

Accountability as part of Mandatory Human Rights Due Diligence



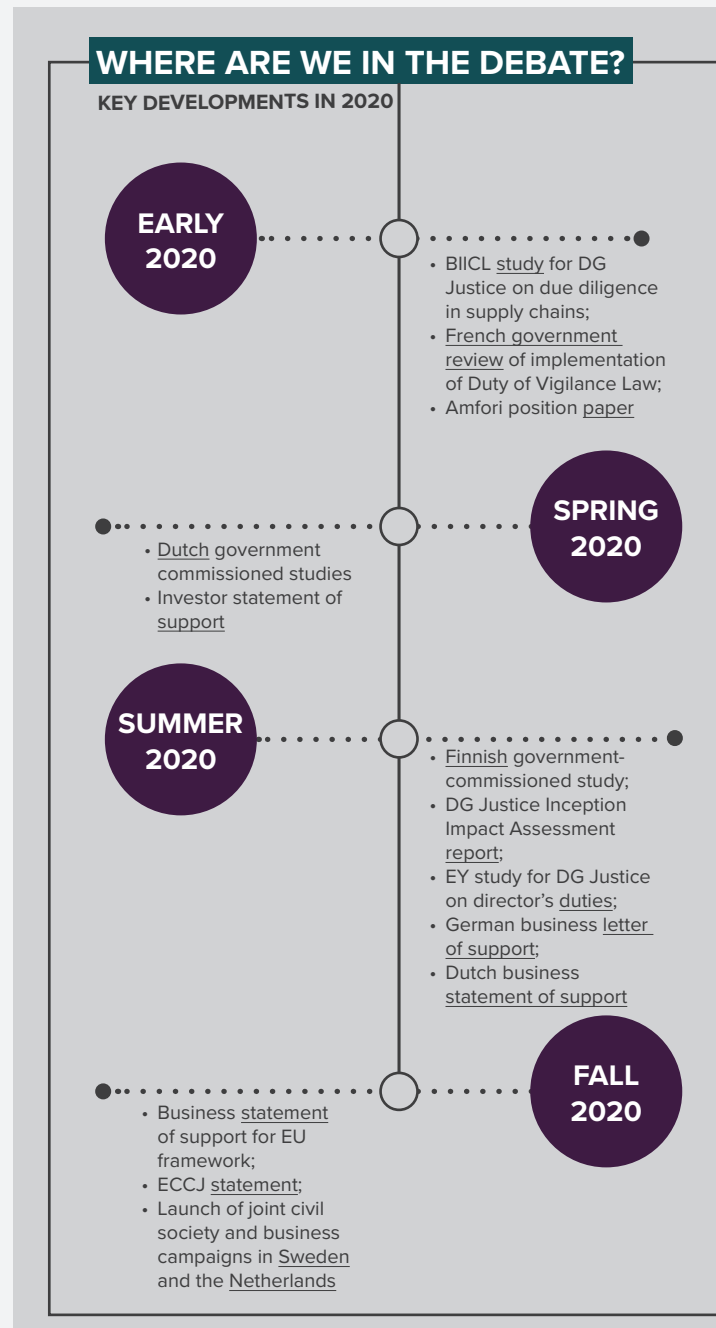
THREE KEY CONSIDERATIONS FOR BUSINESS

Fall 2020

The European debate on mandatory human rights due diligence (HRDD) has gained significant momentum in the last year. A number of national initiatives are coming to a head in late 2020, and the European Commission is launching a formal consultation on a potential EU-wide regime on mandatory human rights and environmental due diligence. We have seen growing business support for mandatory HRDD, from both individual companies and business associations, as well as an increase in joint calls by business and civil society for such measures.

As we approach this critical moment, we have been working hard at Shift to support constructive discussions among government, business and civil society allies about the role and content of new regulation. In particular, we have been engaging with businesses that are supportive of new measures, but have concerns about what shape it might take and what the consequences might be.

