



EBCAM Position Paper on EU Human Rights Due Diligence Legislation for companies

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The European Commission under the leadership of DG Justice and DG Grow is currently initiating a binding draft EU Human Rights Due Diligence Legislation for companies. In its response, the European Parliament has shown support for EU law on this matter. According to this draft initiative, all European companies with more than 250 employees and SMEs listed on the stock exchange will have to prove that their international supply chains respect due diligence obligations in terms of human rights (including social, commercial and workers' rights), respect for the environment (including contribution to climate change or deforestation) and good governance (corruption...), failing which they could be held legally responsible and face criminal sanctions before a European court.

We at EBCAM believe that violations of human rights and environmental standards within companies' value chains need to be addressed. The OECD Due Diligence Guidelines need to be followed. However, this new law might cause the opposite effect. And the dedication for enforcing human rights needs the best possible solution, not a punitive neither inefficient compromise focusing only on companies without including partner countries. Companies represented by the EBCAM member organisations have been engaged in African countries for many years by putting CSR at the heart of their strategies and operations. With the looming future EU legislative framework on Human Rights Due Diligence (HR DD) in global supply chains, supposedly creating a level playing field, there is the challenge that the African continent has more to lose than to gain. For the most part, European companies contribute to the sustainable development of local economies, creating much-needed jobs, flanking their engagements with education and skills training, respecting human rights and environmental regulations. Human rights apply universally, and children belong in schools, not in factories. Unfortunately, it is to be feared that the planned law will have the opposite effect to that intended.

This is the reason why EBCAM demands that a future EU legislative framework on HR DD must avoid the pitfall of legal uncertainty as already in some EU member states laws (such as France on the Corporate Duty of Vigilance), but must provide a workable and effective solution which does not lead to a legal patchwork of incompatible national legislative initiatives or duplications. Also, there should be no distortion of competition vis-à-vis non-European companies. It should by no means transfer state responsibilities to companies.

In our view, the following points should be considered by stakeholders for a potential mandatory European HR DD concerning business operations in Africa:

- It is quite impossible for EU companies to guarantee “zero risk” on their supply chains in Africa. So, the possible consequences of a future forceful European Due Diligence law could be very damaging for the EU companies that would be inevitably reluctant to invest in Africa, even purchase intermediate products from their value chain in the continent, unlike other investors from non-EU countries. This will inevitably undermine the value chains developed by EU companies in cooperation with their African partners, especially those exporting to the EU markets.
- Especially European medium-sized enterprises will deliberate even more carefully about whether they can engage in African countries, e.g. for trading, purchasing intermediate products, or even investing and producing locally. And what African markets need is business and investments. The



reluctance of many companies to take the step to Africa could increase with a forceful European Due Diligence law.

- Even larger companies would reconsider their involvement in Africa – their business units in Africa often make only a small contribution to profits, and the risk of suddenly being excluded from public contracts in the European market because of challenges in an African country could put a swift end to many European projects in Africa.
- The very broad scope of these regulations is a hindrance both for companies in identifying their risks and for potential victims. Also does a broad regulation negate the different underlying mechanisms in each sector – be it agriculture, mining, textiles, electronics, or automotive.
- Especially in the agricultural and agri-food sectors in Africa, some specific aspects need to be taken into account:
 - o Informality in agriculture is the norm, even in value chains that are certified. With companies' obligation to identify risks not only with direct suppliers, but along the whole value chain, the possibility to address and fight informality cannot be left to individual companies.
 - o The issue of deforestation, increasingly relevant in the fight against climate change, is especially salient when it comes to single-crop farming (palm oil, rubber, cocoa plantations). So far, the EU and several member states (e.g. Netherlands, Germany and France) have implemented a strategy to combat imported deforestation, but more attention needs to be paid to plantations with harmful climate effects. Companies cannot be prosecuted in hindsight for negative side-effects of single-crop farming.

While the European Union and several Member States such as the Netherlands, Germany and France have implemented a strategy to combat imported deforestation, the issue of deforestation, which has become very sensitive in the context of the fight against climate change, is associated with sectors identified as "harmful" by public opinion, starting with palm oil, rubber and cocoa in Africa. But the concerns of civil societies in the North are expanding to non-tropical products, such as animal feed and meat.

