

COMPARATIVE TABLE – mHRDD WITH CORPORATE LIABILITY LAWS IN EUROPE

	FRENCH DEVOIR DE VIGILANCE (2017) ⁽¹⁾	SWISS RESPONSIBLE BUSINESS INITIATIVE ⁽¹²⁾	SWISS PARLIAMENT COUNTER-PROPOSAL ⁽¹⁶⁾	GERMAN DRAFT LAW FOR A HR AND ENVIRONMENTAL DD ACT ⁽¹⁸⁾	DUTCH CHILD LABOUR DUE DILIGENCE LAW ⁽²³⁾
NATURE OF THE SCHEME	Company law with implications for civil law (tort law)	Proposal to introduce a new article 101a into the Constitution, establishing an obligation on companies to respect HR and environmental standards. - Implementing legislation, most probably via a special act including company law, private international law and tort law provisions.	- Change not at constitutional level. - Changes to the Swiss Code of Obligations, Swiss Civil code and PILA (Private International Law Act) (Company law with implications for civil law)	Public law, civil and criminal liability (form: new “principal act” as opposed to amending existing acts or codes)	Consumer law
WHAT OBLIGATIONS DOES THE LAW CREATE?	Duty of vigilance (close to notion of duty of care ⁽²⁾) and disclosure of due diligence processes.	- Duty of care incorporating mandatory HRDD. - Risks-based approach (scope of due diligence will depend on risks to HR and environment).	- Similar to RBI: Mandatory HR and environmental due diligence. - Includes remediation. - Due Diligence must be “appropriate” ⁽¹⁷⁾ . - Measures to be taken depend on “leverage”.	- HR and environmental due diligence duties/duty of care ⁽¹⁹⁾ . - Core elements: risk analysis, preventive measures, and remediation; - Complementary elements: documentation and disclosure of measures, internal organisation duties (whistleblowing system, appointing a compliance officer...).	- Obligation to issue a declaration that due diligence is conducted to prevent child labour from being used in the production of goods and services. - Implicit requirement to conduct due diligence (<i>gepaste zorgvuldigheid</i>).
SCOPE (PERSONAL)	Companies that for 2 consecutive financial years employ: ➤ 5,000 employees itself and in its direct and indirect	- Companies with registered office, central administration, principal place of business in Switzerland (definition based on Lugano Convention). - Low-risk SMEs exempted.	Limited to companies which meet 2 of 3 thresholds: ➤ Balance sheet of 40 million CHF/USD ➤ Turnover of 80 million CHF/USD,	- Companies with a registered office, head office or principal place of business in Germany that meet one of the following criteria:	Any company ⁽²⁴⁾ , whether domiciled in the Netherlands or abroad, that delivers products and services to the Dutch end-users ⁽²⁵⁾ .

	<p>subsidiaries whose registered office is in France.</p> <ul style="list-style-type: none"> ➤ 10,000 employees itself and in its direct and indirect subsidiaries whose registered office is in France/abroad. <p>French subsidiaries of foreign companies covered if they reach the thresholds.</p>		<ul style="list-style-type: none"> ➤ 500 full-time employees - SMEs in high-risk sectors included. - Large companies with particular low risks exempted. - Low-risk/High-risk to be defined by government decree. 	<ul style="list-style-type: none"> ➤ they are (alone or on a consolidated basis together with the companies controlled by it or controlling it) a "large corporation" within the meaning of Commercial Code⁽²⁰⁾ ➤ they operate themselves, or through a controlled company, in a high-risk sector or a high-risk geographical area; this does not apply to small companies.⁽²¹⁾ 	
SCOPE (MATERIAL)	<p>Risks + Severe impacts ⁽³⁾ to:</p> <ul style="list-style-type: none"> • Human Rights (HR) • Health + Safety • Environment (FR International Commitments) 	<ul style="list-style-type: none"> • HR • Environment (Internationally recognized standards) 	<ul style="list-style-type: none"> • HR • Environment (Switzerland international commitments) 	<ul style="list-style-type: none"> • HR (Internationally recognized standards as stated in Annex) • Environment (DE international commitments, applicable law at the place of the alleged harm, international state of the art). 	<p>Child Labour ⁽²⁶⁾.</p>
MAIN OBLIGATION	<p><u>Duty of vigilance</u> ⁽⁴⁾:</p> <ul style="list-style-type: none"> - Establishment, effective implementation, publication of Vigilance Plan + report. - 5 types of measures required (no remedy). - UNGPs-inspired 	<ul style="list-style-type: none"> - Responsibility to respect human rights -> mandatory HRDD obligations. - Risk-based approach. 	<p>Similar to RBI.</p>	<p>Responsibility to conduct HR and environmental due diligence.</p>	<ul style="list-style-type: none"> - Due diligence to prevent child labour from being used in the production of goods and services supplied to Dutch end-users ⁽²⁷⁾. - Requirement to issue a declaration that due diligence is conducted.