In this briefing note, we explore what well-designed mandatory HRDD measures could look like, with a focus on the role of accountability – or consequences – for meeting a new legal standard of conduct. We set out three key considerations that we believe businesses that are committed to meeting their responsibility to respect human rights should keep in mind. While there are important areas of overlap with new environmental due diligence measures due to the impacts on people of environmental harms (including climate change), we focus here on mandatory HRDD grounded in the UN Guiding Principles on Business and Human Rights (UNGPs). ►►



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FEATURES OF EFFECTIVE MANDATORY HRDD

Well-designed mandatory HRDD regimes have the potential to drive better outcomes for people by scaling uptake by business of the UN Guiding Principles, the OECD Guidelines for Multinational Enterprises, and the international human rights standards underpinning them. To be effective, such regimes should:

- ⦿ Require companies to progressively strengthen and deepen their **due diligence** to prevent and address human rights risks **throughout their value chains**;
- ⦿ Set an expectation that companies should put in place the **governance and culture** necessary to enable their HRDD to be effective and inform business practices;
- ⦿ Reflect the **global nature** of the expectations on businesses in the UN Guiding Principles while allowing for **appropriate flexibility and proportionality in implementation**, depending on the size of the business and the severity of its human rights risks;
- ⦿ Recognize the efforts of those businesses that demonstrate they are taking **meaningful steps towards meeting** this standard of conduct, and employ a range of **accountability measures** to drive wider uptake – from liability through to positive incentives, as we discuss further below;
- ⦿ Reflect the **dynamism in the concept of a “smart mix”** of measures by states, which demands an ongoing interplay between new regulations, policy measures and support to voluntary efforts by business, with each strengthening the effect of the others in driving a **measurable increase** in business respect for human rights over time.

In our conversations with business, we see increasing interest in, and support for, mandatory HRDD among both individual companies and business associations with a commitment to sustainability. Many see it as having the potential to level the playing field for companies that are already carrying out HRDD, and provide greater leverage with business partners in seeking to address human rights risks. However, even in discussions with companies that are positive about mandatory HRDD, we often find that the issue of accountability for meeting a new legal standard is a source of both concern and confusion.

For any measure that requires companies to meet a standard of conduct to be successful, there needs to be some form of consequence for companies that fail to act appropriately. For example, many stakeholders, including business, have critiqued existing human rights reporting requirements (including those focused on modern slavery) for the lack of consequences for non-compliance. If mandatory HRDD is actually going to help level the playing field in practice, then it needs to be accompanied by consequences that will be strong enough to ensure that a critical mass of the businesses that it covers actually do carry out HRDD – and to a high enough standard. There are three aspects of accountability that we think are particularly important for business to keep in mind.

1. THE LEGITIMATE ROLE OF LIABILITY IN IMPLEMENTING THE UN GUIDING PRINCIPLES

In our discussions with businesses and business associations about mandatory HRDD and potential consequences for failure to implement a new legal standard of conduct, the issue of liability is usually front and center. In talking ►►

about what can be a difficult topic, we find it helpful to start with what the UN Guiding Principles themselves say.

The Guiding Principles clearly foresaw the relevance of liability as one form of accountability for businesses in ensuring they meet their responsibility to respect human rights. The UNGPs also made clear that the robustness of a company's due diligence should have an effect on future civil and/or criminal liability. As the commentary to Guiding Principle 17 states:

Conducting appropriate human rights due diligence should help business enterprises address the risk of legal claims against them by showing that they took every reasonable step to avoid involvement with an alleged human rights abuse. However, business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses.

We also find it helpful to put current discussions about liability in context. Already in 2011, companies could be held liable under existing legal theories for a range of human rights harms that they caused or contributed to themselves, such as abuses of the labor rights of their own employees, or failures in product safety. Liability for human rights harms by business was clearly not a new concept – then or now. What is less familiar is the application of civil liability to failures of due diligence in relation to human rights harms by specific business entities beyond the company itself – such as subsidiaries, joint venture partners or strategic suppliers. However, under existing laws (such as in France) and case law (such as in the UK and Canada), as well as in discussions about new measures (such as in Germany or Switzerland), it is still

a relatively narrow set of business relationships that are or would be covered. And the scope of these provisions often turns on the concept of “controlled” entities, typically drawing on existing legal definitions. (The French Duty of Vigilance Law goes furthest, including suppliers with whom the company maintains “an established commercial relationship,” but this concept again is familiar to French business and grounded in domestic law.)

