OCTOBER 2023

EUROPEAN DIRECTIVE **ON CORPORATE SUSTAINABILITY DUE DILIGENCE AND LEGAL ACTIONS IN FRANCE:**

lessons learned and recommendations

Introduction

The European institutions are currently negotiating the adoption of a directive imposing due diligence obligations on companies established or active in Europe, concerning the risk of human rights violations and environmental damages resulting from their activities.

Six years after the adoption of a pioneering law in this field in France, some initial lessons must be drawn from the legal proceedings underway in France to ensure that the legislation adopted at European level is effective.

The European Commission published a proposed text upon which the Council of the European Union – which represents the Member States – adopted a worrying position.[1] On 1 June 2023, the European Parliament adopted its position on the text, which showed some significant progress. The trilogue negotiations between the Council, Parliament and Commission have now begun, with the aim of agreeing on a final version of the text by the end of the year.

However, the scope of the due diligence duty may remain more limited than in French law, and certain human rights violations and environmental damages which are currently being debated in the French courts may be more difficult to bring to trial in other Member States.[2] This is particularly true of certain aspects of the **EDF "Mexico"**, **Yves Rocher**, **Total "Climate"**, **Total "Uganda"**, **BNP Paribas "Climate"** and **Casino** cases.

This document will firstly present a selection of six ongoing cases (**I**), and will then analyse the following key points, comparing the versions of the text drawn up by the Commission, the Council and the Parliament:

- Civil liability and access to justice (**II.A**)
- Companies covered ("personal" scope) (**II.B**)
- "Adverse impacts" covered ("material" scope) (**II.C**)
- Content of the due diligence duty (**II.D**)

A summary of our main recommendations will then be provided (**III**).

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1 See the press release published on 1 December 2022 by the member organisations of the FCRSE: Directive européenne sur le devoir de vigilance: le Conseil de l'Union européenne approuve un texte affaibli par la France, bit.ly/44ArGQc.

2 Article 1.2 of the proposed directive provides that it cannot be used as grounds for "reducing the level of protection of human rights or of protection of the environment or the protection of the climate provided for by the law of Member States". This means that the directive cannot diminish the content or the scope of the duty of vigilance in existence in certain Member States, such as France.

1. Cases

Total Uganda

Company	**TotalEnergies SE**
Claimants	Six French and Ugandan associations: AFIEGO, Friends of the Earth France, CRED, NAPE/Friends of the Earth Uganda, NAVODA and Survie.
Background	The Tilenga (oil extraction) and EACOP (giant pipeline) oil projects entail the partial or full eviction of over 118,000 people, depriving them of their homes and livelihoods without fair and prior compensation. The projects represent considerable risks to biodiversity and water resources and will have a clear impact on the climate (drilling of more than 400 oil wells, one-third of which are in a protected natural area; and the foreseen to be the longest heated oil pipeline in the world – heated using electricity – measuring 1445km and ending at a Tanzanian port).
Claims	The purpose of the legal action is to order Total to develop and effectively implement the necessary measures to end the human rights violations and prevent the irreversible impacts on the environment and the climate.
Proceedings	**June 2019** Total receives formal notice. **October 2019** Total is summoned to appear at Nanterre Civil Court, under summary proceedings given the social and environmental urgency of the situation. This is the first legal case brought under the French duty of vigilance law. **2020-2021** Total contests the civil court's jurisdiction. The case goes up to the Court of Cassation (French Supreme Court), which rejects the company's request for the case to be handled by the Commercial Court. **2022** The case is transferred to Paris Civil Court, which at the end of 2021 assumed exclusive jurisdiction over duty of vigilance cases. Due to the imminent start of oil drillings, the associations ask for the project to be suspended, as a provisional measure. A hearing finally takes place in December.