- This future EU legislative framework does not take into account the regulatory and legislative provisions put in place - or being put in place - by African states in the field of human and environmental rights, which is contrary to the spirit of the new EU-Africa partnership that both parties wish to strengthen. Hence, African partners must be involved in the policy formulation so as not to counteract on the alleged EU's and AU's partnership on an equal footing.
- The future law should focus on the supply chain upstream (direct subcontractors or providers) and not midstream. The duty of vigilance should stop at just tier 1 suppliers. Indeed, the supplier would try to apply its own due diligence regarding the customer whereas the customer would apply its own due diligence regarding the supplier. It seems neither appropriate nor necessary to generate a stack of rules and overlapping due diligence obligations. SMEs in particular would face a new competitive disadvantage. They are more sensitive to bureaucracy and less able to diversify risks. Above all – due their lack of comparable market and purchasing power – they can exert much less influence on their suppliers.



- The future law should be based on an obligation of means rather than results because it is impossible to guarantee “zero risk” on the supply chains. Even the best sustainability audit carried out at a given time does not ensure that a moment later the level of compliance with contractual clauses will not significantly decrease for reasons that cannot always be anticipated or monitored.
- The role of OECD National Contact Points (NCP) should be preferred as they offer a unique State-based non-judicial mechanism through which the non-respect of OECD Guidelines can be effectively raised. Almost 50 NCPs currently exist for each government adhering to the OECD Guiding Principles. The NCPs offer a non-judicial grievance mechanism which help to resolve issues that can arise if the OECD Guidelines are not observed. NCPs are often more efficient than lengthy judicial procedures. They contribute to improving access to remedy for victims of business-related rights violations, especially in cross-border transactions where judicial systems may fail.
- Increasing bureaucracy, associated costs, and, most importantly, the risk of sanctions, particularly affect companies that are active in relatively fragile countries.

If the EU companies are thus held criminally responsible for the actions or failings of their suppliers and subcontractors in Africa, which they do not control, they will look twice before investing in Africa - even if this investment is likely to bring relative progress to the situation of the local populations, to the benefit of our competitors, notably Chinese. In this context, the documentation of potential risks and impacts, which requires the expertise of professionals, increases the cost of investment for the company in drawing up its due diligence plan, hence the need to be able to amortise these additional costs on a regional scale. Not all SMEs have the resources to identify and mitigate risks in their value chain. Moreover, monitoring these measures could cost them fifteen times more than in large companies.

In addition, there are non-financial risks, such as the reputational risk of the company in the event of a problem. This reputational risk, which has become major and which the law does nothing to mitigate, is growing in a society marked by the omnipotence of social networks and the development of "name and shame".

Proposals:

- Dialogue with African partner countries, sector-specific certification and audit systems should be expanded
- The advisory and support structures for companies, especially for SMEs – both European and African - should be further enhanced. Contact points could be established for companies that feel disadvantaged by competitors who, for example, tolerate child labour or other problematic working conditions in their supply chains (“blacklist”). Countries in which there are obvious problems in enforcing fundamental human rights in mines, on plantations, or in factories should be offered more support. In addition, critical dialogue with countries that give little thought to human rights and working conditions at home or abroad should be intensified.
- Existing EU initiatives such as the online portal 'due diligence ready!', which contains information, tools and training materials to guide companies in conducting due diligence on its minerals and metals supply chain - on tin, tantalum, tungsten and gold but also includes all other minerals and metals such as battery raw materials - should be supported and information about and existence of this portal should be widely advertised.



- Multilateral initiatives need to be strengthened, in a dialogue with African partners, such as the mentioned OECD NCPs. Connections with OECD's Centre on Responsible Business Conduct need to be made.
- Development cooperation should focus more on skills transition for African companies, who are disadvantaged when it comes to standards compliance for EU firms.
- Additionally, the EU should explore the creation of an expert circle on Sustainable Corporate Governance to identify best practices on stakeholder engagement and maximise sustainable value creation, based on already existing corporate government models, cooperation with business representatives, and the possible consultation channels. EBCAM as voice of European-African business needs to be heard.
