European Economic and Social Committee

INT/911
Mandatory due diligence

OPINION

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Mandatory due diligence
(exploratory opinion)

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1. Conclusions and recommendations

1.1 The European Economic and Social Committee (EESC) affirms that it is time for the European Commission (EC) to act and propose legislation to the Member States and the European Parliament (EP) on mandatory due diligence that acknowledges responsibility based on current standards and offers a clear and secure legal framework for European businesses.

1.2 Human Rights Due Diligence (HRDD) has become a matter for the internal market; with different Member States attaching differing legal sanctions to the behaviour of firms, a fragmented, partly sectoral legislative initiative (LI) at EU level is not sufficient.

1.3 The material scope of the LI – either a directive or a regulation with their respective advantages and disadvantages – should guarantee a broad coverage of the HR and environmental rights definition including workers' and trade union rights and ensure the inclusion of new developments in HR.

1.4 Due diligence obligations, notably with regard to global value chains, must guide management decisions that aim at sustainable companies, economically, ecologically and socially. In any case, environmental impacts should be considered of great importance for sustainable business conduct and be a high priority in GVCs.

1.5 The LI should cross-sectorally cover all companies, with proportionate requirements for SMEs established or active in the EU, in order to avoid unfair competition and an uneven playing field, as well as the public sector. It should require companies to abide by high standards of responsible business conduct but at the same time provide adequate measures in line with the respective risk of HR violations.

1.6 The following aspects should be included in mandatory HRDD:

- A coherent due diligence framework based on current instruments applying to firms active in the internal market, including companies from third countries selling a significant volume of goods and services;
- A liability resulting in effective remedies for people who are affected by misconduct. A specific liability framework, including criminal liability, must be introduced for cases where HR, social and environmental standards violations or adverse impacts of companies' operations occur, including in their supply and subcontracting chains.

1.7 In order to avoid any legal uncertainty, the LI has to prescribe very clearly which individual actions have to be taken by companies throughout the whole due diligence process to assess HR risk in coherence with other EU binding legislation including the perhaps-to-be-adapted revision of the directive on extra-financial reporting requirements:

- Clearly defined risk analysis (identification and assessment of (potential) adverse impacts of corporate activities on HR and the environment set out in a formal, detailed document that is accessible, transparent and sincere, and which maps out the risks on the basis of a clear and

transparent procedure for assessing and prioritising risks) including a negotiated early-alert procedure and the protection of whistleblowers;
- Follow-up measures (define internal corporate responsibilities, end and prevent adverse effects);
- Tracking the effectiveness of the measures taken based on the OECD MNE Guidelines and UNGP;
- Communication (adequate reporting on the handling of (potentially) adverse impacts of corporate activities) respecting legitimate business secrecy and transparency;
- The trade union organisations represented in the company should be involved according to the national framework applicable to social dialogue.

1.8 Victims whose rights are infringed and their representatives, such as trade unions and HR defenders, must have access to effective remedies against negative impacts they suffered.

1.9 It must be ensured that victims of business-related HR infringements and their representatives including trade unions and human right defenders have, as a matter of HR, guaranteed access to fair proceedings, courts and authorities. When it is unclear if the parent company, one of its subsidiaries or suppliers with which established business relationships exist is potentially liable, one forum conducting fair proceedings should have jurisdiction. Accordingly, the Brussels I Regulation should be modified to allow for a proceeding in Europe, when HR infringements are involved.

1.10 A mandatory due diligence framework would be realised by an agreed standard that is enforced by proportionate, effective and dissuasive sanctions, whereas liability would have to be based on the violation of a clearly defined set of HR. Like in all liability regimes, an obvious causal link must be established between a fault, or a failure to prevent and certain damage. In cases of quite atypical causal cases there is consequently no risk connection.

1.11 Based on lessons learned from the French due diligence legislation, in order for European companies to be able to fulfil this role, the following quality standards must be ensured in a binding LI:

- Clear definitions and comprehensible language;
- Ensuring legal certainty and practicability in particular on the applicable law, proportionate reporting requirements respecting legitimate businesses secrecy.

1.12 The development of innovative information technologies (e.g. "blockchain"), which allow all data to be traced, should be encouraged for the management of GSCs in order to minimise administrative burdens and costs and avoid redundancies. They provide security and ensure traceability.