2023 The summary proceedings judges issue an order on 28 February, almost four years after the letter of formal notice was sent. Without weighing in on Total's compliance with its duty of vigilance, the Court declares the associations' demands inadmissible on procedural grounds – considering that despite the letter of formal notice sent in June 2019 and compliance with the statutory deadline of three months, the applications and grievances of the claimants were "substantially different" from the initial letter of formal notice. The claimants contest this. The Court states that only proceedings on the merits (which take even longer to be heard in court) would be able to determine whether Total's vigilance measures are appropriate.[3]

In June 2023, 26 members of the affected communities in Uganda, a human rights defender and five French and Ugandan associations relaunched the legal battle against Total with a new summons to court. The proceedings are still based on the duty of vigilance law, but this time take the form of a claim for damages.[4]

Total Climate

Company	**TotalEnergies SE**
Claimants	14 local authorities,[5] in conjunction with the associations Notre Affaire à Tous, Sherpa, ZEA, les Eco Maires and France Nature Environnement.
Background	Total Group is responsible for 1% of worldwide emissions each year (458 million tons of CO_2eq). Total is therefore one of the 20 companies which contribute most to climate change around the world. The measures taken by Total to reduce its GHG emissions are clearly inadequate to keep to the 1.5°C limit set out in the objectives of the Paris Agreement.

3 See the associations' press release bit.ly/3rk0JD3.

4 See the presentation of the new legal action against Total: bit.ly/3PTH3iw.

5 Arcueil, Bayonne, Bègles, Bize-Minervois, Champneuville, Centre Val de Loire, Correns, Est Ensemble Grand Paris, Grenoble, La Possession, Mouans-Sartoux, Nanterre, Sevran and Vitry-le-François.

Claims

The purpose of the legal action is to order Total to implement appropriate and effective vigilance measures to gradually reduce direct and indirect greenhouse gas emissions in line with the Paris Agreement 1.5°C goal.

Proceedings

June 2019 Total receives formal notice.

January 2020 Total is summoned to appear in Nanterre Civil Court. The proceedings are delayed by Total's unsuccessful contestation of the Civil Court's jurisdiction over the matter, in an attempt to have the case heard at the Commercial Court.

2022 The case is finally transferred to Paris Civil Court. Three new local authorities and Amnesty International France join the coalition.[6]

February 2023 The associations and local authorities ask the pre-trial judge[7] to order provisional measures including the suspension of new oil and gas projects whilst awaiting a court decision on the merits of the case.

July 2023 The pre-trial judge declares the legal action inadmissible on the grounds that the claims made in the summons were not strictly identical to those in the letter of formal notice. However, this condition does not exist under the duty of vigilance law.[8]

6 Paris, New York and Poitiers.

7 The sole judge at Paris Civil Court responsible for ruling on certain procedural issues which may terminate the legal action, before examination of the merits of the case.

8 See the associations' and local authorities' press release: bit.ly/46nVil7.

EDF Mexico

Company	**Electricité de France SA (EDF)**
Claimants	Representatives of the Mexican indigenous community Unión Hidalgo, the Mexican human rights organisation ProDESC and the European Center for Constitutional and Human Rights (ECCHR).
Background	EDF plans to build a wind farm on an indigenous community's land in Mexico. The right of the community to provide their free, prior and informed consent to this project has not been respected, leading to significant polarisation within the community and an increase in violence towards human rights defenders.
Claims	The purpose of the legal action is to order EDF to take appropriate measures to respect the rights of the indigenous community and prevent risks to the physical integrity of its members, as well as compensate for the harm already done to them.
Proceedings	**October 2019** EDF receives formal notice. **October 2020** EDF is summoned to appear at Paris Civil Court. **February 2021** Due to the slow pace of the legal proceedings and the imminent risk of serious and irreversible human rights violations, the claimants request the pre-trial judge to order provisional measures involving the suspension of the project until the company complies with its duty of vigilance. **November 2021** Paris Civil Court declares the action inadmissible on the grounds that the letter of formal notice and the summons do not concern the same vigilance plan. However, this condition does not exist under the duty of vigilance law. The judge also rejects the request for provisional measures without even examining the merits of it, considering it linked to the request for an injunction. **2022** EDF contests the admissibility of the appeal launched by the claimants. **March 2023** Paris Court of Appeal declares the appeal admissible. A hearing will take place on 24 November 2023.

