








# National mHRDD laws and legislative proposals in Europe

## COMPARATIVE TABLE

May 2020

							
	<u>FRENCH DUTY OF VIGILANCE LAW</u>	<u>SWISS RESPONSIBLE BUSINESS INITIATIVE</u>	<u>SWISS NATIONAL COUNCIL COUNTER-PROPOSAL</u>	<u>DUTCH CHILD LABOUR DUE DILIGENCE LAW</u>	<u>DUTCH CHRISTEN UNIE PROPOSAL</u>	<u>GERMAN LIEFERKETTENGESETZ PROPOSAL</u>	<u>NORWEGIAN ETHICS INFORMATION COMMITTEE DRAFT</u>
STATUS	<ul style="list-style-type: none"> <li>In force<sup>1</sup></li> </ul>	<ul style="list-style-type: none"> <li>Proposal (CSOs)<sup>2</sup></li> </ul>	<ul style="list-style-type: none"> <li>Proposal (lower house of the parliament)<sup>3</sup></li> </ul>	<ul style="list-style-type: none"> <li>Entry into force expected in 2022<sup>4</sup></li> </ul>	<ul style="list-style-type: none"> <li>Proposal (political party)<sup>5</sup></li> </ul>	<ul style="list-style-type: none"> <li>Proposal (CSOs)<sup>6</sup></li> </ul>	<ul style="list-style-type: none"> <li>Proposal (experts committee)<sup>7</sup></li> </ul>
NATURE	<ul style="list-style-type: none"> <li>Company law</li> <li>Civil law</li> <li>International private law</li> </ul>	<ul style="list-style-type: none"> <li>Constitution<sup>8</sup></li> <li>Company law</li> <li>Civil law</li> <li>International private law</li> </ul>	<ul style="list-style-type: none"> <li>Company law</li> <li>Civil law</li> <li>International private law</li> </ul>	<ul style="list-style-type: none"> <li>Consumer law</li> </ul>	<ul style="list-style-type: none"> <li>Company law</li> <li>International private law</li> </ul>	<ul style="list-style-type: none"> <li>Company law</li> <li>Civil law</li> <li>International private law</li> </ul>	<ul style="list-style-type: none"> <li>Consumer law</li> </ul>
SCOPE	<ul style="list-style-type: none"> <li>Large companies based in FR<sup>9</sup></li> </ul>	<ul style="list-style-type: none"> <li>All companies based in CH except low-risk SMEs<sup>10</sup></li> </ul>	<ul style="list-style-type: none"> <li>Large companies<sup>11</sup> based in CH (except those with particularly low risks)</li> <li>SMEs in high-risk sectors based in CH</li> </ul>	<ul style="list-style-type: none"> <li>All companies delivering products or services in NL (whether based or not in NL)<sup>12</sup></li> </ul>	<ul style="list-style-type: none"> <li>All companies based in NL</li> <li>All companies delivering products or services in NL</li> </ul>	<ul style="list-style-type: none"> <li>Large companies<sup>13</sup> based in DE</li> <li>Large companies delivering products or services in DE</li> <li>SMEs in high-risk sectors based in DE</li> <li>SMEs in high-risk sectors delivering products or services in DE</li> </ul>	<ul style="list-style-type: none"> <li>All companies delivering products or services in NO</li> </ul>
STANDARDS	<ul style="list-style-type: none"> <li>Human rights</li> <li>Environment (FR international commitments)<sup>14</sup></li> </ul>	<ul style="list-style-type: none"> <li>Human rights</li> <li>Environment (internationally recognized standards)</li> </ul>	<ul style="list-style-type: none"> <li>Human rights</li> <li>Environment (CH international commitments)</li> </ul>	<ul style="list-style-type: none"> <li>Child labour<sup>15</sup></li> </ul>	<ul style="list-style-type: none"> <li>Human rights</li> <li>Environment</li> </ul>	<ul style="list-style-type: none"> <li>Human rights</li> <li>Environment</li> </ul>	<ul style="list-style-type: none"> <li>Human rights</li> <li>Environment</li> </ul>
DUE DILIGENCE OBLIGATIONS	<ul style="list-style-type: none"> <li>Due vigilance<sup>16</sup> (DV): establish and implement a vigilance plan<sup>17</sup> on an annual basis (UNGP-based)</li> </ul>	<ul style="list-style-type: none"> <li>Duty of care including due diligence (DD)<sup>18</sup></li> </ul>	<ul style="list-style-type: none"> <li>Duty of care including due diligence<sup>19,20</sup> (DD)</li> </ul>	<ul style="list-style-type: none"> <li>Submit a statement declaring that due diligence (DD) was conducted</li> <li>DD: <sup>21</sup> draw up an action plan if there is a suspicion of child labour (UNGP/OECD)</li> </ul>	<ul style="list-style-type: none"> <li>Due diligence (DD) (OECD-based)<sup>22,23</sup></li> </ul>	<ul style="list-style-type: none"> <li>Due diligence (DD): a DD plan must be submitted to the competent authority (UNGP/OECD-based)</li> <li>Duty to keep internal documentation of the actions taken</li> </ul>	<ul style="list-style-type: none"> <li>Duty to know of salient risks (all companies)<sup>24</sup></li> <li>Due diligence (DD) (only large companies<sup>25</sup>)<sup>26</sup></li> </ul>