REACH OF OBLIGATION (Supply Chain)	Vigilance Plan’s scope: Full Supply Chain: i. Companies it “controls” (directly/indirectly) ⁽⁵⁾ . ii. Subcontractors and suppliers with “established commercial relationship” ⁽⁶⁾	Due diligence obligations: Full supply chain: i. direct/indirect subsidiaries. ii. other business relations.	Similar but mentions: - “Reasonable” due diligence - Measures depending on “leverage”.	HRDD obligations cover full supply chain.	DD requirement covers the activities of any natural or legal person throughout the supply chain ⁽²⁸⁾ .
SUMMARY OF REQUIREMENT	<i>Primary obligation:</i> Establish and implement an effective vigilance plan which: <ul style="list-style-type: none"> ➤ identifies and ranks risks, ➤ sets out procedures to assess subsidiaries, subcontractors and suppliers, ➤ establishes appropriate action to mitigate risks, creates an alert mechanism and ➤ a monitoring scheme to assess the efficiency of the measures implemented. 	<i>Primary obligation:</i> Duty of care incorporating due diligence obligations, with key elements: <ul style="list-style-type: none"> ➤ risk and impact assessment; ➤ prevent violations and cease existing violations and ➤ account for the actions taken. 	Same as RBI	<i>Primary obligation:</i> HR and environmental due diligence. HRDD obligation has 3 main elements: <ul style="list-style-type: none"> ➤ Risk analysis; ➤ Risk prevention, ➤ Remedial measures. - Measures must be appropriate/adequate ⁽²²⁾ . - Companies also have to: <ul style="list-style-type: none"> > document and disclose measures, > establish internal organisational obligations (such as whistleblowing system, appointing a compliance officer) 	<i>Primary obligation:</i> Due diligence to prevent child labour from being used in the production of goods and services supplied to Dutch end-users. - Companies have to submit a statement to the regulatory authority declaring that they have carried out due diligence related to child labour in their full supply chain. - If there is a presumption of the use of child labour, the company is required draw up an action plan (requirement to conduct due diligence).
ENFORCEMENT / A2J	a) Transparency: Plan and Report published in annual report (company management report) ⁽⁷⁾ . b) Judicial enforcement: i. Formal Notice + Order	a) Transparency: No transparency requirement in the proposal. Lawmakers to define the details. b) Enforcement:	Civil liability but with limitations (see below). - Liability only when there is damage to limb, life or property	A range of instruments: a) reporting (included in material obligations part), b) Administrative Monitoring and	a) Transparency: Statements will be published on the website of the competent authority. b) Enforcement: - In response to a