Casino

Company	**Casino Guichard-Perrachon SA**
Claimants	Organisations representing the Indigenous Peoples of the Brazilian and Colombian Amazon (OPIAC, COIAB, FEPIPA and FEPOIMT), along with French, Brazilian and American associations (Canopée, CPT, Envol Vert, Mighty Earth, Notre Affaire à Tous, France Nature Environnement and Sherpa).
Background	Casino is a large chain of hypermarkets selling beef products, among other goods, in South America. Several studies have shown that some of these beef products have been linked to the destruction of the Amazon forest and confiscation of Indigenous Peoples' land.
Claims	The purpose of the legal action is to order Casino to adopt a vigilance plan in line with its legal obligations, and compensate the indigenous organisations for the harm caused to their land and livelihoods.
Proceedings	**September 2020** Casino Group receives formal notice. **March 2021** Casino Group is summoned to appear at Saint-Etienne Civil Court. **March 2022** The case is transferred to Paris Civil Court. **June 2022** First pre-trial hearing at Paris Civil Court. **January 2023** The Jupau People become involved in the proceedings.

Yves Rocher

Company	**Laboratoires De Biologie Végétale Yves Rocher SA (Yves Rocher)**
Claimants	34 former employees of Kosan Kozmetik (Turkish subsidiary of Yves Rocher), alongside the French associations Sherpa and ActionAid France and the Turkish union Petrol-Iş.
Background	In 2018, workers at Kosan Kozmetik protested against their working conditions, wages and discrimination against women in the factory, and joined the Turkish union Petrol-Iş. Following this, more than 130 employees were dismissed.
Claims	The purpose of the legal action is to order Yves Rocher to adopt appropriate vigilance measures regarding the rights of workers – including freedom of association, the principle of non-discrimination, and occupational health and safety – at its Turkish subsidiary and to provide compensation for damages suffered by the employees and the union.
Proceedings	**April 2020** Yves Rocher receives formal notice. The company subsequently publishes its vigilance plan in July. **March 2022** The company is summoned to appear at Paris Civil Court. **February 2023** The company raises an objection of inadmissibility concerning the applications for damages lodged by the former employees.

BNP Paribas

Entreprise	**BNP Paribas SA**
Demandeurs	Friends of the Earth France, Notre Affaire à Tous (NAAT) and Oxfam France.
Background	The climate impact of banks is linked to their financing and investments in polluting companies. While the scientific community, the UN and the International Energy Agency are calling for a halt to the exploitation of all new fossil energy resources, BNP Paribas provides active and large-scale support to some of the most aggressive groups involved in the expansion of oil and gas. In 2020, the bank's carbon footprint was higher than that of France.
Claims	The purpose of the legal action is to order BNP Paribas to cease its financial support for the expansion of fossil fuels.
Proceedings	**October 2022** BNP Paribas receives formal notice. **February 2023** The company is summoned to appear at Paris Civil Court.

Worrying procedural decisions

In four different cases, despite the letter of formal notice sent at least three months before the summons as required by law, the claims lodged against the companies were deemed inadmissible at the Court of First Instance on questionable grounds related to the formal notice requirement.

In two of these cases (**EDF Mexico** and **Suez Chile**), the defendant company published a new vigilance plan after receiving formal notice but before receiving the summons. The pre-trial judge found that the claimants should have sent a new letter of formal notice based on the latest vigilance plan published by the company.

In the two other cases (**Total Uganda** and **Total Climate**), the judges stated that the claimants had changed their requests after sending the letter of formal notice.

As well as slowing down proceedings, these initial rulings are worrying for a number of reasons. Firstly, they seem to take a formalist, tick-the-box view of the duty of vigilance, often limiting it to the annual publication of a plan. However, the vigilance plan is only the physical medium corresponding to the duty of vigilance, which consists of adopting, publishing and implementing "reasonable vigilance measures", capable of identifying risks and preventing human rights violations and environmental damages. Furthermore, these rulings seem to aim to force affected stakeholders to engage in a compulsory phase of dialogue with the company after the letter of formal notice is sent, which is not required by law.

2. The directive in the light of "duty of vigilance" cases in France

A. Civil liability and access to justice

BACKGROUND

A company must be held civilly liable when human rights violations and environmental damages result from activities along its value chain, unless it proves that it has implemented all necessary, reasonable, suitable and effective vigilance measures to prevent these violations from occurring. To be effective, this civil liability must cover all obligations set out by the directive, limit the possibilities for exemptions, and be accompanied by a preventative mechanism (injunction).

