

STRENGTHENING CORPORATE RESPONSIBILITY

**The case for mandatory due
diligence in the EU to protect
people and the planet**

Introduction.....	3
Setting the scene: EU consumption and deforestation	4
Corporate commitments and reporting	5
Due diligence: the current state of play in the EU	5
Potential legal basis	6
What is due diligence?.....	7
Defining due diligence.....	7
Key steps of a due diligence process	9
1. Identify and assess risks and impacts.....	9
2. Take action on risks and impacts identified – by ceasing, preventing and mitigating.....	10
3. Monitoring and tracking responses as a check on effectiveness.....	10
4. Stakeholders participation.....	10
Other aspects of due diligence.....	11
Policies embedded into management systems	11
Remedying harms done	11
Key issues for forthcoming legislation.....	11
Defining risks – the need for clear standards	11
Legality and beyond	12
International standards.....	13
Certification	13
Scope	13
Product scope.....	13
Scope of companies	14
Transparency and reporting	14
Enforcement	15
Penalty regime.....	15
Enforcement authority and compliance checks	15
Role of third parties and complaint mechanisms	16
The role of auditors, industry schemes and monitoring organisations	16
Recommendations	17
Conclusion	18

INTRODUCTION

In a globalised world, consumption and investment can drive and accelerate environmental destruction in some of our most precious and fragile landscapes, sometimes thousands of miles away.

At times, the pursuit of profit has made environmental and human rights concerns peripheral to commercial interests. However, it is no longer possible to ignore the urgency of the current climate breakdown, the destruction of biodiversity and vital ecosystems, the harm caused to local communities and indigenous peoples, and the role of our consumption and financing in this crisis.

Guidelines and voluntary approaches are failing to prevent environmental destruction at scale. The time has come for the EU to establish mandatory due diligence for companies that are EU-based or that provide goods or services in the EU. These companies, importantly, include financiers and investors, who wield a huge amount of power in facilitating projects that can have large environmental and human rights impacts.¹ Mandatory due diligence should be used by these companies to identify, prevent and mitigate their risks and impacts on the environment, human rights and governance.²

The long-awaited publication of the EU's communication on deforestation provides an opportunity for the EU to show global leadership by taking concrete action to tackle deforestation, environmental harm and human rights abuses through the introduction of mandatory due diligence across sectors, supply chains and investments for EU based companies and

those providing goods and services in the EU.³

The EU should also take measures to support producers in developing countries to improve their environmental standards and human rights practices and to improve livelihoods.

Effective due diligence is in the interest of companies themselves as environmental and human rights considerations can entail significant material risks. These can include operational blockages, as well as reputational, financial and legal risks.⁴ Legislation requiring companies to identify, prevent and mitigate environmental damage and human rights abuses can help them manage these risks and provide a level playing field for companies.

It would also help investors fulfil their obligations under the new EU Investor Disclosure Regulation as they will need to assess the relevant environmental, social and governance information of the companies they invest in. Mandatory due diligence and associated disclosure requirements for companies would create a coherent and coordinated framework.

EU due diligence legislation would also benefit the private sector operating in more than one Member State by providing a common set of criteria, and help the EU to meet its international commitments particularly concerning the 2030 Agenda for Sustainable Development and the Paris Climate Agreement.

This briefing sets out the key components of due diligence legislation requiring

companies to conduct checks on their investments and supply chains to identify, prevent and mitigate environmental, social and governance risks and impacts within and outside the EU.

This briefing draws on lessons from Global Witness and ClientEarth's combined experience of due diligence in operation across a range of sectors. It aims to inform discussions amongst policy makers, and encourage a more rigorous and consistent approach to checks on Europe's business practices, imports, production and investments.

In this briefing, we are looking at the particular case for due diligence in relation to deforestation risks, but we believe that due diligence should apply across all sectors, supply and investment chains and encompass environmental, human rights and governance risks and impacts.

SETTING THE SCENE: EU CONSUMPTION AND DEFORESTATION

Across the globe, the rapid destruction of our climate-critical tropical forests is reaching crisis point. This damage is one of the starkest examples of the impact of consumption and investment in the EU on the environment and climate. Despite widespread agreement on the crucial role of forests for our climate and biodiversity, deforestation continues apace. Not only is our global environment being ravaged, but the impact of deforestation, forest degradation and grabbing of forested land for industrial agriculture and illegal logging is devastating for the human rights of communities that reside in and around the forests and rely on them for their livelihoods.

Deforestation is the second largest source of anthropogenic greenhouse gas emissions.⁵ A recent study showed that over a four-year period (2010–2014) international trade drove between 29% and 39% of deforestation-related emissions.⁶

Globally, tree cover loss has been rising steadily over the past 18 years, in fact, 2018 saw the disappearance of 3.6 million hectares of primary rainforest, an area the size of Belgium.⁷ Just over a quarter of global tropical forest loss is due to deforestation through permanent land use change for the production of commodities, including beef, soy, palm oil and wood products, and this can be as high as 78% in South East Asia and 56% in Latin America.⁸

The European Commission's own study found that EU imports were responsible for over a third of all deforestation embodied in crop and livestock products traded between regions over the period 1990-2008.⁹ Numerous cases studies have also revealed how products consumed in the EU and investments made by EU-based financial institutions are associated with environmental harm and human rights abuses.¹⁰

Recognising the need for action to tackle the EU's deforestation footprint, the European Commission recently consulted on a roadmap as well as an initiative on tackling deforestation.¹¹ The subsequent publication of a communication on this issue presents an opportunity for the EU to show global leadership and take concrete action to tackle its deforestation footprint.

Local communities on the frontline of efforts to fight climate breakdown and preserve ecosystems are under increasing attack from some industries trying to meet this consumer

demand. In 2017, the worst year on record so far, 201 land and environmental defenders were killed and many more were attacked, threatened or criminalised for speaking out for their communities, their way of life and the environment.¹² In 2017, commercial agriculture became the sector most associated with the killings of land and environmental defenders. Forty defenders were killed protesting against agribusiness companies, including for palm oil, coffee, tropical fruit, sugar cane and cattle ranching.¹³

CORPORATE COMMITMENTS AND REPORTING

An increasing number of companies are recognizing their responsibility for the role of their operations, imports and investments in deforestation and are adopting policies to address this. However, these policies are not mandatory and remain at the company's discretion – so there is no consistency between the corporate commitments and implementation. Finally, there is a lack of transparency and accountability in their implementation.

Not one of the 500 main companies and financial institutions in forest-risk supply chains is on track to eliminate commodity-driven deforestation from their supply chains and portfolios by 2020.¹⁴ Yet, nearly half have made commitments to do so by 2020 or earlier.¹⁵ Most recently, one of the world's biggest agricultural commodity traders, Cargill, admitted that the agricultural commodities industry would fall short of eliminating deforestation from their supply chains by 2020.¹⁶

The EU Non-Financial Reporting Directive adopted in 2014 requires large public

companies and financial corporations operating in Europe to disclose information on environmental, social, human rights and anti-corruption matters in their annual reports from 2018 onwards, but does not require companies to undertake due diligence.¹⁷ However, even this reporting requirement falls short, as highlighted by a recent report assessing the effectiveness of this reporting requirement:

"The vast majority of companies acknowledge in their reports the importance of environmental and social issues for their business. However, in only 50% of cases for environmental matters and less than 40% for social and anti-corruption matters this information is clear in terms of concrete issues, targets and principal risks. The general information that most companies provide does not allow investors and other actors to understand companies' impacts and by extension their development, performance and position."¹⁸

DUE DILIGENCE: THE CURRENT STATE OF PLAY IN THE EU

EU policies have repeatedly encouraged companies to exercise due diligence throughout their supply chains as well as legislating for mandatory due diligence in a number of sectors.¹⁹ This is a core part of the EU Timber Regulation, EU Minerals Regulation as well as the recently adopted EU Investor Disclosure Regulation.²⁰ The table featured in this briefing sets out the key characteristics of each regulation to enable a comparative analysis of the relevant EU laws,

as well as the French law on the Corporate Duty of Vigilance.