	<p>to comply: any person with standing⁽⁸⁾. Non-compliance is subject to periodic penalty payments⁽⁹⁾.</p> <p>ii. Civil liability (compensation):</p> <ul style="list-style-type: none"> - for damage that the execution of the company's obligation could have prevented. - Based on general tort law principles⁽¹⁰⁾. - Burden of proof on victims. 	<ul style="list-style-type: none"> - New specific liability provision on responsibility for acts of controlled companies. - Parent company is responsible for damage caused by controlled companies unless it can prove that it took all due care or that the violation/damage would have occurred even if all due care had been taken. 	<p>+</p> <ul style="list-style-type: none"> - As a result of violating international standards. 	<p>Enforcement:</p> <ul style="list-style-type: none"> - State monitoring. - ad hoc administrative orders. - fines for non-compliance. - exclusion from public contracts, - public procurement incentives, etc. <p>c) civil liability</p> <ul style="list-style-type: none"> - HRDD obligations define applicable duty of care (overriding mandatory provision). <p>d) criminal liability of directors and compliance officer.</p>	<p>complaint⁽²⁹⁾, the supervising regulator can issue a binding order to a company to comply with the act + set a deadline.</p> <ul style="list-style-type: none"> - Failing to comply with the regulator's order can lead to administrative fines: <ul style="list-style-type: none"> i. up to €4,100 (or to €8,200) for non-compliance with the duty to file a declaration, ii. up to €820,000 (or 10% of the company's annual turnover) for non-compliance with the duty to conduct due diligence.
PARENT COMPANY LIABILITY	<p>Parent company liability for damage caused by⁽¹¹⁾:</p> <ul style="list-style-type: none"> - Controlled companies (direct and indirect). - Subcontractors and suppliers with established commercial relationship (when liability conditions are met). 	<p>New liability provision establishes specific liability for harm caused by controlled companies (subsidiaries and economically controlled companies, "de facto" control)⁽¹³⁾.</p> <ul style="list-style-type: none"> - Companies can avoid liability if they prove they took all care (burden of proof for due diligence on the company⁽¹⁴⁾. - It does not pierce the veil; it creates a form of "vicarious liability"⁽¹⁵⁾. 	<p>Parent company liable only for:</p> <ul style="list-style-type: none"> - legally controlled companies, and - when control is really exercised. <p>> A parent company could also release itself from liability if:</p> <ul style="list-style-type: none"> - they prove they took all care (as in the RBI), or - if – during the relevant period of time – the possibility to influence the behaviour of the controlled company did not exist in reality. 	<ul style="list-style-type: none"> - Duty of care for any company to take adequate preventative measures regarding the entire value chain without regard to its corporate structure. - Companies can be held liable for HR violations in the entire supply chain if compliance with the duty of care would have prevented the damage (depends on circumstances of the individual case). - Burden of proof rests on the plaintiff. 	<ul style="list-style-type: none"> - The law establishes criminal sanctions for officers of companies that are repeat offenders: <ul style="list-style-type: none"> > If, within 5 years of imposition of an administrative fine, a similar transgression is committed by the company by order or under supervision of the same director, it is considered a criminal offense. > Punishment can be up to 2 years of imprisonment for the company's director and a €20,500 fine⁽³⁰⁾.

EXPLANATORY NOTES

French duty of vigilance law:

1. The law's implementation has been sequenced. It relies on the dates when companies publish their annual reports. 1st stage (for financial year 2017): companies have to establish their duty of vigilance and have their plans published in their annual reports (published in 2018). 2nd stage (for financial year 2018): judicial mechanisms apply, but publication of annual reports will be in 2019.
2. The concept of **"duty of care"** does not exist in France. The law on the duty of vigilance could be assimilated to a particular form of statutory duty of care.
3. **"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 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.
4. The **duty of vigilance** is the core of the law. The Vigilance Obligations are at heart of the duty (obligation to design and effectively implement measures in order to identify and prevent impacts and to assess their implementation). The five measures are a means to meet the Vigilance Obligations. In other words, the core duty of the law is to prevent and remedy harm.
5. 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 Thematique, *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).
6. **"Established commercial relationship"** is a well-known legal concept defined in French jurisprudence, 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. The relationship gives rise to 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 tier one 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 don't end at tier one. 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).
7. No public institution monitors the quality of the vigilance plans. NGOs have created a website which identifies companies covered by the law and monitors their vigilance plans. See <https://vigilance-plan.org/>
8. **Person with standing** is a very broad notion in the French law. NGOs, victims and unions are included.
9. **Periodic penalty payments** are injunctive fines payable on a daily basis or per-event basis until the defendant satisfies a given obligation.

10. Under the French law of tort, an individual is liable for his/her **own fault (*responsabilite pour faute*)** except in certain circumstances, where an individual can be liable for someone else's fault (*responsabilite du fait d'autrui*). The duty of vigilance establishes liability for a company's own fault. There are three conditions for establishing liability under the French general law of tort: 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 because:

- a. Difficulty in determining whether a company has breached its Vigilance Obligations.
- b. 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 Thematique, *Revue Internationale de La Compliance et De L'éthique Des Affaires*, op. cit.)