Effective access to justice and compensation must be guaranteed for affected persons, including by facilitating access to evidence and enabling collective action.

LEGISLATIVE PROPOSAL / CASES

Obligations covered by the liability regime

The Commission and the Council plan to limit liability claims to breaches of articles 7 and 8 of the directive alone. Failure to comply with other provisions of the directive, including of article 15 regarding climate obligations, may not be sanctioned by judges. Only the Parliament's version extends the scope of civil liability to all obligations set out by the directive.

It is therefore important for Parliament's position to take precedence, to give full scope to the climate obligations set out in the directive. Accompanied by a preventative jurisdictional mechanism (injunctions), it could enable similar actions to those against **Total** and **BNP Paribas** in France to be launched in other EU countries.

Compensation

Even in the event of environmental damages, the Council's proposal limits civil liability to harm caused to natural persons, meaning that there is no possibility of claiming compensation for harm caused to natural environments alone, regardless of the repercussions on persons or property.

This approach represents a major step backwards when compared with the French law, which does not rule out the possibility of legal action to claim compensation for harm caused to the environment in the event that a company does not honour its duty of vigilance, and which also includes a specific regime for compensation for "purely" environmental harm.[9]

Liability of parent companies

No version of the Directive currently under negotiation provides for the automatic liability of parent companies in the event of violations committed by their subsidiaries, despite the control that they have over them, and even though subsidiaries are often entirely owned by their parent company.

9 See articles 1246 of the French Civil Code.

Grounds for exemptions

The Commission's proposal provides a defence mechanism for companies in the event that harm results from the activities of one of their indirect partners when they have signed contractual clauses with their direct partners. These sorts of exemptions are strongly linked to ineffective compliance procedures and encourage the development of strategies to evade responsibility.

The Council's version includes an exemption clause if the harm is caused by a business partner acting alone – however, violations are often committed by subcontractors, as seen in the **Total Uganda** and **Casino** cases. Equally problematic is the Council's stipulation that companies cannot be held liable for harm that they have deemed "less serious" and have therefore not prioritised, even when there is proof of the damage caused.

To prevent these circumvention strategies, the Parliament incorporates a crucial provision stating that companies which have participated in industry initiatives, carried out audits, or used contractual clauses to fulfil their due diligence obligations (see also **II. D**) can still be held civilly liable in the event that harm arises.

Injunction

Contrary to the French duty of vigilance law, it is not certain that the future directive will enable legal action via injunction mechanisms to prevent or stop environmental harm and human rights violations. This possibility was incorporated at a later stage in the text adopted by Parliament, but is not present in either the Commission or Council versions. These two versions only include administrative oversight of the due diligence obligations by the authorities contemplated by the directive (which can adopt measures to prevent or stop violations, among other things).

However, it is essential that potentially affected or interested persons (natural or legal) be able to seek an injunction via judicial channels, including before harm is caused, in accordance with the precautionary principle. Without this, it would not have been possible to request an injunction **in any of the "duty of vigilance" cases**, and the only option open to the victims would have been to seek compensation after the damage had already occurred.

Burden of proof and access to evidence

When proving a violation of the due diligence duty, the courts may consider that it is the claimant's responsibility to show that the company had not drawn up and/or implemented the necessary preventative measures and that this lack of vigilance caused harm to them.

As well as the practical difficulties encountered by claimants (high legal and expert assessment fees, expensive translation of evidence, etc.), certain violations or harm are particularly difficult to document, and much of the information, particularly that related to the internal organisation of groups or supply chains, is held solely by the company itself.

Unambiguously reversing the burden of proof would provide some level of equality of arms between large multinationals and the affected persons or the organisations supporting them. However, none of the proposed texts – whether it be the Commission, Council or Parliament version – include a clear reversal of the burden of proof, and the text adopted by the Commission and Parliament leaves the decision on whether to include such a measure in the hands of the Member States.