<p><b>TRANSPARENCY OBLIGATIONS</b></p>	<ul style="list-style-type: none"> <li>▪ Publish the vigilance plan in the annual report</li> </ul>	<ul style="list-style-type: none"> <li>▪ No disclosure requirement</li> </ul>	<ul style="list-style-type: none"> <li>▪ No disclosure requirement</li> </ul>	<ul style="list-style-type: none"> <li>▪ No disclosure requirement (statements are published on the authority's website)</li> </ul>	<ul style="list-style-type: none"> <li>▪ Publish yearly their DD process in line with the OECD DD Guidance and the UNGP Reporting Framework.<sup>27</sup></li> </ul>	<ul style="list-style-type: none"> <li>▪ Publish their annual DD plan on the company's website.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Publish the production sites (all companies)</li> <li>▪ Publish the DD process and results (only large companies)<sup>28</sup></li> </ul>
<p><b>REACH OF DUE DILIGENCE</b></p>	<ul style="list-style-type: none"> <li>▪ Whole supply chain: <ul style="list-style-type: none"> <li>- directly/indirectly controlled companies<sup>29</sup></li> <li>- subcontractors and suppliers with an "established commercial relationship"<sup>30</sup></li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>▪ Whole supply chain: <ul style="list-style-type: none"> <li>- direct/indirect subsidiaries</li> <li>- other business relations</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>▪ Whole supply chain: <ul style="list-style-type: none"> <li>- direct/indirect subsidiaries</li> <li>- other business relations</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>▪ Whole supply chain: any natural or legal person throughout the supply chain<sup>31</sup></li> </ul>	<ul style="list-style-type: none"> <li>▪ Whole supply chain: <ul style="list-style-type: none"> <li>- own activities</li> <li>- those linked to them by business relationships, including along their entire value chain</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>▪ Whole supply chain</li> </ul>	<ul style="list-style-type: none"> <li>▪ Whole supply chain: all entities supplying goods and services that deliver products or factor inputs to an enterprise</li> </ul>
<p><b>CIVIL LIABILITY</b></p>	<ul style="list-style-type: none"> <li>▪ Parent company (direct<sup>32</sup>) liability<sup>33</sup></li> <li>▪ For damage that DV could have prevented, caused by controlled companies (directly/indirectly), and subcontractors and suppliers with "established commercial relationship"</li> <li>▪ Victims must prove the causal link between the fault of the company and the damage</li> </ul>	<ul style="list-style-type: none"> <li>▪ Parent company (vicarious<sup>34</sup>) liability</li> <li>▪ For damage caused by controlled companies (subsidiaries and economically controlled companies)<sup>35</sup></li> <li>▪ Unless the company proves that<sup>36</sup> <ul style="list-style-type: none"> <li>- it took all due care, or</li> <li>- the damage would have occurred even if all due care had been taken</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>▪ Parent company liability</li> <li>▪ For damage to limb, life or property, caused by legally controlled companies (if control is actually exercised), arising from the violation of international standards</li> <li>▪ Unless the company proves that <ul style="list-style-type: none"> <li>- it took all due care, or</li> <li>- the impossibility to influence the behaviour of the controlled company</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>▪ No explicit provision (under Dutch law, victims can still seek judicial remedy and hold companies liable for harm linked to their failure to conduct DD)</li> </ul>	<ul style="list-style-type: none"> <li>▪ No explicit provision (under Dutch law, victims can still seek judicial remedy and hold companies liable for harm linked to their failure to conduct DD)<sup>37</sup></li> </ul>	<ul style="list-style-type: none"> <li>▪ Parent company liability</li> <li>▪ For damage to life, limb or property, or for damage derived from the violation of international human rights recognised by DE or environmental harm caused by subsidiaries and suppliers</li> <li>▪ Unless the company proves that <ul style="list-style-type: none"> <li>- it conducted DD, or</li> <li>- the damage would have occurred even if all due care had been taken</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>▪ No explicit provision</li> </ul>
<p><b>PUBLIC ENFORCEMENT</b></p>	<ul style="list-style-type: none"> <li>▪ Any concerned party<sup>38</sup> can file a complaint for non-compliance before the judge<sup>39</sup></li> <li>▪ The judge can give formal notice to comply in a three-month period</li> <li>▪ If non-compliance persists, the judge can oblige the company to publish a plan and impose periodic penalty payments<sup>40</sup></li> </ul>	<ul style="list-style-type: none"> <li>▪ No explicit provision</li> </ul>	<ul style="list-style-type: none"> <li>▪ No explicit provision</li> </ul>	<ul style="list-style-type: none"> <li>▪ Any person can file a complaint before the company<sup>41</sup></li> <li>▪ If the response is found inadequate, they can file a complaint before the regulator</li> <li>▪ The regulator can issue an order to require compliance</li> <li>▪ Failing to comply is punishable with fines, up to imprisonment<sup>42</sup></li> </ul>	<ul style="list-style-type: none"> <li>▪ Any concerned party can file a complaint before the regulator<sup>43</sup></li> <li>▪ The regulator monitors and determines the company's link to an impact, and can oblige the company to cease and remedy it</li> <li>▪ Failing to comply is punishable with fines, up to imprisonment<sup>44</sup></li> </ul>	<ul style="list-style-type: none"> <li>▪ The competent authority audits the DD plans and initiate further investigations if there are signs of violations</li> <li>▪ Failing to conduct DD or to submit the plan may lead to fines, including exclusion from public procurement and from foreign trade funds</li> </ul>	<ul style="list-style-type: none"> <li>▪ Any person can file a request for information about a company's DD before the company<sup>45</sup></li> <li>▪ The company must answer within three weeks or two months, depending on the request<sup>46</sup></li> <li>▪ The Consumer Authority and the Market Council monitor compliance</li> </ul>