11. Does the *devoir de vigilance* law pierce the corporate veil?

It does not pierce the 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.

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 to 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.

Swiss Responsible Business Initiative:

12. The Responsible Business was launched in 2016. More information on the RBI's website

<https://corporatejustice.ch/about-the-initiative/>

13. 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 existing concept of employer's liability in the Swiss Code of Obligations.

14. 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 RBI) 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.

15. **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.

Swiss Parliament Counter-proposal:

16. [Counter-Proposal to the Responsible Business Initiative adopted by the Parliament's Low Chamber](#) in May 2018.

17. The criterion of "appropriate" is based on the UNGPs, which applies a risk-based approach. "Appropriate" is to be defined according to circumstances, i.e. to risk. It allows judges a margin of appreciation to determine whether due diligence has been conducted in relation to the circumstances and risks.

German draft of an Act on the regulation of HR and environmental due diligence:

18. The draft of an Act on the Regulation of Human Rights and Environmental Due Diligence in Global Value Chains prepared by the Ministry of Development and Cooperation (BMZ) was leaked in February 2019 (https://die-korrespondenten.de/fileadmin/user_upload/die-korrespondenten.de/SorgfaltGesetzentwurf.pdf). The content of the draft law, the obligations set out therein and the enforcement mechanisms are very similar to those suggested in the German NGOs' proposal for a HRDD Act (see NGOs' proposal [here](#) and an unofficial translation into English [here](#)).

19. The German concept of "Sorgfaltspflichten" does not differentiate between "duty of care" and "due diligence". It is a broader concept that comprises both, "duty of care" and "due diligence".

20. Sect. 267 para. 3 of the German Commercial Code (Handelsgesetzbuch – HGB) equals Art. 3 para. 4 of directive 2013/34/EU. Large undertakings in this sense are undertakings which on their balance sheet dates exceed at least two of the three following criteria: (a) balance sheet total: EUR 20 000 000; (b) net turnover: EUR 40 000 000; (c) average number of employees during the financial year: 250.

21. Small companies within the meaning of the German Commercial Code. According to Sect. 267 para. 1 Commercial Code (HGB) small are undertakings which on their balance sheet dates do not exceed at least two of the three following criteria: (a) balance sheet total: EUR 6 000 000; (b) net turnover: EUR 12 000 000; (c) average number of employees during the financial year: 250.

22. Appropriate/adequate depends on a number of factors:

- country/sector specific risks,
- expected severity/likelihood of potential violations,
- size of the company,
- how directly the company is involved,
- actual and economic leverage the company can exert on the direct perpetrator.

Dutch Child Labour Due Diligence Law:

23. The Senate in the Netherlands approved the [Child Labour Due Diligence law](#) (CLDD law) on May 14th 2019. The date for entry into force is yet to be determined, but it won't be sooner than January 1st, 2020. 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).

24. The CLDD Act pertains to every company that supplies goods or services to Dutch end-users. 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. First of all, companies that do not supply goods or services to Dutch end-users are not bound by the obligations set out in it. Secondly, companies that merely transport the goods that are to be supplied are exempted from compliance with the Act (art. 4(4)). It also leaves open the possibility that certain other categories of companies are 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.

25. The due diligence requirement is imposed on the company that supplies the goods and services to the Dutch end-users (i.e. the last-tier companies, which are closest to the Dutch end-users of the products and services). The law defines end-users as ‘the natural or legal persons that use or use up the goods or make use of the services’ (Preamble).

26. The 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).

27. Specification of the due diligence obligation and other aspects of the law (such as the determination of the supervising regulator) will be defined in subsequent GAOs.

28. Companies which 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.

29. Complaints from interested third parties (e.g. trade union/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. (MVO Platform, [“FAQ on the about the new Child Labour Due Diligence Law”](#)).

30. If the second transgression was committed without intent, it is considered a misdemeanour, punishable by 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 by a maximum of 2 years’ imprisonment and a €20,500 fine (art. 9 of the Child Labour Due Diligence Law).

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- Dutch Child Labour Due Diligence Law: Liesbeth Enneking, Erasmus School of Law, Erasmus University Rotterdam; Manon Wolfkamp, MVO Platform.
- Oversight: Marilyn Croser, CORE Coalition.

¹ Any errors are the sole responsibility of ECCJ.

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