligence and reporting obligations for companies incorporated in or with head offices in Switzerland which import or process minerals or metals containing tin, tantalum, tungsten or gold from conflict or high-risk regions, or offer products or services where there are clear grounds to suspect they have been manufactured or offered using child labor.

#### IV. International Framework

In addition to obligations for corporations under domestic or European law, international frameworks have been developed, to which corporations or States may adhere.

##### *Major International Frameworks:*

UN Guiding Principles on Business and Human Rights

OECD Guidelines for Multinational Enterprises

UN Global Compact

##### 1. UN Guiding Principles on Business and Human Rights

The UNGPs, endorsed by the UN Human Rights Council and the European Union in 2011, are the most authoritative international statement of the responsibilities of States and businesses in preventing and addressing the human rights consequences of business activities. The UNGPs establish a corporate

<sup>38</sup> [UN Guiding Principles on Business and Human Rights](#), Principle 11 (“Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address human rights impacts with which they are involved”).

<sup>39</sup> [UN Guiding Principles on Business and Human Rights](#), Principle 15. *See also ibid*, Principles 17-20.

<sup>40</sup> Office of the UN High Commissioner for Human Rights, [State national action plans on Business and Human Rights](#).

<sup>41</sup> [OECD Guidelines](#), pp. 19-20. *See also* [OECD Due Diligence Guidance for Responsible Business Conduct](#) (2018).

responsibility to respect human rights,<sup>38</sup> and require businesses, inter alia, to establish “[a] human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights.”<sup>39</sup>

The UNGPs are not binding international law. However, 24 States, the majority of which are EU Member States, have published national action plans on the implementation of the principles domestically.<sup>40</sup>

##### 2. OECD Guidelines for Multinational Enterprises

The Organisation for Economic Co-operation and Development’s Guidelines for Multinational Enterprises (the “OECD Guidelines”), adopted in 1976 and subsequently revised on a number of occasions, most recently in 2011, require enterprises, inter alia, to “[c]ontribute to economic, environmental and social progress with a view to achieving sustainable development,” to “[r]espect the internationally recognised human rights of those affected by their activities,” and “[c]arry out risk-based due diligence.”<sup>41</sup> Additional sector-specific guidance for due diligence can be found from the OECD for the minerals, agriculture and garment and footwear sectors,<sup>42</sup> as well as the International Labour Organization.<sup>43</sup>

According to due diligence guidance issued by the OECD,<sup>44</sup> companies should identify potential human rights and environmental impacts as criteria for evaluating suppliers. To identify potential impacts, companies should gather information related to their specific sector, geography and enterprise-specific risk

<sup>42</sup> *See* [OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas](#) (2016); [OECD-FAO Guidance for Responsible Agricultural Supply Chains](#) (2016); [OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Section](#) (2017).

<sup>43</sup> International Labour Organisation, [Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy](#) (2017).

<sup>44</sup> *See* [OECD Due Diligence Guidance for Responsible Business Conduct](#) (2018).

factors by consulting reports from various sources including, governments, international organizations, civil society organizations, trade unions and national human rights institutions. Companies should prioritize risks and obtain information on sub-suppliers when appropriate and feasible. With this information, impacts can be evaluated through the companies' human rights and environmental impact assessments. The position of the company in the supply chain will also determine the scope and focus of their assessments.

Additionally, OECD guidance outlines comprehensive steps for due diligence that can lower risks that a company's supply chain contributes to human rights abuses. This includes taking steps to cease, prevent and mitigate these impacts. Impacts that can be immediately addressed may result in updated contract terms with suppliers, while other risks may require long term assessments and action plans. A larger enterprise is encouraged to identify control points in its supply chains where information can be gathered on traceability and actions can be taken for auditing. Companies may also use their leverage with their business relationships and suppliers to mitigate and prevent risk, such as preparing policies, codes of conduct, contracts, written agreements and corrective actions plans.

Although the OECD guidance discussed above is non-binding, 49 States that adhere to the OECD Guidelines have created National Contact Points ("NCPs") to oversee their enforcement.<sup>45</sup> Affected parties may commence procedures relating to breaches of the OECD Guidelines before NCPs, which are expected to

assist the parties in reaching a settlement or a conciliatory solution with respect to the issues raised.<sup>46</sup>

### 3. UN Global Compact

Businesses may also sign the UN Global Compact, a voluntary and non-binding pact amongst businesses to encourage the adoption of sustainable and socially responsible policies and to report on their implementation. Over 11,000 corporations are currently signatories. The UN Global Compact provides, *inter alia*, that "[b]usinesses should support and respect the protection of internationally proclaimed human rights," and "make sure they are not complicit in human rights abuses,"<sup>47</sup> as well as to "support a precautionary approach to environmental challenges" and "undertake initiatives to promote greater environmental responsibility."<sup>48</sup>

Although the major international frameworks setting out human rights, sustainability and due diligence obligations on corporations are non-binding, non-compliance with such "soft-law" instruments may be considered in the context of access to public sector or development financing or in the context of public procurement decisions.<sup>49</sup>

### V. Outlook and Practical Steps

The human rights frameworks for business continue to evolve at national, European, and international level. Several governments have currently tabled or recently enacted proposals. The patchwork of different regimes requires careful navigation. In particular, corporate groups will have to assess the extent to which they may face overlapping liabilities, and the extent to which parent companies may be held liable for the human rights (and environmental) impacts of their

<sup>45</sup> [Annual Report on the OECD Guidelines for Multinational Enterprises 2019](#), p. 7.

<sup>46</sup> [OECD Guidelines](#), pp. 83-84.

<sup>47</sup> UN Global Compact, [The Ten Principles of the UN Global Compact](#), Principles 1-2.

<sup>48</sup> UN Global Compact, [The Ten Principles of the UN Global Compact](#), Principles 7-8.

<sup>49</sup> See, e.g., Organisation for Economic Co-operation and Development, [Responsible business conduct for institutional investors: Key considerations for due diligence under the OECD Guidelines for Multinational Enterprises](#) (2017), p.

46; Office of the UN High Commissioner for Human Rights, [Frequently Asked Questions about the Guiding Principles on Business and Human Rights](#) (2014), p. 16 ("[T]he Performance Standards on Environmental and Social Sustainability of the International Finance Corporation, the private-sector lending arm of the World Bank, were updated in 2011 and correspond in important aspects with the corporate responsibility to respect set out in the Guiding Principles"); [Directive 2014/24/EU of 26 February 2014 on public procurement](#), in particular Article 18(2).



subsidiaries, joint venture partners or supply chain partners, including with respect to business activities that take place outside of the European Union.

In addition to potential liability for corporations and, potentially, their directors, businesses should consider other legal consequences of failure to conduct human rights (or environmental) due diligence, in particular through the possible breach of contractual obligations, including the triggering of events of default under financing arrangements, or potential exclusion from public procurement processes or financing from public sources.

Given the scope of the measures surveyed in this alert memorandum, businesses worldwide should closely consider the human rights impacts of their supply chains, and measures that may be taken in response.

## **VI. Related Publications by Cleary**

For more on this topic, see the website of our Sustainability practice group, available [here](#).

...

CLEARY GOTTLIB