2. **Main elements and background**

2.1 The EP has asked the EESC to give an opinion on the LI announced at EU level on "Due Diligence and Corporate Accountability". The EESC will therefore deal with proposals on the possible

content and definitions of such a legislative act based on its work on "Due Diligence" (DD) and "Business and HR" and on the knowledge and experience of its members, particularly those countries with ambitious legislation.

2.2 The EESC has been active in working on issues of DD in global value chains (GVC)[1]. Violations and infringements of human rights (HR)[2], including workers' rights[3] and environmental rights still occur in GVC, even though in many cases such impacts could be prevented by DD and by compliance by the states and their administration with their international commitments, particularly in the field of labour rights and HR. The victims of such infringements often have no legal recourse to make their case.

2.3 A number of voluntary frameworks have been developed to enable companies to implement HRDD in their business activities. That usually takes the form of Corporate Social Responsibility (CSR) strategies.

2.4 Very influential among those instruments are the United Nations Guiding Principles on Business and HR (UNGP), the UN Global Compact, ISO 26000 on social responsibility, and the guidelines developed at the OECD (OECD MNE Guidelines). They suggest, among other things, that contracts with business partners in GVC should be designed in a way that structures business relationships in order to protect HR. Such voluntary instruments show that it is possible to manage risks and implement standards on HR infringements in GVC. From them, further, potentially mandatory, measures can be developed.

2.5 Voluntary measures have not always been able to prevent grievous violations of fundamental rights, nor do they offer companies legal certainty when engaging in business relations abroad. This leads to a patchwork of measures that do not provide for legal certainty and legal predictability.

2.6 To remedy this, certain EU Member States have adopted legislation enhancing corporate accountability and establishing firmer frameworks for HRDD, which can offer valuable experiences. Similar legislation is currently being considered in different European countries. The UK adopted the "Transparency in Supply Chains" clause in its Modern Slavery Act. The Netherlands adopted the Child Labour Due Diligence Bill, to fight against child labour for companies established in Netherlands and providing goods and services on the Dutch market.

2.7 At EU level, there is legislation pertaining to HRDD. The EU Conflict Minerals Regulation, the Non-financial Reporting Directive and the Timber Regulation are examples in which HRDD has been strengthened. Infringements of HR in GVC are handled indirectly through administrative, civil or criminal law. They raise issues of international private, international procedural and

1 OJ C 303, 19.8.2016, p. 17; OJ C 97, 24.3.2020, p. 9; and the EESC opinion on the Sustainable supply chains and decent work in international trade- EESC-2020-02161 (not yet published in the Official Journal).

2 As expressed in the International Bill of HR, the 9 core HR instruments, as pertains to Europe and the EU, the European Convention on HR, the European Social Charter and the EU's Charter of Fundamental Rights.

3 As expressed in the Core Labour standards and in particular the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.

international (corporate) criminal law, which have to some extent been harmonised in the EU (i.e. the Brussels I and Rome II Regulations).

2.8 There are efforts at the international level. A working group at the UNHRC in Geneva has been negotiating on a legally binding instrument on business and HR (UN Treaty), which was subject to an EESC opinion[4] in which it agreed with the EP[5] on the necessary content of such a treaty, namely:

- Building on the UNGP framework;
- Defining mandatory DD obligations for transnational corporations and other business enterprises including their subsidiaries;
- The recognition of the extraterritorial HR obligations of states and the adoption of regulatory measures to that effect;
- The recognition of corporate criminal liability;
- Mechanisms for coordination and cooperation among states on investigation, prosecution and enforcement of cross-border cases; and
- The setting-up of international judicial and non-judicial mechanisms for supervision and enforcement.

2.9 Aspects of HRDD have been the subject of a number of studies by European institutions and agencies, including the Fundamental Rights Agency (FRA)[6] and the EP.

2.10 Recently, a study commissioned by DG Justice[7] put forward an analysis of DD requirements through supply chains. It surveyed stakeholders, illustrated the regulatory framework, assessed various policy options and demonstrated the necessity to work on comprehensive, binding measures on HRDD.

2.11 The majority of its over 600 survey respondents indicated that "mandatory DD as a legal standard of care may provide potential benefits to business relating to harmonisation, legal certainty, a level playing field, and increasing leverage in their business relationships throughout the supply chain through a non-negotiable standard". The preference was for a general cross-sectoral regulation as many companies operate in multiple sectors, possibly covering all companies, based on the UNGP, and for a standard of care, rather than a procedural requirement.