However, **all cases** linked to the duty of vigilance show that an unambiguous reversal of the burden of proof is necessary. In the **EDF Mexico**, **Casino** and **Total Uganda** cases, there is a high level of risk involved in gathering evidence on the ground,

as the local communities and organisations are regularly subjected to threats and harassment.[10]

If a reversal of the burden of proof is not incorporated, the directive must include measures to facilitate effective access to evidence, as the current legal tools in existence are not sufficient.[11]

Although the text adopted in Parliament contains certain measures to facilitate access to evidence during or before legal proceedings, these provisions are nonetheless absent in the Commission's proposal and the Council's amendments. However, evidence proving that due diligence measures have been effectively implemented to mitigate a risk or prevent a harm is essential and is most often held exclusively by the company itself.

Companies

KEY INFORMATIONS KEPT SECRET

→ Structure of the group

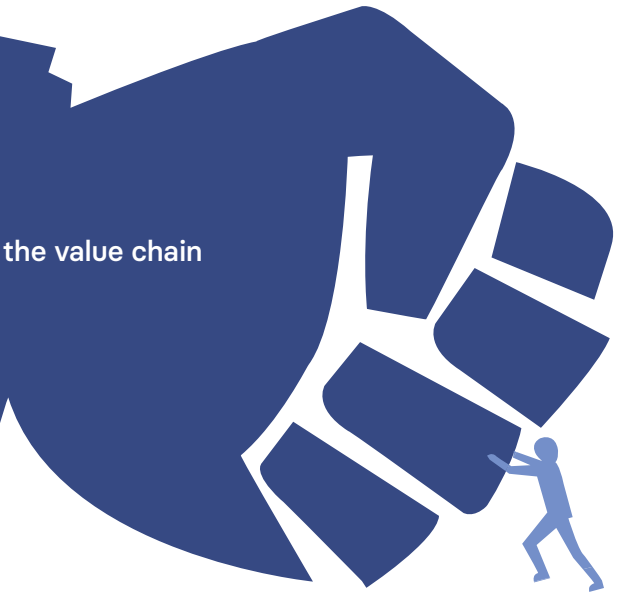
→ Contracts with subcontractors or partners

→ Transmission of orders and information along the value chain

→ Audits, internal investigations

→ Expert assessments

→ Financial data



Affected persons

AN UPHILL STRUGGLE TO GATHER EVIDENCE

→ **Costs**: legal fees, expert assessments, translation of evidence, etc.

→ **Risks** : threats, harassment, arrest

→ Information **difficult to access**

10 See: bit.ly/46qDcix and: bit.ly/3Oe1TXV

11 Using procedures for pre-trial access to evidence such as article 145 of the French Code of Civil Procedure proved ineffective in the Perenco case, in which the company refused to hand to the court clerk certain pieces of evidence related to its activities and shareholder structure, despite a court order. See article of 9 October 2019 in Le Monde newspaper: bit.ly/457bJSp. Similarly, ahead of a duty of vigilance action against Bolloré, a request for documents to determine Bolloré's degree of control over other companies, or alternatively the existence of established business relationships, was only partially successful. The Court of Appeal upheld the request for documents regarding control, but refused for established business relationships, stating that the claimants did not provide sufficient evidence of factors pointing to a possible established business relationship (Paris Court of Appeal, 1 December 2022). See Mediapart article of 1 December 2022: bit.ly/3Dz5CKQ

RECOMMENDATIONS

→ The directive **must not lead to the exclusion or limitation of the civil liability of companies** which exists under national law, or hinder preventative actions based on the duty of vigilance of companies. The Council's position on civil liability must be rejected and Parliament's position should prevail.

→ In the absence of a systematic reversal of the burden of proof, **access by third parties to information held by companies must be facilitated** prior to any court action. If access is refused, this mechanism could enable a legal challenge to be mounted, as is the case for access to administrative documents. The future directive must also contain an obligation for companies to produce all pieces of evidence considered useful by the claimants, as added in the Parliament's version.

B. Companies covered ("personal" scope)

Parent companies

BACKGROUND

Parent companies exercise oversight and hold most of the information, as well as the decision-making power and the human, legal and financial resources necessary to ensure compliance with due diligence obligations within value chains, but they often try to evade their responsibilities by transferring the blame to their subsidiaries, subcontractors or suppliers.