Whilst the EU Minerals Regulation and EU Timber Regulation are welcome steps to strengthen the responsibilities of businesses to identify, prevent and mitigate abuses in their supply chains, they only apply to specific commodities. The recently agreed EU Investor Disclosure Regulation has a much wider remit, applying across all investments and it will require investors to assess the relevant environmental, social and governance information of the companies they invest in. This shows that there is now a growing acceptance of the need for due diligence to be undertaken beyond a focus on specific, high-risk sectors.²¹

Policy makers across Europe are introducing new legislation to set standards and promote consistency in due diligence. Some countries have already adopted laws to ensure better corporate responsibility to avoid environmental harm and human rights abuses e.g. the French law on the Corporate Duty of Vigilance that entered into force in March 2017 and the Child Labour Due Diligence Bill adopted on the 14th of May 2019 by the Dutch Lower House. Other laws are also under consideration elsewhere in the EU.²²

Calls for the EU to specifically address deforestation through mandatory due diligence are mounting. In September 2018, the European Parliament called for a new framework to regulate European trade and consumption of forest-risk commodities.²³ In November 2018, France encouraged the development of an ambitious EU Action Plan on deforestation, including legislative proposals for a mandatory due diligence for

commodities associated with deforestation.²⁴

Mandatory due diligence and associated disclosure requirements for companies are the missing piece in the corporate responsibility and reporting landscape. Legislation on corporate actors would create a coherent and coordinated framework across sectors and investors.

POTENTIAL LEGAL BASIS

In addition to the environmental and human rights imperative for introducing a due diligence requirement, the number of different rules imposed by Member States could potentially threaten the functioning of the internal market. Some Member States have already put in place national provisions to ensure better protection of the environment and better recognition of human rights throughout global supply chains. Other Member States have made public commitments to adopt mandatory human rights due diligence.²⁵ The EU therefore has an important role to play in the harmonisation of the conditions applicable to companies selling goods on the internal market, both to facilitate their operation and to promote a high level of protection.

Article 114 of Treaty of the Functioning of the European Union (TFEU) provides the EU with the power to harmonise the rules applicable to the sale of goods on the market while seeking, as detailed in Article 114(3), a high level of protection when the proposal concerns health, safety, environmental protection and consumer protection.²⁶

New EU measures should build on and go beyond the standards applicable in Member States that have already adopted due diligence requirements. Article 114 of TFEU

explicitly takes into account the situation where provisions already exist, so that they can be preserved. New EU regulations can also contain an explicit provision to give Member States the right to adopt standards that go beyond the EU standards.

Given the scale of environmental damage associated with illegal and unsustainable products in the EU's supply chain, article 114 could be combined with article 192 (1) which references the EU's objectives of preserving, protecting and improving the quality of the environment and promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

WHAT IS DUE DILIGENCE?

The effectiveness of a new due diligence requirement will depend on how it is designed. Drawing on lessons in the timber and extractive sectors, and informed by the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises (OECD Guidelines), we have highlighted key elements (not an exhaustive list) of effective due diligence requirements. OECD Guidelines for Multinational Enterprises

The current OECD Guidelines provide a comprehensive set of principles and standards for responsible business conduct.²⁷ They are a multilaterally agreed code of responsible business conduct, which nearly all EU governments have endorsed.²⁸ They include a comprehensive approach to risk-based due diligence and responsible supply chain management.

The OECD implementing guidance on due diligence for responsible business conduct also provides practical explanations of due

diligence to help companies avoid and address adverse impacts, including those related to the environment and human rights. Similar implementing guidance has been created for sector-specific due diligence, including guidance for agricultural supply chains and institutional investors.²⁹

The OECD Guidelines and sector specific guidance influenced the French law and were used in the EU Minerals Regulation, and the more recent EU Investor Disclosure Regulation which introduces investor due diligence.³⁰ They could therefore also form a useful basis for new legislative proposals on corporate due diligence.³¹

DEFINING DUE DILIGENCE

As set out by the OECD and taken up by the European Commission,

"the term 'due diligence' means acting with reasonable care and investigating an issue before making a decision. In other words, it is an on-going, proactive and reactive process through which companies put in place systems and processes to make sure they are able to identify, manage and report on risks in their supply chain."³²

The more recent 2018 OECD Due Diligence Guidance for Responsible Business Conduct – which is designed to provide practical support to enterprises on the implementation of the OECD Guidelines for Multinational Enterprises – offers an even more comprehensive definition, including the prevention and mitigation of impacts:

"The concept of due diligence under the OECD Guidelines for MNEs

involves a bundle of interrelated processes to identify adverse impacts, prevent and mitigate them, track implementation and results and communicate on how adverse impacts are addressed with respect to the enterprises' own operations, their supply chains and other business relationships."³³

Responsible business conduct due diligence is different to standard corporate or transactional due diligence. Responsible business conduct due diligence is about the risks and impacts of a business' operations and supply chains on people and the planet, rather than the standard identification risks to the business itself. However, the risks identified through this due diligence could also help companies identify potential legal, financial or reputational vulnerabilities, which could threaten their profitability and commercial interests.

There are other business reasons why companies carry out due diligence, including improving stakeholder relations, protecting their reputation and bringing positive contributions to society. Undertaking due diligence can often be referred to as building the company's "social license to operate" – the legitimacy it has to operate by having the approval of stakeholders affected by its operations.³⁴

For example, a company may have the necessary business licenses to convert forestland for agriculture purposes. However, when it does not take into account the needs and rights of local communities living in the area, it risks rejection in the local area where it operates. This in turn may ultimately impact business, including through the disruptions of operations,

environmental penalties and reputational impacts, etc.

Based on the definitions above, companies conducting due diligence must put in place processes to (a) develop a thorough understanding of the risks and impacts in their own operations and in their entire supply chain, (b) manage those risks and impacts and; (c) communicate about them.

Due diligence processes should be integrated into company management systems so that environmental and human rights considerations become an integral part of business decision-making, such as choosing where to invest, which businesses to purchase from and what businesses to partner with.

Thus due diligence has an important proactive, forward-looking function that identifies potential risks and adverse impacts on the environment and human rights so that decisions can be made to avoid these before entering into new business activities. Due diligence is also a reactive process, used to manage impacts that have already occurred or as a tool to correct and remedy ongoing impacts that the company is made aware of. Consequently, it is an iterative process rather than a one-off "box-ticking" exercise.

As a risk-based approach, the extent of due diligence investigations depends on the nature of the company's activities, the number of suppliers it sources from, where the product is sourced from and its business partners, etc. As such, due diligence could be less onerous on those with less complex

supply chains and potentially involving fewer significant risks.