2.12 The study also highlights that "currently only just over one-third of business respondents indicated that their companies undertake DD which takes into account all HR and environmental impacts". In addition, "the majority of business respondents which are undertaking DD include first tier suppliers only"[8]. Presenting the study results, Justice Commissioner Reynders stated that this

4 OJ C 97, 24.3.2020, p. 9.

5 EP resolution 2018/2763(RSP).

6 FRA Study, Improving access to remedy in the area of business and human rights at the EU level (Vienna 2017).

7 https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en

8 Study on due diligence requirements through the supply chain, European Commission, January 2020, p.16.

shows "that voluntary action to address HR violations, corporate climate and environmental harm, although incentivised through reporting, has not brought about the necessary behavioural change"[9].

3. General comments

3.1 Voluntary measures cannot prevent all rights infringements. Binding measures accompanied by appropriate sanctions can serve to ensure adherence to a minimum legal standard, also by those businesses that do not take their moral responsibility as seriously as those that implement high HR standards. Binding rules should be shaped coherently with existing DD systems, such as the UNGPs, for easier implementation and to avoid redundancies.

3.2 Negative impacts or violations of HR and social and environmental standards can be the result of the company's own activities, of the activities of the company's subsidiaries or controlled undertakings, as well as of the company's business relationships, i.e. its supply and subcontracting chain. Accordingly, the UNGP, the OECD Guidelines and the ILO Tripartite Declaration recognise that DD should also cover companies' business relationships, including supply and subcontracting chains. Based on these frameworks, DD requirements should ideally therefore cover all companies' operations, independently of their size, including their own activities, the operations of their subsidiaries and controlled undertakings, and their business relationships, including their whole supply and subcontracting chains, franchise and contract management. They should cover operations, actual and potential impacts and violations both within and outside the EU. However, on the ground, defining the scope for the application of DD is difficult: one of the criteria, for example, chosen in the French law No 2017-399 of 27 March 2017, is the existence of an established business relationship with an entity in the supply chain that implies a certain degree of control. The French Constitutional Court has defined in another judgement what "established business relationship" means: it means a regular, stable and continuous relationship developed, generally, with first tier suppliers and sub-contractors. Of course, it would be more ambitious to cover all the entities without exception, but we have to take into account the complexity of a large numbers of suppliers (up to 100 000 for one multinational company) and at the same time incentivise companies to implement effective DD for the entire value/supply chain.

3.3 The development of innovative information technologies (e.g. "blockchain"), which allow all data to be traced, should be encouraged for use in the management of GSCs in order to minimise administrative burdens and costs and avoid redundancies between various internal structures. They provide security and ensure traceability.

3.4 The EESC reiterates[10]: *"When EU Member States, on an individual basis start stipulating more stringent mandatory DD frameworks this will lead to a mismatch of such standards within the EU. Companies that are located in EU Member States with more stringent DD requirements shall not be out-competed by those that are not. The EESC notes that companies shall have a level playing field and legal certainty, with clear responsibilities".*

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9 Speech by Commissioner Reynders in RBC webinar on due diligence, 30 April 2020.

10 OJ C 97, 24.3.2020, p. 9.

3.5 The unbalanced and piecemeal take-up of voluntary schemes creates unfair competition at European level because there is not a single regime but a patchwork of national laws that are different from one to the next while pursuing the same global goal. Outside the EU, there is very little legislation on DD, which is unfortunate for some key trading partners like the USA and China. When a mandatory EU initiative is implemented, companies from those other markets will have to adhere to the standards in order to be active in our internal market, when the EU LI covers companies from third countries providing goods and services in the EU. For reasons of fair competition, it also makes the UN treaty very important to level the playing field outside the EU jurisdiction. The current EU framework offers room for different practices and standards, unequal in terms of HR and environmental and social standards. An EU LI should be both ambitious and pragmatic and made ready to implement the international standard that is being agreed upon at the UN[11] to level the international playing field. Given the EU's role in defence of HR, a track record of good HRDD by many, in particular large, European companies can make them pioneers in the responsibility to protect HR in GVC.

3.6 In order for European companies to be able to fulfil this role, the following quality standards must be ensured in a binding EU legislative act:

- clear definitions and comprehensible language;
- ensuring legal certainty and practicability.

3.7 Through the influence of the European internal market on world trade, a European LI would further level the playing field by requiring not only European companies to adhere to HRDD, but also companies from third countries which are providing goods and services in the internal market. This requirement for a level playing field between EU companies established in the EU and companies of third countries selling goods and services and investing in the internal market must be at the heart of any new EU LI, otherwise EU companies will suffer a competitive disadvantage. Looking at practical examples in the above-mentioned regulations on Timber and Conflict Minerals, we see that it is possible to leverage the internal market also for international suppliers.