LEGISLATIVE PROPOSAL

The proposed directive takes an approach based on legal entities, enabling certain parent companies below the thresholds to fall out of the scope of due diligence duty. However, one of the key political objectives of the text is to expand the legal liability of parent companies by shedding light on the independence of legal persons, which for many years have enabled multinationals to act with total impunity, hiding behind complex ownership and legal structures.

Only the Parliament proposed to consider the number of employees of subsidiaries when calculating the application thresholds, to avoid companies circumventing the directive by means of their ownership structure.

CASES / CONSEQUENCES

In practice, this means that certain parent companies may not fall within the scope of the directive purely due to their group structure. For example, certain parent companies such as **Casino**, which are currently subject to the French duty of vigilance law, do not reach the thresholds for number of employees/turnover set out in the draft directive. Some of their French subsidiaries would fall within the scope of the directive, but these subsidiaries have no control over the group's entities in Brazil or Colombia, where the violations are being committed.

RECOMMENDATIONS

→ **Adopt the Parliament's approach** which states that parent companies of groups which exceed certain thresholds fall within the scope of the due diligence duty.

Downstream activities and established business relationships

BACKGROUND

To ensure that all risks caused by their activity are covered, companies must fulfil their due diligence obligations throughout their whole value chain, including "upstream" activities (i.e., risks linked to the activity of suppliers and subcontractors) and "downstream" activities (i.e., risks linked to the use of the company's products and services, whether by a client company or the end user).

LEGISLATIVE PROPOSAL

→ *Downstream activities*

The Council's position involves replacing the concept of "value chain" with that of "activity chain", the definition of which includes activities upstream of the contracting party (subcontractors, suppliers participating in the development of the product or service) but only applies to a limited list of explicitly designated downstream activities. Therefore, for the Council, the scope of due diligence does not include how the products marketed by the companies are used, the activities of the clients of service companies, or the export of weapons or surveillance equipment. Some of these proposals have been maintained by the Parliament, which also does not explicitly mention the use of products and services by the end clients.

→ *Established business relationships*

While the Council and Parliament positions use a relatively broad definition of "business relationships" (which may be direct or indirect), the interinstitutional negotiations before the adoption of the text could see the Commission's original proposal re-emerge, which was to use the concept of "well-established business relationships" (this relationship can be "direct or indirect" and must be "long-lasting").[12]

Introducing the criterion of the duration of the relationship could exclude a significant share of the upstream supply chain from the scope of due diligence. In this part of the supply chain, the informal sector is prevalent and business relations are more ad-hoc and less formalised. It could also mean that relationships which are significant from an economic point of view but occur on an ad-hoc basis are excluded from the scope of due diligence.

It is also crucial to include all business relationships in the scope of due diligence, regardless of their significance.

Some components may represent only a "negligible" part of the supply chain of the businesses which use them, but nevertheless pose a serious risk of harm. Likewise, certain services, precisely because they are perceived as "ancillary", are massively subcontracted.

CASES

The duration or stability of business relationships within companies' supply chains are not public knowledge. For example, **Casino** does not even reveal the names of the slaughterhouses which supply it with beef in Brazil – let alone the duration of its business relationships with them.

In the **Total Uganda** case, Total and its subsidiaries used a number of subcontractors, particularly for the mass acquisition of local populations' land in Uganda and Tanzania. These externally provided services correspond to a tiny fraction of the total cost of the projects, but caused clear human rights violations.

Moreover, in the **Total Climate** case, the defendant company has already tried to claim that it is not responsible for its indirect ("scope 3") emissions as, according to the company, the French duty of vigilance law only applies to the "activities" of the group and its supply chain, not the use of products by its clients.

RECOMMENDATIONS

→ The scope of due diligence must **include the downstream of companies' value chain.** Specifically, companies must fulfil their due diligence duty regarding "adverse impacts" stemming from their own activities, the activities of their subsidiaries and the activities of the entities in their value chain.