KEY STEPS OF A DUE DILIGENCE PROCESS

In relation to deforestation, multiple environmental, social and governance risks and impacts can arise at different stages of the agricultural supply chain.³⁵ The section below highlights in more detail the key steps of due diligence and the risks and impacts associated with deforestation. It is important to note that “due diligence” is not one set process – it is often a bundle of processes carried out by businesses to identify, prevent and manage adverse impacts.

1. Identify and assess risks and impacts

The main purpose of identifying risks and impacts is to pinpoint potential or actual adverse impacts on people and the environment that could result or have resulted from a company’s operations and its business relationships, within its supply chain. Where a company is setting up new operations or engaging new business partners, this includes identifying the actors involved in the new supply chain, such as suppliers and contractors, and assessing their policies and practices, as well as their production and processing sites.

In the case of deforestation risk, land and forest rights typically sit at the nexus of environmental, social and governance issues. The complexity of overlapping and intersecting tenure regimes, regulations and prevalence of natural resource-related corruption or conflict make it particularly important for companies to undertake adequate due diligence and hold a social

license to operate. Companies operating without the free, prior and informed consent of local people, particularly indigenous communities, risk the use of land triggering local evictions, land-tenure disputes or unlawful forest conversion. Companies should therefore identify the location of the site of production and its legitimacy to use the land and associated forest resources.

For existing operations, due diligence should identify and assess ongoing adverse impacts and harms as well as potential risks. While it can be challenging to identify relevant information, especially throughout supply chains, companies can share information, including through multi-stakeholder initiatives.³⁶

Any upcoming new due diligence obligation should describe risk assessment criteria, as is the case in the EU Timber Regulation.³⁷ We further elaborate on the potential elements of a risk assessment criteria later in this briefing, but it could include the assurance of compliance with applicable legislation, the prevalence of a high rate of deforestation, unsustainable forestry practices and/or land grabbing in the country where the commodity is from, and the complexity of the supply chain.

Due diligence should also go beyond deforestation risk and include a risk assessment of broader environmental impacts, for example in relation to the use of pesticides, insecticides and biocides unauthorised in the EU, as well as human rights impacts.

2. Take action on risks and impacts identified – by ceasing, preventing and mitigating

The point of identifying risks and adverse impacts is for companies to be better prepared to avoid and reduce them through changing their project design and taking the necessary mitigation measures. This could involve the company or its supply chain partners ceasing operations (for example, ceasing further clear-cutting operations) or identifying the mitigation measures needed to avoid further negative impacts.

Mitigation and preventative measures may require a company to undertake a series of actions – such as changing its purchasing practices to change the types of forest products purchased, amending contracts with suppliers, providing support to suppliers to change their practices, monitoring whether targets are met, including science-based targets for reducing environmental impacts.

Mitigating actions under a due diligence system should first seek to improve practices throughout the supply chain. Where improvements do not sufficiently reduce the risks, changing purchasing and investment decisions should be considered. Such sequencing is important to avoid obligatory due diligence resulting in immediate divestment and reduction of trade with developing countries. Due diligence should rather be a tool to allow such investment and trade in a responsible way.

Due diligence guidance recommends that companies take an organised approach to due diligence. This means incorporating planned actions into their on-going company management systems and procedures, and

potentially also into an action plan that sets out a clear set of steps with timeline and budget. With business relationships, this could become a corrective action plan with suppliers.

3. Monitoring and tracking responses as a check on effectiveness

As part of the due diligence process, a company should check periodically to see if its actions are actually reducing harm and if not, to adjust them or develop other actions. This is also a matter of good business sense to ensure that a company and its business partners are taking the most effective and efficient steps in addressing key risks and impacts, particularly whenever something changes in a supply chain or new operations are added.

4. Stakeholders participation

Involvement of stakeholders in the due diligence process is a core part of due diligence, as required by the OECD Guidelines, the United Nations Guiding Principles on Business and Human Rights and the French law on the Corporate Duty of Vigilance.³⁸ Involving, for example, external stakeholders that might be affected by a company's operations will help the company understand the core concerns regarding a project or ongoing activities, so that they may be taken into account during due diligence. A lack of consultation can mean that companies may fail to understand and take preventative action to avoid conflicts over land rights including unfair and illegal evictions.³⁹

Reporting and disclosure are also key elements of due diligence which we address in the section on transparency and reporting.

OTHER ASPECTS OF DUE DILIGENCE

Policies embedded into management systems

Due diligence processes are likely to work better if the company makes its objectives clear to its staff, business partners and customers. This is where corporate commitments to people and the planet, such as zero deforestation commitments, are important.⁴⁰ However, those commitments are meaningful only if made in conjunction with effective due diligence systems, and if embedded in the company's management systems: its enterprise risk systems, purchasing system, contract management system and staff performance incentives etc. Aligning processes and procedures with a company's commitments to people and the planet should promote internal coherence. This helps to ensure that the whole company's operations and its relationship with its suppliers are moving in the same direction.

Remedying harms done

The due diligence process is geared towards identifying and managing adverse impacts. However, adverse impacts may still happen and actions by the company may be needed to remedy or address past harms (such as forest replanting or compensating affected communities).

The OECD Guidelines and the UN Guiding Principles on Business and Human Rights encourage companies to set up operational

level grievance mechanisms to deal with issues early before they escalate. We look at different forms of complaint mechanisms later on in this briefing.

Grievances or concerns from interested parties informing the company about risks of environmental or human rights harms throughout the supply chain provide early red flags to businesses where potential adverse impacts can occur. The EU Mineral Regulation defines this type of mechanism. Where the issues cannot be dealt with at the local level, businesses are expected to provide for or co-operate with other remedy mechanisms – which can include a specialised environmental tribunal or working with a labour inspectorate to resolve worker disputes.

KEY ISSUES FOR FORTHCOMING LEGISLATION

DEFINING RISKS – THE NEED FOR CLEAR STANDARDS

The risks in relation to environmental harm, human rights abuses and governance can be open to interpretation. For example, the companies' first round of reporting under the French law on the Corporate Duty of Vigilance as well as reporting under the EU Non-Finance Reporting Directive have been criticised for failing to mention critical risks of environmental harm and human rights abuses.⁴¹

Due diligence legislation should therefore establish clarity through a mandatory framework with a set of standards for assessing and dealing with risks and impacts developed in consultation with stakeholders including civil society representatives and the private sector.⁴² This would ensure a

clear and consistent understanding of the concepts of environmental harm, human rights abuses and governance risks. These standards should be integrated into the legislation and further elaborated in delegated acts and guidelines.

Guidance or standards should include a list of potential risks that companies should take into account, including the risk of corruption, deforestation, land tenure conflicts, child and forced labour and other severe breaches of labour rights and presence of armed groups/conflict, etc.

The level of risk can vary within countries and over time, so legislation and accompanying guidance should not be too prescriptive in this regard, and should avoid identifying low/medium/high risk areas. Companies should instead be encouraged to carry out ongoing risk assessments in all operations, undertaking research including engaging with stakeholders and reviewing reports from governments, international organisations, NGOs, media, industry and the UN, with particular attention to the impacts of associated commercial activities on conflict, human rights or the environment in the country/region.