Two other points are also important to keep in mind: the duty of states and the perspective of affected stakeholders. First, states have a duty to consider the legitimate role of liability in setting a foundation for judicial remedy for business-related human rights harms, as Guiding Principle 25 requires. As the Office of the UN High Commissioner for Human Rights (OHCHR) has made clear, there are a range of questions to be asked and choices to be made about how liability should best be crafted in any new mandatory HRDD regimes, and these will require robust debate. However, current practice suggests that the scope of entities whose actions or omissions could trigger potential liability for a company will likely be narrower – arguably much narrower – than the range of entities that are in scope for that company in carrying out HRDD, since the latter should extend all the way to both ends of the value chain. ▶▶

“Mandatory human rights and environmental due diligence is on the legislative agenda of the European Commission. I appreciate that many details still need to be worked out. Perhaps none is more important than the question of liability. It may be helpful to recall that the UNGPs foresaw the possibility of liability, and how it might play out in practice in the commentary to GP 17.”

- JOHN RUGGIE, AUTHOR OF THE UNGPs



In our experience, the discussion of liability by companies is often approached solely from the perspective of the risks it would pose to the business. While companies will naturally consider these risks, it is equally important that they consider the reality faced by affected stakeholders. For those experiencing human rights harms, accessing remedy remains a widespread challenge. From their perspective, civil liability for failures of due diligence offers a much-needed avenue to seek remedy for the harms they suffer.

Affected stakeholders face a range of legal and practical barriers in accessing judicial remedy, including meeting the burden of proof, the costs of accessing legal advice, and the availability of class or group actions. All of these can be major impediments to claimants even bringing cases in the first place. They are also legitimate areas for states to address, as recognized in Guiding Principle 26 and in the [OHCHR's detailed guidance to states on enabling access to judicial remedy in practice](#). As businesses grapple with discussions on liability, they should not lose sight of these realities for people seeking remedy for harms. And indeed we are starting to see individual companies that are committed to the UN Guiding Principles [publicly acknowledging the role that liability should play in regulating business conduct](#).

2. INCENTIVIZING ROBUST HRDD THROUGH ACCOUNTABILITY MEASURES THAT GO BEYOND LIABILITY

While recognizing the legitimate role of civil liability in enabling remedy, the enforcement of such liability will not, on its own, deliver the increase in HRDD necessary to reduce harms to people at the scale needed to transform global value chains. Among companies that are supportive of mandatory HRDD, there is concern about an excessively narrow, compliance-focused approach, in which the practical scope of corporate HRDD efforts ends up being limited to the (relatively small) circle of business relationships that may give rise to liability risks. In many sectors, those entities are unlikely to be the same as the entities that are the cause of human rights harms deep in their global value chains – harms which often result from complex, systemic issues.

In the graphic below, we use a hypothetical circle of liability in order to highlight the accountability gap that would likely still remain between the limited scope of potential liability and the full scope of HRDD. To address this, it will be important to consider the role of a range of accountability measures to incentivize, require and support businesses to carry out HRDD across the full scope of their activities and value chains. ►►

THE ACCOUNTABILITY GAP



Under the UNGPs, businesses have a responsibility that extends beyond the scope of liability defined in existing mandatory HRDD measures. Other policy measures will be needed to address that accountability gap.

Liability is one important form of accountability; but there are other, additional levers that can sit within or around legislation to help ensure that it meets its full potential. Relevant policy measures could include **positive incentives** (such as positive weighting of measurable human rights criteria in public procurement or access to export credit or trade promotion services), **administrative penalties** (such as public listing and/or fines for companies that fail to comply with requirements to disclose key elements of their HRDD efforts), and **support** (such as guidance on how businesses should respond to evolving challenges like COVID-19 or sourcing from contexts with a high risk of forced labor). These and other examples should all be in the mix as EU and Member State policy-makers consider how best to design regimes that incentivize businesses to meet the full scope of their responsibility to respect human rights.

Many of these measures will be targeted at, or depend for their implementation on, companies' public disclosure, and on the evolution of appropriate metrics for assessing corporate human rights performance. This means that the EU's reform of the Non-Financial Reporting Directive, and the development of a possible EU standard on reporting, will be a critical piece of the evolving accountability landscape.