3.8 HRDD has become a matter for the internal market; with different Member States attaching differing legal sanctions to the behaviour of firms, a fragmented, partly sectoral legislation at EU level is not sufficient. DD can have different legal ramifications depending on the specific national and legal context. In the context of this opinion, DD denotes a catalogue of obligations that a company has to follow to prevent, mitigate and account for HR (including the core ILO conventions) and environmental impacts in its operations and its GSC. Furthermore, it must be ensured that a level playing field exists for all companies involved. At international level, in particular regarding the binding UN treaty on Business and HR, the EESC regrets the absence of a dynamic for DD legislation and considers that the inclusion in the scope of a future EU LI of the companies of third countries investing and selling in the EU is a good starting point to raise the standards.

11 UN treaty "Business and HR".

3.9 The EESC affirms that it is time for the EC to act and propose to the Member States and the EP a mandatory DD LI that acknowledges responsibility based on current standards and offers a clear legal framework for European businesses.

3.10 Such an LI would have to start from a holistic but also legally robust and unambiguous understanding of stakeholders in a company[12]. Shareholders are at the core of a group of stakeholders, often incurring financial losses when companies are connected with HR infringements and the associated image damage. But more than just shareholders, employees, their representatives at shop and sector level and people affected by the acts done at a company level, either by living nearby or being exposed to its impacts and often being organised in civil society organisations have a stake in the responsible management of business affairs with DD for HR. All stakeholder groups should be given due consideration within a DD LI according to their respective interests.

3.11 From that follows that victims whose rights are infringed and their representatives, such as trade unions and HR defenders, must have access to effective remedies against negative impacts they suffered. Effective remedies mean that they must be able to gain full compensation for damages suffered.

3.12 It should also be pointed out that the negotiations for a UN treaty have yielded potential provisions on criminal liability for the most grievous acts, such as war crimes or unlawful executions. Therefore, a European DD LI must be able to incorporate such questions of criminal law into its frameworks.

3.13 Therefore, there are aspects to include in the consideration of mandatory HRDD:

- A coherent DD framework based on current instruments applying to firms active in the internal market;
- A liability resulting in effective remedies for people who are affected by misconduct; and
- A specific liability framework, including – where appropriate depending on the legal system and the violation – criminal liability.

3.14 The interrelation between the DD framework and questions of civil (and potential criminal) liability is obvious. Stringent DD procedures and information allow companies to illustrate that they are not responsible for a specific HR infringement. Companies that conduct DD must benefit from their efforts. This may not be construed as a general exclusion of liability. The UNGP addresses this issue in its commentary to Principle 17 by stating: *"Conducting appropriate HRDD 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 HR abuse. However, business enterprises conducting such DD should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to HR abuses*".

12 https://opportunity.businessroundtable.org/wp-content/uploads/2019/08/BRT-Statement-on-the-Purpose-of-a-Corporation-with-Signatures.pdf

3.15 An LI must cover DD but also make sure that it is adequately and coherently factored into questions of liability inside a scope based on the UNGP that will encompass in particular entities with which an enterprise has a direct link in its operations, products or services through established business relationships.

3.16 This may also be an ideal approach to including commensurate liability, without arbitrarily declaring "SME" thresholds. The existing DD frameworks, such as the UNGP and the OECD MNE Guidelines apply to all businesses, for good reason: HR are universal and indivisible; the size, revenue and sector specificities may vary wildly in their HR exposure in value chains; cutting off liability at specific sizes, subsidiaries and suppliers may create issues as GVC would adjust according to compliance thresholds. It is a fact that these companies, already deeply impacted by the COVID-19 crisis, have less adequate resources to perform the required task. A reasonable DD will ensure respect for HR and compensation for directly affected people, but avoid imposing in the most serious economic crisis any disproportionate logistical, financial and human burden on SMEs. A clarification of how the DD requirements interact with potential liability might be a practical approach to factoring in the particularities of SMEs in Europe.

3.17 The LI should cross-sectorally cover all companies - as stipulated in the UNGP - established or active in the EU, in order to avoid unfair competition and an uneven playing field, as well as the public sector. It should require companies to abide by high standards of responsible business conduct, but at the same time propose adequate measures in line with the respective risk of HR violations. Effective DD mechanisms must be put in place by companies in order to identify, prevent, and mitigate HR violations and negative social and environmental impacts, covering their activities and business relationships, including their supply and subcontracting chains clearly linked in a business relationship in well-defined GVCs.