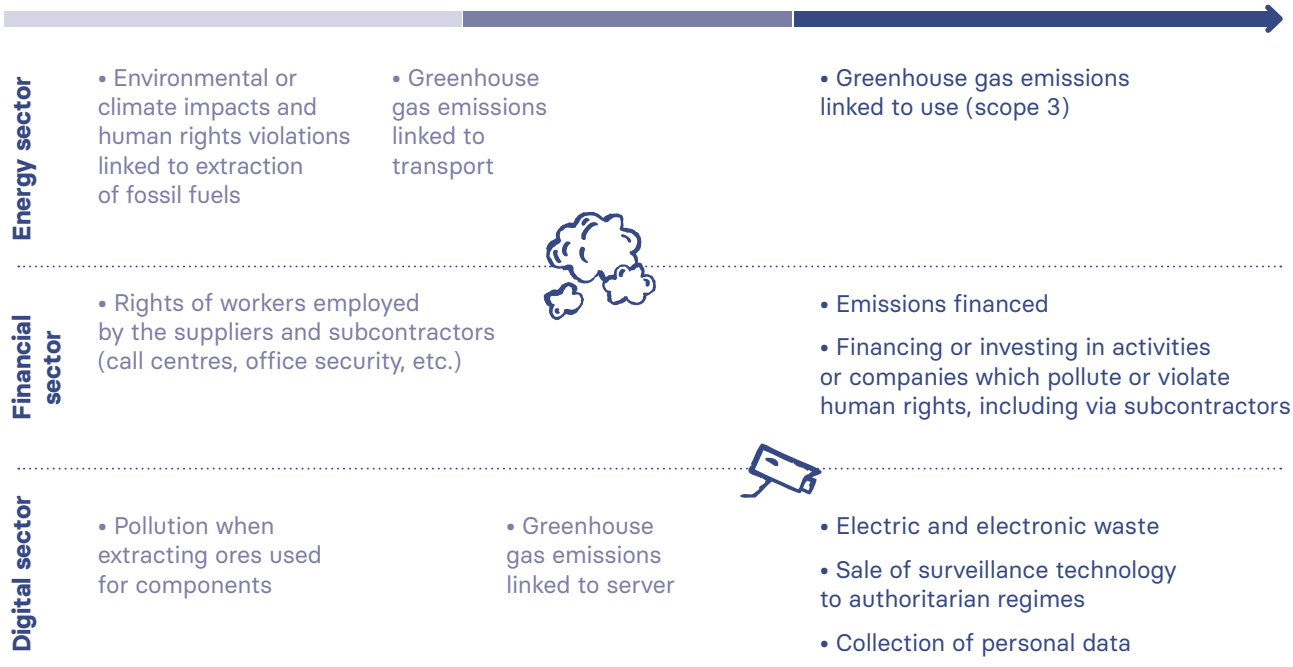
12 The Commission's proposal also excludes business relationships which represent "a negligible or merely ancillary part of the company's value chain".

➔ Companies must fulfil their due diligence obligations regarding **the use of products they market or services they deliver**, including sales of weapons or surveillance equipment.

➔ The directive must adopt a **broad definition of "business relationships"** which takes into account the reality of economic trade and does not encourage companies to favour unstable business relationships to shirk their obligations.

Value Chains

Risks to human rights, the environment and the climate
(Exemples in three sectors)



Financial services

BACKGROUND

By providing different types of financial support to companies and projects, banks enable their existence and development. In many sectors, this involves significant risk to human rights, the environment and the climate. All financial actors (without exception), all of their financing and investment services and the impact of their clients' activities must be covered by the directive.

LEGISLATIVE PROPOSAL

The texts adopted by the three institutions contain significant limitations and shortcomings with regard to the financial sector. The Council's text is the most problematic, as it gives Member States the choice of whether or not to include financial services when transposing the directive into national law, and in any case only covers a limited list of financial services (excluding for example investment activities).

Furthermore, there is a risk that the due diligence duty will cover only direct clients and their subsidiaries which are the beneficiaries of financial services. This approach excludes the activities of subcontractors which are indirectly financed by these financial services, when in many high-risk sectors such as oil or garment most violations are linked to subcontracting or the use of the products.

The Parliament also plans to exclude certain asset managers (pension funds and alternative asset managers) as well as certain financial activities from the scope of the directive, where these are already covered by other due diligence obligations under European law.