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## STATUS

<sup>1</sup> [Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre](#) (see [FAQs by ECCJ](#)).

In February 2020, the French General Council of the Economy published an [assessment report](#) of the law, calling for a broader scope, for harmonising the thresholds, and for scaling the law up to the EU level.

<sup>2</sup> In 2016, a broad civil society coalition, the [Swiss Coalition for Corporate Justice](#) (SCCJ), launched the Responsible Business Initiative (RBI), which proposed changing the Constitution to introduce a duty of care for companies, including human rights due diligence obligations and civil liability (more information is available on the RBI's website <https://corporatejustice.ch/about-the-initiative/>).

<sup>3</sup> The National Council, the lower house of the Swiss parliament, approved in June 2018, and reaffirmed in June 2019, January 2020 and March 2020, a [legislative proposal](#) that would require large companies to undertake human rights and environmental due diligence according to the UNGPs and the OECD Guidelines and would establish civil liability for parent companies for harm caused by their subsidiaries. The bill was passed as a counter-proposal to the citizen RBI.

However, the Council of States, the upper house of the Swiss parliament, has so far [rejected the RBI as well as the counter-proposal](#), and voted for a weaker bill that nevertheless includes non-financial reporting requirements, and human rights due diligence rules with respect to child labour and conflict minerals.

<sup>4</sup> In May 2019, the Dutch Senate adopted the Child Labour Due Diligence Law (see [MVO Platform, 'FAQ on the about the new Child Labour Due Diligence Law'](#)). For an analysis of the Act, see L.F.H. Enneking, 'Corporate duties of care in relation to responsible business conduct in global value chains - Legal developments in the Netherlands and beyond', in: L.F.H. Enneking, I. Giesen, F.G.H. Kristen, L. Roorda, C.M.J. Ryngaert, A.L.M. Schaap (eds.), *Accountability, International Business Operations and the Law: Providing Justice for Corporate Human Rights Violations in Global Value Chains*, Routledge 2019 (forthcoming).

<sup>5</sup> In March 2020, the Christian Union (CU), one of the four national government coalition partners, published an [outline for a broad due diligence law](#).

<sup>6</sup> In February 2020, the civil society coalition [Initiative Lieferkettengesetz](#) presented a [legal opinion](#) outlining the essential elements of their proposal for a German mandatory supply chain due diligence law (a sort unofficial summary translation by the Business & Human Rights Resource Centre is available [here](#)). In December 2019, the German Ministers for Labour and Development jointly committed to developing a supply chain due diligence law.

<sup>7</sup> In 2018, the Norwegian government mandated appointed an expert committee, the [Ethics Information Committee](#), to explore responsible business and supply chain regulation. In November 2019, the Ethics Information Committee published a [draft act relating to transparency regarding supply chains, the duty to know and due diligence](#).

## NATURE

<sup>8</sup> The RBI proposes introducing (i) a new article 101a into the Federal Constitution, establishing an obligation on companies to respect human rights and the environment, and (ii) implementing legislation, most probably via a special act, including company law, private international law and tort law provisions.

## SCOPE

<sup>9</sup> The scope of the law covers companies that for two consecutive financial years employ: (a) 5,000 employees itself and in its direct and indirect subsidiaries whose registered office is in France, or (b) 10,000 employees itself and in its direct and indirect subsidiaries whose registered office is in France or abroad. French subsidiaries of foreign companies are also covered if they reach the thresholds.

<sup>10</sup> Companies with registered office, central administration, principal place of business in Switzerland (definition based on the Lugano Convention).

<sup>11</sup> Companies that meet two of three of the following thresholds: (a) balance sheet of CHF/USD 40 million; (b) turnover of CHF/USD 80 million, (c) 500 full-time employees.

<sup>12</sup> The Child Labour Due Diligence Law covers every company that supplies goods or services to Dutch end-users (i.e. the last-tier companies, which are closest to the Dutch end-users of the products and services). The preamble of the law defines end-users as "the natural or legal persons that use or use up the goods or make use of the services". As such, it may apply not only to companies that are registered in the Netherlands, but also to companies that are registered abroad. The Act contains a number of exemptions: (i) companies that do not supply goods or services to Dutch end-users, (ii) companies that merely transport the goods that are to be supplied (art. 4(4)). Moreover, certain other categories of companies may be exempted by a subsequent General Administrative Order (GAO) (art. 6). These other categories of companies may include for instance small companies and companies from low-risk sectors.

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<sup>13</sup> According to section 267 of the German Commercial Code, large companies are companies that meet at least two of the following three thresholds: (a) more than 250 employees; (b) total assets of more than €20 million; (c) turnover of more than €40 million.

## STANDARDS

<sup>14</sup> The material scope of the duty of vigilance covers “risks” and “severe impacts” on human rights, health and safety and the environment. ‘Severe impacts’ are not defined in the law. The UNGPs can offer guidance, insofar as the severity of an impact is defined according to scale, scope and irremediable character. The notion is also linked to the notion of ‘*vigilance raisonnable*’ in the law (reasonable vigilance). Reasonable vigilance can be related to the ‘due diligence’ notion in the UNGPs (reasonable measures link to impacts over which the company has the ability to act, in connection to business activities or relationships). The assessment of the context (including operational sector and context) is crucial.