The proposed taxonomy in the European Commission's Action Plan on financing sustainable growth (currently in development) is intended to provide uniform criteria for determining whether an economic activity is environmentally sustainable.⁴³ This could inform work on a new due diligence obligation and the level of due diligence required by both companies and investors. However, its effectiveness will depend on the robustness of its environmental and social criteria, including how it refers to deforestation.

Legality and beyond

The legality of the product or the service in question, and the extent of compliance with national laws are crucial factors in due diligence considerations. Legality is a criterion in several EU legislations, such as the Timber Regulation, the Unreported and Unregulated Fishing Regulation and the Minerals Regulation.

In relation to deforestation, a recent assessment made by the New York Declaration on Forests, highlighted that much of the tropical deforestation is illegal. It also found a high risk of violation among forest laws where commercial agriculture is driving significant forest loss. In all countries that are the largest tropical producers of palm oil, soy, and beef, there is a significant risk that forest laws are being broken in the production of these commodities.⁴⁴ It is therefore crucial that companies involved in these commodities are required to carry out robust due diligence, with particular attention to the risks of illegality in their supply chains.

For agricultural products, due diligence must also consider sustainability not just legality. National legal frameworks may lack the necessary provisions to protect forests and the people depending on them for their livelihoods. Laws governing other sectors that affect forests may also contradict forest laws, for example in relation to mining activities creating legal confusion on whether forestland may be converted for other uses.⁴⁵ Therefore, in addition to the legality criteria in national frameworks, the set of standards must also include sustainability criteria relating to human rights and environmental protections.

International standards

The development of any standard or guidance relating to risk of environmental harm or human rights abuses should take into account a number of key international standards, binding conventions, and declarations. This should include the international legally binding treaties such as: Convention on Biological Diversity (CBD) 1992 and the Indigenous and Tribal Peoples Convention 1989; international human rights instruments such as the UN Declaration on the Rights of Indigenous Peoples 2007 as well as non-legally binding guidelines like the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests 2012, and the United Nations Guiding Principles on Business and Human Rights 2011. These instruments as well as principles subscribed to by companies, such as the United Nations Principles for Responsible Investment, could also inform standards.

However, it should be noted that even if forests are referenced in several international treaties, there is not yet an international binding treaty on forests that specifically regulates or defines the activities that can be undertaken in forests or sets protections.

Certification

Some agricultural commodities certification schemes exist, including the Roundtable on Sustainable Palm Oil (RSPO) and the Roundtable on Responsible Soy Association (RTRS). However, these have their limitations and are no substitute for rigorous due diligence by companies on their supply chains.⁴⁶ According to the EU Timber Regulation, operators can use the certification tool when assessing and

mitigating the risk of timber being illegally logged, but cannot use it on its own to evidence compliance with the Timber Regulation.⁴⁷ We believe that a new due diligence legislation should follow a similar approach by not only relying on certification or industry-led schemes and instead requiring rigorous due diligence.

SCOPE

Product scope

Some due diligence obligations only apply to companies placing certain products on the EU market. This is currently the case for the Timber Regulation which applies to those placing timber and timber products on the EU market, and the Mineral Regulation which applies to 4 metals (see annex for a comparative table).

To address deforestation and associated human right abuses, a new due diligence legislation could focus only on agricultural products that are of higher risk of being associated with deforestation. However, given the wide range of products consumed and purchased in the EU that can have an impact on the environment and human rights, there should be a generalised due diligence obligation on all EU-based companies, or companies providing goods or services in the EU (including financial activities).

This would apply to products produced in the EU as well as those imported, to avoid being at risk of breaching WTO rules by ensuring that products of all origins are treated similarly.⁴⁸ This holistic approach would prevent the fragmentation that we currently see, and would provide all operators a level playing field and consistency.

The scope should extend to investments and financing as they can be linked to, or contribute to, adverse environmental and human rights impacts through their investments or business relationships.⁴⁹

Scope of companies

Thresholds and phased approaches can help lessen the burden on small and medium sized enterprises.⁵⁰ However, these can create loopholes and undermine legislation as thresholds can be too high, or smaller companies with riskier supply chains can fall out of the remit where arbitrary thresholds are set. If legislation intends to prevent environmental harm and human rights abuses, it should ultimately cover operators of all sizes – this would also align with the United Nations Guiding Principles on Business and Human Rights, which highlights that all businesses have a responsibility to respect human rights.⁵¹

A proportionate approach to due diligence would mean that companies based in the EU, or providing goods or services in the EU – where there may be limited risk of environmental harm and human rights abuses, and less complex supply chains – wouldn't need to do as extensive due diligence as a company importing a product associated with higher risks. This proportionate approach should mean that companies do not face unnecessary additional burdens. It could also involve a prioritisation of risk by starting to identify, assess, prevent and mitigate the most significant environmental, human rights and governance risks and impacts, and once those have been addressed, moving on to the less significant impacts within a reasonable timeframe.⁵²

Furthermore, it is essential that a due diligence system covers the entire supply chain – and that the company has its own systems, while also putting in place requirements on its suppliers to check and report on compliance with supply chain due diligence requirements. This should include both “upstream” operations that relate to the initial stages of production as well as “downstream” operations that relate to processing the materials into a finished product.

Under the French Corporate Duty of Vigilance law for example, it is essential that the company carrying out due diligence is obliged to do so throughout its own activities, those of its subsidiaries, as well as the activities of subcontractors or suppliers with whom they have an established commercial relationship. Companies can use collaborative mechanisms to carry out such due diligence, to build expertise, take account of other stakeholders' views and approaches and to allocate responsibilities across the supply chain.

TRANSPARENCY AND REPORTING

The OECD highlights the importance of making timely and accurate information available to local and wider stakeholders.⁵³ Public disclosure of relevant and up to date policies and plans for implementing due diligence on a company's website, along with regular or annual reporting on implementation of due diligence, can help ensure accountability. It can also enable third parties such as NGOs to test the effectiveness of the due diligence when issues arise in the supply chain. It allows communities to better recognise a company's, including financiers, connection to activities in their area. It can help

consumers make informed choices, which could itself help drive up standards of reporting and due diligence. It can also provide investors with information to conduct their own due diligence and fulfil their new obligations under the EU Investor Disclosure Regulation.

Public disclosure of due diligence also reduces the reliance on enforcement agencies, as experience has shown with the EU Timber Regulation. Where there is limited capacity for checks by national enforcement agencies on due diligence, there is limited pressure on companies to conduct due diligence.

In order to be effective, future legislation should require all companies to conduct and report on their due diligence. Reporting requirements should not include so-called “comply or explain” mechanism as seen in the Non-Financial Reporting Directive, which allow companies to avoid reporting requirements by simply explaining why they are not reporting.⁵⁴

Legislation should specify in detail the elements that should be included in a report, including the format of the report and its frequency, relevant policies, plans for implementation of due diligence, risks identified and measures taken to mitigate the risks, as well as sanctions for failing to publish reports. It should also record information received in relation to risks and action taken to follow this up. This should at least include the list of subsidiaries.