3.18 The material scope of the LI should guarantee a broad coverage of the human and environmental rights definition including workers' and trade union rights and ensure the inclusion of new developments in HR (e.g. principle of non-discrimination). It should build on instruments such as the International Bill of HR and ILO Conventions, as well as the European Convention on HR and the European Social Charter. The ILO's Tripartite Declaration of Principles concerning MNEs and Social Policy also includes a comprehensive catalogue of rights pertaining to MNEs and work, which also specifically notes the conventions and recommendations on occupational safety and health, and should be considered. With regard to environmental rights, the Paris Agreement must be taken into account with the limit that this international treaty has been signed by governments and not by companies which means that the former must respect their commitments and the latter must contribute to their realisation. It should further build on the EU Treaties and the Charter of Fundamental Rights of the EU as well as national instruments in the area of HR. In any event, the level of protection of HR should by no means be lower than the one provided for by existing legislation at international, European or national level.

3.19 The DD obligations should cover actual and potential impacts. They should also cover social and environmental impacts, including on the basis of the SDGs, as well as anti-corruption, corporate governance and fair taxation. Environmental impacts should be considered of paramount importance for sustainable business conduct. According to the UNGP, OECD Guidelines and ILO Tripartite Declaration definitions, companies should carry out DD to "identify, prevent, mitigate

and account for how they address their actual or potential adverse impacts. Building upon those instruments, mandatory DD should include, while protecting legitimate interests of business secrecy, assessing and identifying actual and potential adverse impacts, acting upon the findings in order to cease and prevent negative impacts, tracking the implementation and the results, and communicating how impacts have been addressed". The LI should be built coherently with existing DD systems, such as the UNGPs, to facilitate easier implementation and to avoid redundancies.

3.20 The LI has to prescribe clearly which individual actions have to be taken by companies throughout the whole DD process to assess HR risk in coherence with other EU binding legislation, such as the revision of the Non-Financial Reporting Directive[13], which may need to be adjusted accordingly in the future. It should contain the following measures:

- Clearly defined risk analysis (identification and assessment of (potential) adverse impacts of corporate activities on HR and the environment) including an early-alert mechanism;
- Follow-up measures (define internal corporate responsibilities, end and prevent adverse effects);
- Tracking the effectiveness of the measures taken based on the OECD MNE Guidelines and UNGP;
- Communication (reporting on the handling of (potentially) adverse impacts of corporate activities) respecting legitimate business secrecy;
- The trade union organisations represented in the company should be involved according applicable to social dialogue.

3.21 Member States should ensure that one or more national public authorities (e.g. labour or health and safety inspectorates) have the responsibility to monitor the respect of companies' obligations. The authority should have the necessary resources and expertise to carry out controls, also ex officio and checks based on risk assessments, information received from whistleblowers and complaints. It should work in close cooperation with and ensure the active participation of the social partners. Properly equipped OECD contact points should play a role as well.

3.22 The international instruments recognise the necessary role that meaningful consultations with representatives of civil society, as well trade unions, workers and their legitimate representatives at the respective levels of social dialogue (shop, sectoral, national, European, international), should play in the definition and implementation of companies' DD initiatives. Therefore, an LI should guarantee such participation in the respective DD provisions.

3.23 In the existing systems on which a mandatory LI may be based, implementing and conducting a DD system does not in itself always preclude liability, as damages result from infringements of HR, not due diligence oversights. When prevention fails, victims of HR infringements still need at least effective judicial remedies guaranteeing full compensation for the damages incurred. A DD system will serve to illustrate the efforts taken in preventing damages.

13 OJ L 330, 15.11.2014, p. 1.

4. Specific comments

4.1 Businesses operating across borders within the EU and beyond must be managed in a way that is sustainable: economically, socially, ecologically, with prospects for locations, production of goods and services in Europe. The LI should also require companies to embed responsible and sustainable business conduct principles and considerations in their business relationships in GVCs. The LI should orientate to install a framework, which will include an effective and binding dialogue with the key stakeholders of a company, preferably at the level of their supervisory and advisory boards.