<sup>15</sup> The Child Labour Due Diligence Law defines child labour along the lines of ILO Conventions C138 (the Minimum Age Convention 1973) and C182 (the Worst Forms of Child Labour Convention 1999) (art. 2).

## DUE DILIGENCE OBLIGATIONS

<sup>16</sup> Instead of ‘due diligence’, the French law resorts to the concept of ‘duty of vigilance’, which could be assimilated to a particular form of statutory ‘duty of care’ (the concept of “duty of care” does not exist in France).

<sup>17</sup> The vigilance plan must include the following measures:

1. A risk map intended for their identification, analysis and prioritization.
2. Procedures for regular assessment of subsidiaries, subcontractors and suppliers, with regard to risk mapping.
3. Appropriate actions to mitigate risks or prevent serious harm.
4. An alert mechanism relating to the existence or realization of risks, established in consultation with trade unions.
5. A system for monitoring the adopted measures and evaluating their effectiveness.

<sup>18</sup> The scope of due diligence will depend on risks to human rights and the environment (risk-based approach). The duty of care includes: (i) assessing risks and impacts; (ii) preventing violations and ceasing existing violations and (iii) accounting for the actions taken.

<sup>19</sup> Due diligence includes remediation.

<sup>20</sup> Due diligence must be “appropriate”. The criterion of ‘appropriate’ is based on the UNGPs, which apply a risk-based approach. ‘Appropriate’ is to be defined according to the circumstances (i.e., according to risk). It allows judges a margin of appreciation to determine whether due diligence has been conducted in relation to the circumstances and risks.

<sup>21</sup> Due diligence to prevent child labour from being used in the production of goods and services supplied to Dutch end-users.

<sup>22</sup> Due diligence is defined as the process by which enterprises identify, prevent and mitigate the actual and potential negative consequences of their actions, and remediate such impacts when they occur. The proposal aims at passing into law the six-step process set in the OECD Due Diligence Guidance for Responsible Business Conduct (2018).

<sup>23</sup> The proposal focuses on avoiding and remediating adverse impacts through due diligence. The company would not be relieved of its duty to address an impact it caused/contributed to/is linked to until the impact was effectively addressed (i.e., ceased and remediated), even if the company had conducted what appeared to be appropriate due diligence. If a company caused or contributed to an impact, it would be obliged to stop the activity causing or contributing to the harm and to provide for or contribute to remediation. In cases of an adverse impact directly linked to a company, the company would be obliged to use its leverage to encourage the entity causing the impact to cease the activity causing the impact and remediate the impact.

<sup>24</sup> All enterprises would be obliged to know of salient risks that may have an adverse impact on fundamental human rights and decent work, both within the enterprise itself and in its supply chains. The scope of the duty to know depends on factors that include the size of the enterprise, its ownership and structure, activities, industry and type of goods or services. The duty to know applies in all cases where the risk of adverse impact is most severe, such as the risk of forced labour and other slavery-like labour, child labour, discrimination in employment and at work, lack of respect for the right to form and join trade unions and undertake collective bargaining and risks to health, safety and the environment in the workplace.

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<sup>25</sup> 'Large enterprises' means enterprises covered by the Accounting Act section 1-5, or which exceed the limits for two of the following three conditions on the balance sheet date: (a) sales income: NOK 70 million; (b) total assets: NOK 35 million; (c) average number of employees in the accounting year: 50 full time equivalents (section 3(b) of the draft Act).

<sup>26</sup> Large enterprises would be obliged to exercise due diligence in order to identify, prevent and mitigate any possible adverse impact on fundamental human rights and decent work and account for how they address any adverse impacts.

#### **TRANSPARENCY OBLIGATIONS**

<sup>27</sup> The proposal would oblige enterprises to communicate the way in which they identify, prioritize and deal with actual or potential adverse impacts. The information should be accessible for intended target groups (particularly, rights-holders) and be sufficient to demonstrate that the enterprise's response to the (risk of) adverse impacts is adequate.