ENFORCEMENT

Penalty regime

Sanctions are essential to ensure that due diligence requirements are respected. An absence of penalties for non-compliance is a factor in the weak application of the Non-Financial Reporting Directive, with many companies still failing to report at all, or to include sufficient detail.⁵⁵

Penalties should apply to a failure to identify, prevent or mitigate risk and impacts, provide remediation to those affected as well as a failure to fulfil reporting requirements.⁵⁶ The case law of the Court of Justice of the EU (CJEU) has continuously indicated that infringements of EU law must be penalised by effective, proportionate and dissuasive penalties.⁵⁷ An effective penalty ensures that the goal set by the legislator is reached, and intends to prevent future harm from happening. A penalty is dissuasive when non-compliance becomes economically unattractive. Finally, a penalty is proportionate when it is appropriate to attain the objectives set by the legislation in question.⁵⁸

Enforcement authority and compliance checks

According to the EU Timber Regulation and the EU Mineral Regulation, national governments have to designate a competent authority responsible for the application of the regulation.⁵⁹ In both cases, the Regulation requires the national competent authority to verify if the companies have complied with the requirement to conduct due diligence. To undertake the checks needed to verify compliance, national competent authorities should follow a risk-

based approach. Companies should offer all assistance necessary to facilitate the performance of the checks. Checks may be conducted when a competent authority is in possession of relevant information. This information could include or be based on substantiated concerns provided by third parties on companies' compliance with the Regulation.

As has been found under the EU Timber Regulation, the quality and quantity of checks can vary substantially between different national authorities. It is therefore important to provide additional guidance for authorities, either within the legislation, or as part of separate guidance (as is the case for the EU Mineral Regulation) detailing the steps to be followed by Member State competent authorities carrying out checks.⁶⁰ This should facilitate more even enforcement and a level playing field for companies across the EU.

Role of third parties and complaint mechanisms

Complaint mechanisms, which enable third parties to highlight concerns and seek redress, can play an important role in ensuring accountability and are also a crucial part of operational level grievance mechanisms as outlined in the OECD Guidelines and the UN Guiding Principles on Business and Human Rights. These can take a number of forms, which should be included in any new due diligence legislation:

- **Early alert mechanism:** companies should provide a system that will give an opportunity to workers and interested parties to inform the company about any risk of environmental harm and human rights violations throughout the supply

chain. The Minerals Regulation outlines this type of mechanism.

- **Substantiated concern:** third parties such as NGOs often have valuable information about developments on the ground with evidence of environmental harm or human rights abuses associated with company operations/supply chain. Though the EU Timber Regulation has accompanying guidance on dealing with substantiated concerns, there is no requirement for authorities to respond to substantiated concerns. New due diligence legislation could strengthen this.
- **Criminal or civil liability:** this refers to access to justice in case of breach of the legislation. As an example, as part of the French law, companies considered to be breaching the law might face civil liability action.⁶¹ It will be key in any upcoming legislation to ensure that victims, including those outside the EU, are able to file a civil liability action.

The role of auditors, industry schemes and monitoring organisations

Under both the EU Minerals and Timber Regulations there is a role for entities, such as industry monitoring organisations or due diligence schemes, to get recognition by the European Commission to assist companies by developing a due diligence system.⁶² Any new due diligence legislation should emphasise that European Commission recognition and the formal role for these entities should be made contingent on these entities demonstrating they have sufficient expertise and capacity to undertake this role and do not have any conflict of interests.

In the Minerals Regulation, auditors have a role to play in providing assurance on due diligence systems. However, the OECD alignment assessment and Global Witness statements make clear that audits, particularly in the current form used in the minerals sector, are insufficient measures of company due diligence efforts.⁶³

Any new due diligence legislation should avoid over-relying on auditors or industry-led schemes. Where auditors or such schemes are used, high standards should be demanded and enforced – otherwise, this could create loopholes that undermine the effectiveness of legislation.

RECOMMENDATIONS

The long-awaited publication of the EU's communication on deforestation provides an opportunity for the EU to show global leadership by taking concrete action to tackle deforestation. The EU should introduce a new due diligence legislation that requires companies based in the EU, or providing goods or services in the EU, to conduct due diligence to identify, prevent and mitigate their risks and impacts on the environment, human rights and governance. This would help the EU meet its international commitments and ensure the functioning of the single market by harmonising conditions placed on companies and investors. Learning from the lessons of due diligence in place in other sectors, due diligence legislation should:

- Be based on the OECD Guidelines for Multinational Enterprises
- Require companies to undertake full and effective due diligence, which should include:
 - Full investigation of an issue before making a decision

- On-going, proactive and reactive processes
- Systems and processes to identify, assess, prevent and mitigate, track and report on risks
- Application across the whole of a company's supply chain
- Include a framework and standards to assess and deal with risks and impacts, including legality, environmental harm and human rights, referencing international standards, and not only relying on certification
- Apply to all companies based in the EU, or providing goods or services in the EU, with an approach that is proportionate to risk, to avoid unnecessary burdens on businesses operating in lower risk supply chains
- Ensure standardised full disclosure and transparency through regular public reporting on supply chain due diligence policies and practices available on companies' websites
- Include an effective, proportionate and dissuasive system of penalties to ensure compliance
- Designate an enforcement authority and provide additional guidance to ensure consistent enforcement across the EU
- Avoid over-reliance on auditors and industry-led schemes
- Include complaint mechanisms for interested third parties and affected individuals, including those outside the EU.

CONCLUSION

Climate breakdown and the destruction of biodiversity have highlighted the urgent need for companies to understand the impact of their activities, supply chains and investments on people and the planet. The growing interest in creating binding measures to address deforestation presents an opportunity for policy makers to create a level playing field for companies by requiring them to identify and mitigate the risk of environmental harm and human rights abuses. The increasing number of initiatives at Member State level requires the EU to take action to ensure the effective functioning of the single market by ensuring harmonisation of standards.

Policy makers must ensure they learn lessons from the existing patchwork of regulation governing due diligence, to develop effective rules. This should include a comprehensive and rigorous process of due diligence, comprehensive understanding of risks, wide scope, full transparency and strong enforcement. Only with strong and effective legislation will the EU be able to ensure that the products consumed in the EU do not contribute to climate breakdown, the biodiversity crisis and human rights abuses.

Annex 1: Comparison of due diligence laws in the European Union and Member States

EU Minerals Regulation: Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas

EU Timber Regulation: Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market

EU Sustainable Finance Disclosure Regulation: Proposal for a Regulation of the European Parliament and of the Council on disclosures relating to sustainable investments and sustainability risks and amending Directive (EU) 2016/2341 and Commission Implementing Regulation (EU) no 607/2012 of 6 July 2012

French duty of vigilance law: Law No. 2017-399 of 27 March 2017 on the corporate duty of vigilance for parent and instructing companies

Annex 1: Comparison of due diligence laws in the European Union and Member States