Many of these measures also imply a serious commitment by Member States to resourcing

expertise on business and human rights at the national level that is capable of providing credible guidance to businesses and helping establish clarity on the standard of conduct they need to meet. This will be particularly important to address capacity gaps in smaller businesses that are newer to these discussions. Businesses relying on such guidance and support would not have an "automatic" defense against claims being brought or penalties levied against them – in line with the caution in GP 17 above – but if they are making serious and sustained efforts to act in line with it, then it should help them demonstrate that they are trying to meet the legal standard of conduct.

3. ASSESSING THE QUALITY OF A COMPANY'S DUE DILIGENCE

The UN Guiding Principles crystallized the responsibility to respect human rights as an expected standard of conduct for all businesses and set out high-level expectations of what HRDD should involve, supported by an Interpretive Guide. Those expectations have been supplemented by further guidance from the OECD on the core process steps for both general and sector-specific HRDD. Meeting this standard depends on an assessment of the reasonableness (or "appropriateness") of the HRDD a company does – recognizing that what is reasonable will constantly evolve as both the understanding of human rights risks and leading practices to address them continue to advance. ➡

“Effective regulation should take account of the legitimate concerns of various stakeholder groups. For mandatory HRDD, that means forging legislation that speaks to businesses' concerns that liability on its own won't incentivize the right kinds of practices and behaviors by companies throughout their value chains. But it also has to address the understandable views of civil society that a failure to meet an agreed standard of conduct should result in robust consequences, including a basis for those harmed to seek remedy.”

- RACHEL DAVIS, VICE PRESIDENT & CO-FOUNDER OF SHIFT



We see this kind of analysis informing assessments by National Contact Points of the quality of a company's due diligence under the OECD Guidelines, and it will also inform legal analyses in civil claims of whether a company has met the appropriate standard of conduct under new mandatory HRDD regulations.

So the guidance on due diligence exists; but in our conversations with business, they are still concerned that they won't know whether or when they have done enough to meet the expected standard. Building on the existing authoritative guidance noted above and over a decade of practical experience, there is already significant clarity about some key features of robust or "quality" HRDD. Articulating those features can give business, as well as investors, civil society and affected stakeholders, greater confidence about the legal standard that companies will be held to in carrying out HRDD, as well as the likelihood that HRDD will lead to better outcomes in practice. It is in nobody's interests – least of all those negatively affected by business activities – for mandatory HRDD regimes to lead to superficial commitments to human rights in policy or personnel terms that do not translate into real change in outcomes for people.

These predictable features of "quality HRDD" should inform what is required of companies in the area of non-financial reporting. They should also inform efforts to bring greater clarity to investors' expectations of companies with regard to the social component of ESG assessments, which are currently based on easily measurable but not typically very informative data.

At Shift, we have been exploring some of these areas of consensus on what constitutes better quality HRDD. We have started with a focus on key features of internal governance of human rights, and are now exploring additional areas

including: the quality of a company's human rights risk identification and prioritization processes; the quality of its engagement with affected stakeholders in its HRDD efforts; and the quality of its actions to address salient human rights issues, including in setting meaningful targets and collaborating with others to use leverage. We encourage companies that are committed to the UN Guiding Principles to focus on existing guidance and areas of consensus about what constitutes "quality HRDD" and on its integration into any new legislative measures.

SUMMING UP

Companies that are diving into the mandatory HRDD debate at EU or national level need to be ready to discuss the essential role of accountability. The UN Guiding Principles foresaw the relevance of the quality of a company's HRDD to assessments of future civil and/or criminal liability; they also envisaged liability as an important form of access to remedy for business-related human rights harms. The precise nature and scope of liability should and will be a legitimate topic of debate. However, it is likely to be much narrower than the scope of the HRDD that a company is expected to conduct. Because of that accountability gap, it will be essential for regulators to look at additional measures that can incentivize companies to carry out the full scope of HRDD in line with the UN Guiding Principles, and to a suitably robust standard. This is fundamental if we truly want to achieve the Guiding Principles' promise of preventing harm to people throughout global value chains.

ABOUT SHIFT

Shift is the leading center of expertise on the UN Guiding Principles on Business and Human Rights. Shift's global team of experts works across all continents and sectors to challenge assumptions, push boundaries and redefine corporate practice in order to build a world where business gets done with respect for people's dignity. We are a non-profit, mission-driven organization headquartered in New York City.

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