<sup>28</sup> The report would always have to include information on risks and measures in relation to forced labour and other slavery-like labour, child labour, discrimination in employment and at work, lack of respect for the right to form and join trade unions and undertake collective bargaining, as well as health, safety and the environment.

#### **REACH OF DUE DILIGENCE**

<sup>29</sup> The notion of control is well-known in France (it is part of the Commercial Code). It already exists in accounting. Control means "exclusive control" (decision-making power), exercised through: legal control, de facto control, or contractual control. Companies targeted are those over which another company exercises decision-making power, whether they are direct subsidiaries, second-tier subsidiaries, third-tier subsidiaries, etc., with no limits to the chain of control (see Brabant, S., Michon, C., Savourey, E. 'The Vigilance Plan. The cornerstone of the Law on the Corporate Duty of Vigilance', Dossier Thématique, Revue Internationale de La Compliance et De L'éthique Des Affaires – Supplément à la Semaine Juridique Entreprise et Affaires N° 50 Du Jeudi 14 Décembre 2017, p. 2).

<sup>30</sup> 'Established commercial relationship' is a well-known legal concept defined in French case law, in particular, in that concerning the sudden termination of a contractual/commercial relationship. In this context, 'established commercial relationship' has been defined as a stable, regular commercial relationship, with or without a contract, with a certain value of business. It entails a reasonable expectation for both parties that the relationship continues in the long term. The definition might evolve in the context of the French law. There is no reason to believe that the definition will be limited to the first tier in the supply chain. That would not be the intent of the lawmakers, who drafted the law with reference to the UNGPs and other standards that do not end at the first tier. This should be taken into consideration by judges when applying and interpreting the law (see Brabant, S., Michon, C., Savourey, E. 'The Vigilance Plan. The cornerstone of the Law on the Corporate Duty of Vigilance', op. cit. p. 3-4).

<sup>31</sup> Companies that are the primary addressees of the law (those which provide Dutch end-users with products and services) can fulfil their obligations by purchasing these goods and services from companies that have issued a declaration with respect to those goods and services along the lines set out in the Act.

#### **CIVIL LIABILITY**

<sup>32</sup> Under French tort law, an individual is liable for his/her own fault (*responsabilité pour faute*) except in certain circumstances, where an individual can be liable for someone else's fault (*responsabilité du fait d'autrui*). The duty of vigilance establishes liability for a company's own fault. There are three conditions for establishing liability under French general tort law: (i) damage, (ii) a breach of one of the obligations established in law, (iii) causation between the two. The burden of proof is on the claimant, who has to prove the case satisfies the three conditions. Breach and causation are likely to be most difficult to establish under the French law due to:

- a. Difficulty in determining whether a company has breached its vigilance obligations.
- b. Difficulty in proving causation (many factors interacting in long supply chains). To establish it, a judge will assess:
  - i. If a breach of the vigilance obligations caused the damage (and consider other factors that led to the damage).
  - ii. If meeting those obligations would have prevented the damage.

(See Brabant, S., Savourey, E., 'A closer look at the penalties faced by companies', Dossier Thématique, Revue Internationale de la Compliance et de L'éthique des Affaires, op. cit.)

<sup>33</sup> The law does not pierce the corporate veil. Each company (subsidiary and parent company) maintains its own legal personality (they remain separate legal entities). The vigilance obligation lies only on the parent company because it should have avoided the damage (or the risks of damage) by putting in place effective measures throughout the corporate group. The parent company will be liable for tort only in cases where it breached its own duty of vigilance. However, the subsidiary will also potentially retain shared responsibility.

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NGOs and scholars argue that the law initiates a move away from the fiction of the 'autonomy of corporate persons' (the French equivalent of the 'corporate veil') because it creates a duty that must be exercised throughout the group. It makes the duty of vigilance very close to the common law notion of a 'duty of care'. In short, the law per se does not pierce the veil, but it helps circumvent it.

Companies can be sued for breaches of the new obligation only under the already existing statute concerning civil liability for torts. Thus, the claimant will still need to prove the parent's breach, the damage and the causal link. Therefore, the French law does not create a regime of vicarious liability, as CSOs originally pushed for.