	EU Minerals Regulation	EU Timber Regulation	EU Disclosure Regulation	French duty of vigilance law
Applies from	1 January 2021	3 March 2013	Provisional agreement between European Parliament and Council – not yet fully adopted. It is anticipated it will take effect from January 2021.	Vigilance plan had to be integrated into companies' 'management report' from 2018.
Legal basis (Treaty of the functioning of the EU)	Article 207, common commercial policy	Article 192(1), objectives of the EU policy on environment	Article 114, functioning of the internal market	This is under French law, but coherent with EU legal frameworks.
Meaning of due diligence	Supply chain due diligence is an ongoing, proactive and reactive process through which economic operators monitor and administer their purchases and sales with a view to ensuring that they do not contribute to conflict or adverse impacts (OECD referenced).	The due diligence system includes three elements inherent to risk management: access to information, risk assessment and mitigation of the risk identified.	Financial market participants must base their due diligence policies on guidance for responsible business conduct developed by the Organisation for Economic Co-operation and Development (OECD). <i>See endnote 21 for further explanation of how the regulation applies to investors.</i>	Vigilance plan will include measures meant to identify risks and prevent severe impacts on human rights and fundamental freedoms, health and safety of persons and on the environment.
Steps of due diligence	<p>5 key steps:</p> <ul style="list-style-type: none"> - Establish company managements systems - Identify and asses risk of adverse impacts in the supply chain - Design and implement a strategy to respond to the identified risks - Carry out audits via an independent third party - Report on the company's supply chain due diligence. 	<p>3 key steps:</p> <ul style="list-style-type: none"> - Information on the timber's supply chain (e.g. country of harvest, species, quantity,) - Risk assessment: evaluate the risk of illegality (e.g. compliance with national laws, prevalence of illegal harvesting of species) <p>Risk mitigation: measures to minimise the risk (e.g. fields visits, controls verified by a third party).</p>	<p>Steps should be in line with the responsible business conduct developed by the Organisation for Economic Co-operation and Development and the United Nations-supported Principles for Responsible Investment.</p>	<p>5 components of the vigilance plan:</p> <ul style="list-style-type: none"> - Mapping to identify, analyse and rank the risks - In view of the mapping, regular assessment of the situation of subsidiaries, subcontractors and suppliers with whom the company has an established commercial relationship, - Tailored actions to mitigate or prevent serious harms, - Alert mechanism to indicate the existence of risks, - Monitoring system to follow the measures implemented.

Annex 1: Comparison of due diligence laws in the European Union and Member States

	EU Minerals Regulation	EU Timber Regulation	EU Disclosure Regulation	French duty of vigilance law
What risks and impacts	Risks linked to conflict affected and high risk areas and impacts on human rights in particular the rights of women.	Risk of illegally harvested timber or timber products derived from such timber.	Sustainability risks and impact (environmental, social or governance event or condition), including the degree of alignment with the long-term global warming targets of the Paris Climate Agreement.	Risks and impacts on human rights and fundamental freedoms, health and safety of persons and on the environment.
Scope of companies	Directly apply to EU-based importers of tin, tantalum, tungsten and gold.	Apply to the entity first placing timber on the EU market: the 'operator'.	Mandatory application for all large financial market participants or financial advisers, i.e. those with over 500 employees 18 months after application. A review will determine if it should be mandatory for all financial market participants or financial advisors after 36 months.	Any company that employs at least (i) five thousand employees itself and in its direct or indirect subsidiaries that is registered in France (ii) ten thousand employees itself and in its direct or indirect subsidiaries that is registered in France or worldwide.
Product scope	Minerals and metals of gold, tin, tungsten, tantalum (3TGs). To cover not less than 95% of the annual volume of EU imports of each of the listed 3TGs. Annex I to the Regulation contains volume thresholds for some of the listed minerals and metals, others will be set by 1 July 2020.	Applies to a defined list of timber and timber products, set out in an annex of the EU Timber Regulation.	Financial market participants when they are considering the adverse sustainability impacts in their processes and the provision of sustainability-related information on financial products.	No products scope specified. The law covers the activities of the company that is within the scope of the law and also the activities of entities related to the company in question.
Transparency/ Disclosure	Importers shall, on an annual basis, publicly report as widely as possible on their supply chain due diligence policies and practices for responsible sourcing.	No reporting obligation for operators. However, operators shall have adequate records of their due diligence system, which shall be stored for five years and made available for checks by the competent authority.	Financial market participants shall publish and maintain on their website detailed information on their due diligence processes and measures.	Vigilance plan and report on its implementation are made public.

Annex 1: Comparison of due diligence laws in the European Union and Member States

	EU Minerals Regulation	EU Timber Regulation	EU Disclosure Regulation	French duty of vigilance law
Enforcement & Penalties	The Regulation is enforced by 'competent authorities' in each of the EU member states. The Regulation provided that members state shall lay down the rules applicable to infringements of the Regulation.	The Regulation is enforced by 'competent authorities' in each of the EU member states. The Regulation provided that member states shall lay down a penalty regime. Penalties vary across the EU and include fines, imprisonment, prohibition to trade, seizure and destruction of illegal timber.	The Regulation is enforced by 'competent authorities' in each of the EU member states.	There is no specific governmental agency responsible to enforce the law. Two penalties are possible: periodic penalty payment and civil liability action.
Role of third parties	Third parties can share information with competent authorities that could lead to checks undertaken by competent authorities.	Third parties can share information with competent authorities that could lead to checks undertaken by competent authorities.	None	Early alert mechanism in relation to actual and potential risks.

ENDNOTES

¹ When we refer to companies in this briefing we are using the term to also refer to financiers and investors.

² These environment, social and governance risks as commonly referred to as ESG. The Principles for Responsible Investment website notes "examples of ESG factors are numerous and ever-shifting", they are also linked to the unique exposure of specific sectors or business. Analysts such as RepRisk can include dozens of different thematic issues in their analysis. PRI lists some examples of ESG factors, including: "Environmental: climate change - including physical risk and transition risk; resource depletion, including water; waste and pollution; deforestation, Social: working conditions, including slavery and child labour; local communities, including indigenous communities, conflict, health and safety; employee relations and diversity, Governance: executive pay; bribery and corruption; political lobbying and donations; board diversity and structure; tax strategy". PRI, *What is responsible investment?* <https://www.unpri.org/pri/what-is-responsible-investment>

³ Communication from the commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. *Stepping up EU Action to Protect and Restore the World's Forests*. 23 July 2019. https://ec.europa.eu/info/sites/info/files/communication-eu-action-protect-restore-forests_en.pdf

⁴ Climate Advisers and Ceres, *Case Study Series: Business Risks from Deforestation*, November 2017, [https://www.ceres.org/sites/default/files/Engage%20the%20Chain/ETC%20Climate%20Advisors%20Case%20Studies%20\(1\).pdf](https://www.ceres.org/sites/default/files/Engage%20the%20Chain/ETC%20Climate%20Advisors%20Case%20Studies%20(1).pdf) Chain Reaction Research, *The Chain: Deforestation as a climate risk for investors*, June 2019, <https://chainreactionresearch.com/the-chain-deforestation-as-a-climate-risk-for-investors/>

⁵ G. R. van der Werf, D. C. Morton, R. S. DeFries, J. G. J. Olivier, P. S. Kasibhatla, R. B. Jackson, G. J. Collatz and J. T. Randerson. *CO2 emissions from forest loss*. Nature Geoscience 2(11) · November 2009.

⁶ Pendrill, F., Persson, U. M., Godar, J., Kastner, T., Moran, D., Schmidt, S. and Wood, R. *Agricultural and forestry trade drives large share of tropical deforestation emissions*. Global Environmental Change(56). p.1–10. <https://doi.org/10.1016/j.gloenvcha.2019.03.002>

⁷ Global Forest Watch, *The World Lost a Belgium Sized Area of Primary Rainforest Last Year*. 25 April 2019. <https://blog.globalforestwatch.org/data-and-research/world-lost-belgium-sized-area-of-primary-rainforests-last-year>

⁸ Philip G. Curtis, Christy M. Slay, Nancy L. Harris, Alexandra Tyukavina, Matthew C. Hansen *Classifying drivers of global forest loss*, Science. 14 Sep 2018. 361(6407). P. 1108-1111. <https://science.sciencemag.org/content/361/6407/1108>

⁹ European Commission, "The impact of EU consumption on deforestation: Comprehensive analysis of the impact of EU consumption on deforestation", *Final Report*. 2013, p. IV.