4.2 Considering the challenges and obstacles that victims often face in the access to justice in third countries where European companies' operations take place, the possibility of access to justice in the Member State where the company is established (or where it conducts business activities) should be ensured. It should therefore be possible to submit claims against companies which are established in or conduct activities in or have otherwise a link with a Member State in that Member State's jurisdiction. This possibility is already foreseen by the French corporate duty of vigilance law of 27 March 2017 but pending cases show that the jurisdiction of national courts is not yet acquired for complaints concerning a subsidiary abroad.

4.3 The jurisdiction of European courts is usually reserved for European defendants. This means that a Europe-based company may be sued in a European court, but its subsidiaries, which are based in the country where the damage occurred, typically may not. Suppliers and intermediaries in the supply chain are even farther removed from the European company in question. It must be ensured that victims of business-related HR infringements and their representatives, including trade unions and human rights defenders have, as a matter of HR, guaranteed access to fair proceedings, courts and authorities. When it is unclear if the parent company, one of its subsidiaries or suppliers is potentially liable, one forum conducting fair proceedings should have jurisdiction. Accordingly, the Brussels I Regulation should be modified to allow for a proceeding in Europe, when HR infringements are involved.

4.4 Another issue that has been discussed at UN level is applicable law. According to Article 7 of the Rome II regulation, there is a choice of laws in cases of environmental damage. Will it be also the case for HR in order to ensure the same level of rights between environmental damages and HR violations? This issue is currently a matter of debate between lawyers and the EESC will favour such an alignment in principle without prejudging all legal consequences.

4.5 A specific liability framework, including – where appropriate depending on the legal system and the violation – criminal liability, must be introduced for cases where HR, social and environmental standards violations or adverse impacts of companies' operations occur, including in their supply and subcontracting chains. Criminal liability for the most heinous international crimes has been included in the UN draft treaty. In its opinion on the UN Treaty, the EESC has already noted that such a liability should also extend to cases of grave negligence[14].

14 OJ C 97, 24.3.2020, p. 9.

4.6 The EESC has also already expressed its views on the issue of a burden of proof and the respective standard of proof. In the EESC opinion[15] it is proposed that: *"(…) That would mean at least that claimants of HR infringements shall only be required to prove the existence of a definite connection between the perpetrator of the infringement (such as a supplier or subsidiary) and the (recipient or parent) company, which shall in turn be required to plausibly explain that the infringements were not within its control"*.

4.7 Companies should not be exposed to frivolous litigation or an absolute liability, as they can refer to their DD processes to illustrate their involvement and actions to mitigate and prevent the harmful impacts. When a company has neither caused, contributed to a damage nor could have known about it, even though it has conducted meaningful DD, no liability can be attached. A DD process should address the often cited problem of "corporate veil", whereby victims often do not have the resources or the possibility to illustrate the specific chain of responsibility within a GVC.

4.8 Measures to facilitate access to justice for victims should include appropriate support schemes. Interim proceedings should allow the halting of operations violating HR, social and environmental standards. The EESC has already noted the importance of witnesses and the role of whistleblowers, as well as the necessity to support NGOs working in this area to the extent that they have a legitimate interest, based on established, legal principles in taking action and gathering evidence. In France, a few formal notices at the initiative of NGOs against companies on the basis on the French DD have demonstrated the difficulties in law enforcement (applicable law for instance).

4.9 A mandatory DD framework would be realised by an agreed standard that is enforced by proportionate, effective and dissuasive sanctions, whereas liability would have to be based on the violation of a clearly defined set of HR. Like in all liability regimes, an obvious causal link must be established between a fault, or a failure to prevent and certain damage. In cases of non-proximate, remote, causal cases, there is consequently no risk connection.

4.10 Sanctions should include exclusion from public procurement and public funding, as well as financial sanctions in proportion with companies' turnover and remediation. This should incentivise companies to comply with the obligations and to prevent negative impacts of their activities. This should further contribute to the upwards convergence of the approach towards HR, including workers' and trade unions' rights. Member States should introduce positive incentives to promote an ambitious approach by companies towards sustainable economic operations, including in their supply and subcontracting chains.

4.11 An LI should include a non-regression clause, a most favourable clause as well as a review clause based on expert input for which data protection legislation could be an example. The requirements of a new EU LI should also apply to existing voluntary DD tools, which should be adapted where necessary.

15 OJ C 97, 24.3.2020, p. 9.

4.12 The EC should actively promote its DD policy at international level, i.e. in the UN treaty process, in all the relevant international organisations in order to stimulate other jurisdictions to follow that path.

Brussels, 18 September 2020

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