<sup>34</sup> Vicarious liability is a form of secondary liability that arises under the common law doctrine of agency, *respondeat superior*, the responsibility of the superior for the acts of their subordinate or, in a broader sense, the responsibility of any third party that had the "right, ability or duty to control" the activities of a violator. In Switzerland, vicarious liability is a form of "strict liability that permits a company to raise a defence on the basis of its use of 'due diligence' to prevent the prohibited event". This is different from "absolute liability", which "does not require proof that the defendant intended to the relevant acts or harm, or that it was negligent, in order to establish legal liability. Instead, liability flows from the occurrence of a prohibited event, regardless of intentions or negligence." (Office of the High Commissioner of Human Rights, "[Improving accountability and access to remedy for victims of business-related human rights abuse: explanatory notes for guidance](#)". 12 May 2016).

<sup>35</sup> This provision introduces liability for the harm caused by controlled companies. It only applies when there is a relationship between a controlling company and a controlled company. This liability has been modelled based on the existing concept of employer's liability in the Swiss Code of Obligations.

<sup>36</sup> When a controlled company causes harm, the controlling company is liable unless it can prove that it took all due care to avoid the harm or loss, or that the damage would have occurred even if all due care had been taken. It is up to the company to prove that it took all due care (partial reversal of the burden of proof). For the rest, this provision (section 2.c of the Responsible Business Initiative) does not reverse the burden of proof. It remains the plaintiff's responsibility to prove the harm, the causality and the control relationship between the business entities.

<sup>37</sup> If companies do not comply with any law in the Netherlands, they can be held liable anyway in civil courts. Therefore, once a legal obligation to conduct due diligence exists, the civil courts will be open for any interested party to claim for civil liability for failure to conduct due diligence.

## **PUBLIC ENFORCEMENT**

<sup>38</sup> Any "person with standing" can file a complaint for non-compliance before the judge. 'Person with standing' is a very broad notion in French law. NGOs, victims and unions are included.

<sup>39</sup> No public institution monitors the quality of the vigilance plans. NGOs have created a website that identifies companies covered by the law and monitors their vigilance plans (see <https://vigilance-plan.org/>).

<sup>40</sup> Periodic penalty payments are injunctive fines payable on a daily basis or per-event basis until the defendant satisfies a given obligation.

<sup>41</sup> Complaints from interested third parties (e.g., trade unions/NGOs) will trigger enforcement by a competent authority. Any individual or entity wishing to submit a complaint must first submit the complaint to the company itself. If the company's reaction is 'inadequate' according to the complainant, he/she can escalate the case to the supervising regulator. (see [MVO Platform, 'FAQ on the about the new Child Labour Due Diligence Law'](#)).

<sup>42</sup> Failing to comply with the order can lead to fines up to €4,100 for failing to submit a statement, and up to €820,000 (or 10% of the company's annual turnover) for failing to conduct DD. If a company is fined twice within five years, the responsible director can face up to 2 years of imprisonment and a €20,500 fine (if the second transgression was committed without intent, it is considered a misdemeanour, punishable with a maximum of 6 months' detention and a €20,500 fine; if the second transgression was committed with intent, it is considered a crime, punishable with a maximum of 2 years' imprisonment and a €20,500 fine).

<sup>43</sup> Any natural person and legal person from within or outside the Netherlands whose interests are affected by an enterprise's failure to conduct due diligence could file a complaint.

<sup>44</sup> Failing to comply is punishable with fines, including exclusion from public procurement, up to imprisonment of the responsible directors and board members.

<sup>45</sup> Any person would be entitled to information about how an enterprise conducts itself with regard to fundamental human rights and decent work within the enterprise and its supply chains. Requests for information may concern: (a) general information about the enterprise's work, systems and the steps taken to prevent or reduce adverse impact on human rights and working conditions; (b) information about any adverse impact on human rights and working conditions, significant risks of such impact occurring and how the enterprise manages this risk, including any risk associated with a particular product or service.

<sup>46</sup> Rejection of requests may be appealed before the Consumer Authority.

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## Contact

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