<http://ec.europa.eu/environment/forests/pdf/1.%20Report%20analysis%20of%20impact.pdf>

¹⁰ Global Witness, *Indecent Exposure - How EU investors and their subsidiaries are helping to bankroll human rights abuses and environmental destruction, and why we need strong EU ESG regulations*, September 2018.

<https://www.globalwitness.org/pt/campaigns/land-deals/indecnt-exposure/>; Mighty Earth, Rainforest Foundation Norway, Fern, *The Avoidable Crisis: The European Meat Industry's Environmental Catastrophe*, March 2018. <https://www.fern.org/news-resources/the-avoidable-crisis-the-european-meat-industrys-environmental-catastrophe-119/>

¹¹ See *Roadmap: Communication on stepping up EU Action against Deforestation and Forest Degradation*, 2018. https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-6516782_en See also, Public consultation, 2019: *Deforestation and forest degradation – stepping up EU action* https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-6516782/public-consultation_en

¹² Global Witness. *At what cost? Irresponsible business and the murder of land and environmental defenders in 2017*, 2018. <https://www.globalwitness.org/en/campaigns/environmental-activists/at-what-cost/>

¹³ Global Witness. *At what cost? Irresponsible business and the murder of land and environmental defenders in 2017*, 2018. p.9. <https://www.globalwitness.org/en/campaigns/environmental-activists/at-what-cost/>

¹⁴ Forest 500 ranks 350 of the biggest companies in forest-risk supply chains and the 150 biggest investors in these companies according to deforestation commitments and their implementation. <https://forest500.org/rankings>. Rogerson, S, *Forest 500 annual report 2018 - the countdown to 2020*, Global Canopy, 2019. p.3 https://forest500.org/sites/default/files/related-documents/forest500_annualreport2018_0.pdf

¹⁵ Rogerson, S, *Forest 500 annual report 2018 - the countdown to 2020*, Global Canopy, 2019. p.3 https://forest500.org/sites/default/files/related-documents/forest500_annualreport2018_0.pdf

¹⁶ Financial Times, *Cargill warns goal of halting deforestation will be missed*. 13 June 2019 <https://www.ft.com/content/a67df690-8def-11e9-a1c1-51bf8f989972>

¹⁷ Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0095>

¹⁸ Alliance for Corporate Transparency Project. *2018 Research Report*, 2019. p.7. https://www.allianceforcorporatetransparency.org/assets/2018_Research_Report_Alliance_Corporate_Transparency-66d0af6a05f153119e7cffe6df2f11b094affe9aaf4b13ae14db04e395c54a84.pdf

¹⁹ Decision No 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet' <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32013D1386>; European Commission, Brussels, 20.3.2019 SWD(2019) 143 COMMISSION

STAFF WORKING DOCUMENT Corporate Social Responsibility, Responsible Business Conduct, and Business & Human Rights: Overview of Progress <https://ec.europa.eu/docsroom/documents/34482/attachments/1/translations/en/renditions/native>

²⁰ Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32010R0995> Referred to in rest of this document as the EU Timber Regulation. Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:L:2017:130:FULL&from=EN> Referred to in the rest of this document as the EU Minerals Regulation P8_TA-PROV(2019)0435 Disclosures relating to sustainable investments and sustainability risks ***I European Parliament legislative resolution of 18 April 2019 on the proposal, European Council expected to approve the Regulation in September 2019. [https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2018/0179\(COD\)&=en](https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2018/0179(COD)&=en)

Referred to in the rest of this document as the EU Investor Disclosure Regulation.

²¹ The reach and application of the regulation applies to specific types of financial advice and investment products, rather than specific actors.

²² Business & Human Rights Resource Centre. *National movements for mandatory human rights due diligence in European countries*. 22 May 2019. <https://www.business-humanrights.org/en/national-movements-for-mandatory-human-rights-due-diligence-in-european-countries> and the website which includes recent updates: <https://www.business-humanrights.org/en/mandatory-due-diligence>

²³ European Parliament, Resolution on transparent and accountable management of natural resources in developing countries: the case of forests (2018/2003(INI)), 11 September 2018.

http://www.europarl.europa.eu/doceo/document/TA-8-2018-0333_EN.pdf

²⁴ Ministère de la Transition Écologique, Stratégie Nationale de Lutte contre la Déforestation Importée 2018-2030 Objectif 4. https://www.ecologique-solidaire.gouv.fr/sites/default/files/2018.11.14_SNDI_0.pdf

²⁵ E.g. Finland. Business & Human Rights Resource Centre, *Finland commits to mandatory human rights due diligence at national & EU level*. <https://www.business-humanrights.org/en/finland-commits-to-mandatory-human-rights-due-diligence-at-national-eu-level>

²⁶ Treaty of the Functioning of the European Union. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT>

²⁷ OECD, *OECD Guidelines for Multinational Enterprises 2011 edition* <http://www.oecd.org/daf/inv/mne/48004323.pdf>

²⁸ OECD, *About the OECD Guidelines for Multinational Enterprises*. <http://mneguidelines.oecd.org/about.htm>

²⁹ OECD & FAO, *OECD-FAO Guidance for Responsible Agricultural Supply Chains*, 2018

<https://www.oecd.org/daf/inv/investment-policy/rbc-agriculture-supply-chains.htm> ; OECD, *OECD Responsible business conduct for institutional investors*, 2018
<https://mneguidelines.oecd.org/RBC-for-Institutional-Investors.pdf>

³⁰ For example, on the French law see Assemblée Nationale, *Proposition de loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*, Explanatory memorandum. 11 February 2015. p.7. <http://www.assemblee-nationale.fr/14/propositions/pion2578.asp>

³¹ The UN Guiding Principles on Business and Human Rights is also a key international framework for guiding due diligence discussions, particularly given that the OECD Guidelines for Multinational Enterprises take human rights as a key framework.

³² European Commission, *The Regulation Explained*, 13 December 2017. http://ec.europa.eu/trade/policy/in-focus/conflict-minerals-regulation/regulation-explained/index_en.htm

³³ OECD, *OECD Due Diligence Guidance of Responsible Business Conduct*, 31 May 2018, p16
<http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>

³⁴ The Ethics Centre, *Ethics Explainer: Social license to operate*, 23 Jan 2018. <https://ethics.org.au/ethics-explainer-social-license-to-operate/>

³⁵ OECD & FAO, *OECD-FAO Guidance for Responsible Agricultural Supply Chains*, 2015.
<https://www.oecd.org/daf/inv/investment-policy/rbc-agriculture-supply-chains.htm> ; ClientEarth, *Putting the brakes on deforestation – a toolkit for forest conversion laws*, 2018. <https://www.clientearth.org/toolkit-forest-conversion-laws/>

³⁶ OECD & FAO, *OECD-FAO Guidance for Responsible Agricultural Supply Chains*, 2015.
<https://www.oecd.org/daf/inv/investment-policy/rbc-agriculture-supply-chains.htm>

³⁷ Art 6.1.b EU Timber Regulation

³⁸ Tiphaine Beau de Loménie & Sandra Cossart, *Stakeholders and the Duty of Vigilance — who are stakeholders and how can companies involve them in developing and implementing vigilance plans?*. 24 December 2017.

https://www.business-humanrights.org/sites/default/files/documents/Stakeholders%20and%20the%20Duty%20of%20Vigilance%20-%20%20Int%20Rev.Compl._%20%26%20Bus.%20Ethics.pdf

³⁹ ClientEarth, *Addressing the risks of a weak legal framework governing forest conversion in Liberia*, 2016.
<https://www.documents.clientearth.org/library/download-info/addressing-the-risks-of-a-weak-legal-framework-governing-forest-conversion-in-liberia/>

⁴⁰ The OECD highlights the importance of companies making commitments—as does the EU Non-Financial Reporting Directive. The Directive requires companies to disclose their policies on environmental and social matters because the Directive recognises that policies are important to reflect commitments, set out objectives and targets to drive a company's approach to issues.

⁴¹ Les Amis de la Terre France, Amnesty International France, CCFD-Terre Solidaire, Collectif Éthique sur l'étiquette. *Loi sur le devoir de vigilance des sociétés mères et entreprises*

donneuses d'ordre - Année 1: Les entreprises doivent mieux faire. February 2019.

https://www.amisdela terre.org/IMG/pdf/2019-etude-interasso_devoir_de_vigilance.pdf Alliance for Corporate Transparency Project. *2018 Research Report*, 2019.
https://www.allianceforcorporatetransparency.org/assets/2018_Research_Report_Alliance_Corporate_Transparency-66d0af6a05f153119e7cffe6df2f11b094affe9aaf4b13ae14db04e395c54a84.pdf

⁴² ClientEarth, *The EU Timber Regulation due diligence obligation: An appropriate tool*, 2015

<https://www.documents.clientearth.org/wp-content/uploads/library/2015-11-25-the-eu-timber-regulation-due-diligence-obligation-an-appropriate-tool-ce-en.pdf>

⁴³ European Commission, Communication from the Commission Action Plan: Financing Sustainable Growth. 2018.
<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018DC0097> European Commission. Proposal for a Regulation of the European Parliament and of the Council on the establishment of a framework to facilitate sustainable investment. 2018.
<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018PC0353>

⁴⁴ *Progress on the New York Declaration on Forests, Improving Governance to Protect Forests Empowering People and Communities, Strengthening Laws and Institutions Goal 10 Assessment Report*, November 2018, page 9.
http://forestdeclaration.org/wp-content/uploads/2018/12/nydf_report_2018-121818.pdf

⁴⁵ ClientEarth, 2018, *Legal Toolkit on Forest Conversion*, p. 5-10.
<https://www.documents.clientearth.org/library/download-info/legal-toolkit-on-forest-conversion-full-report/>

⁴⁶ Research undertaken for the European Commission found that: "The certification schemes still come with some principal limitations to be handled...one key issue is the challenge of monitoring, disclosure and enforcement". ECOFYS, Milieu & COWI, *Feasibility study on options to step up EU action against deforestation*, 2018. p.128.

RSPB, *Using regulation as a last resort? Assessing the performance of voluntary approaches*. 2015.
<http://www.rspb.org.uk/regulatorypolicy>

⁴⁷ Art 4, Commission Implementing Regulation (EU) No 607/2012 of 6 July 2012 on the detailed rules concerning the due diligence system and the frequency and nature of the checks on monitoring organisations as provided for in Regulation (EU) No 995/2010 of the European Parliament and of the Council laying down the obligations of operators who place timber and timber products on the market

<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:177:0016:0018:EN:PDF>

⁴⁸ *General Agreement on Tariffs and Trade*, articles I and III
https://www.wto.org/english/docs_e/legal_e/gatt47.pdf

⁴⁹ For example, see Office of the High Commissioner on Human Rights. OHCHR response to request from BankTrack for advice regarding the application of the UN Guiding Principles on Business and Human Rights in the context of the banking sector. June 2017. <https://www.ohchr.org/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf>

⁵⁰ Laws often establish a threshold at which companies are required to comply with due diligence requirements. The threshold can relate to the size of the company, for example, the EU's Non-Financial Reporting Directive and the French law both use number of employees. The EU Minerals Regulation goes by the volume of goods, such as the weight of metals. However, the EU Timber Regulation applies to all operators regardless of size.

⁵¹ The UN Guiding Principles on Business and Human Rights (UNGPs) note that the responsibility of business enterprises to respect human rights applies to all businesses regardless of size, but recognises that the means through which enterprises meet that responsibility may vary according to this and other factors. UNGPs 11(14).
https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_en.pdf

⁵² OECD, *OECD Guidelines for Multinational Enterprises 2011 edition*, <http://www.oecd.org/daf/inv/mne/48004323.pdf>

⁵³ OECD, *OECD Guidelines for Multinational Enterprises 2011 edition*, p.27 <http://www.oecd.org/daf/inv/mne/48004323.pdf>

⁵⁴ Global Witness, *Regulating risk - Why European investors should be regulated to prevent land grabs, human rights abuses and deforestation*, 2016. p.13.
https://www.globalwitness.org/documents/18640/Global_Witness_Regulating_Risk.pdf

⁵⁵ One analysis found that reports contained insufficient information on concrete issues, targets and principal risks. Only 20% of the 25 UK companies assessed described a due diligence process. Frank Bold, *Analysis: Companies failing to report meaningful information about their impacts on society and the environment*, 25 February 2019.
<http://en.frankbold.org/news/analysis-companies-failing-report-meaningful-information-about-their-impacts-society-and-enviro>; See also European Coalition for Corporate Justice, *A Human Rights Review of the EU Non-Financial Reporting Directive*, March 2019.
<http://corporatejustice.org/news/13195-eccj-study-of-non-financial-reporting-reveals-need-for-ungp-framework>

⁵⁶ E.g. French law on the Corporate Duty of Vigilance (C. com., art. 225-102-5); Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and

remedying of environmental damage. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32004L0035>; International Court of Justice 2nd February 2018 (Costa Rica v. Nicaragua)
<https://www.informea.org/sites/default/files/court-decisions/Costa%20RicaNicaragua%20-%20EN%20%281%29.pdf>

⁵⁷ See Judgment of the Court (Fourth Chamber) of 26 September 2013, Texdata Software, par. 50. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62011CJ0418&from=EN>

⁵⁸ ClientEarth, *National EUTR penalties: are they sufficiently effective, proportionate and dissuasive?* March 2018.

<https://www.documents.clientearth.org/wp-content/uploads/library/2018-03-01-national-eutr-penalties-are-they-sufficiently-effective-proportionate-and-dissuasive-ce-en.pdf>

⁵⁹ Art. 11 EU Mineral Regulation and art. 7 and 10 of the EU Timber Regulation.

⁶⁰ Art. 11.5, EU Mineral Regulation.

⁶¹ For example, under art. 225-102-5 of the French Code de commerce
<https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGI-TEXT000005634379&dateTexte=20190715>

⁶² See sections on monitoring organisations under the EU Timber Regulation and due diligence schemes under EU Minerals Regulation.

⁶³ OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas – Alignment assessment of industry programmes with the OECD minerals guidance*, 2018.

<https://mneguidelines.oecd.org/Alignment-assessment-of-industry-programmes-with-the-OECD-minerals-guidance.pdf>
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