Finally, while the Parliament's proposal uses OECD and UN language defining what is expected from a company which "causes", "contributes to" or has a "direct link" with a violation, an exception is made for financial actors.[13] Unlike other companies, these are presumed to be only "directly linked" to violations. This presumption, as rebuttable as it may be, would limit the measures that can be demanded of companies in the event of a damage (e.g., no obligation to cease financing or an investment relationship) and could limit the conditions in which they can be held civilly liable.

CASES

The directive risks limiting the climate due diligence obligations of banks, even though the **BNP Paribas** case, in which the company is on trial for its financing of and investments in the expansion of fossil fuels, shows that many types of financial services are used to support these activities, and that projects and entities linked to fossil fuels often indirectly benefit from this type of financing and investment.

RECOMMENDATIONS

➔ The decision on whether to include the financial sector **should not be left up to the Member States** at the time of transposition. Also, the **exclusion** of certain actors and financial services should be **removed**, to ensure that the whole sector is covered.

13 United Nations, guiding principles on businesses and human rights, no. 19: "Appropriate action will vary according to whether the business enterprise causes or contributes to an adverse impact, or whether it is involved solely because the impact is directly linked to its operations, products or services by a business relationship" (Link : bit.ly/3q4JAN5)

➔ Financial actors should **not benefit from a derogation differentiating them from other sectors** concerning the due diligence obligations to be implemented in the event that damages occur and their resulting liability.

➔ The due diligence obligations of financial actors must cover **all activities of their clients**, including those of their subcontractors linked to this financial backing.

C. "Adverse impacts" covered ("material" scope)

Environmental damages and human rights violations

BACKGROUND

The normative scope of the future directive must not be narrower than that of the French duty of vigilance law. The human rights scope must not be restrictive and must cover all human rights violations that can result from the activities of companies. For environmental considerations, the future legislation must be capable of covering all risks of harm to ecosystems and their components, including climate change.

LEGISLATIVE PROPOSAL / CASES

The Commission's proposal, like the Council's general approach, chiefly refers[14] to a list of international conventions provided as an annex to define the "adverse environmental and human rights impacts" covered by the text. The Commission and the Council also make these conditional upon the violation of international conventions, a limited list of which is provided as an annex.

This approach will inevitably be more restrictive than the French law, which covers all risks of serious harm to human rights and the environment in a broad sense, without the need to prove that an international convention has been violated.

In terms of human rights, the Commission and Council approach is unsatisfactory, as a number of conventions and instruments on the protection of the rights of vulnerable persons and minorities are not included in the annex. This approach will not cover the risk of certain violations which are clearly demonstrated by ongoing legal cases.[15]

→ For example, certain essential rights of Indigenous Peoples which were violated in the **EDF Mexico** case (right to self-determination, right to free, prior and informed consent) are not explicitly included in the annex of the Commission's text, nor in that of the Council.

In terms of environmental scope, referring only to a list of international conventions is also problematic,[16] as :

→ Many categories of environmental harm (deforestation, pollution of soils, plastic pollution, pollution of the high seas, etc.) are not currently covered by international conventions.

→ Important conventions such as Ramsar (wetlands) and MARPOL (pollution from ships), as well as the Paris Agreement, are not included in the Commission's annex. Similarly, the UN Convention on Biological Diversity was removed from the Parliament's version.

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14 In the list of "adverse human rights impacts", the annex of the proposal also refers to environmental harm (degradation of soil, air or water pollution, etc.) with consequences on the realisation of certain human rights (Annex, Part I, para. 18).

15 Furthermore, "adverse environmental and human rights impacts" are no longer mentioned in the body of the directive, but are moved to an annex. This may enable certain categories of damages to be suspended at a later date during interinstitutional negotiations or a future revision of the directive by the Commission.

16 On this point, see Sherpa's in-depth analysis: bit.ly/3Yhu25h

→ Many of these conventions are in fact framework agreements setting general objectives for states, but their implementation entirely depends on the adoption of national rules.

→ Even where these conventions exist, they are often not sufficient to prevent environmental damagest.

The risk is therefore that the directive may not be capable of preventing and putting a stop to certain serious environmental damages which are the subject of ongoing litigation, but are insufficiently covered by international conventions, or not covered at all:

→ There is no assurance that certain serious harm caused to ecosystems as showcased by the **Total Uganda** case (particularly concerning are the risks for the aquatic and marine environments in the area of the Murchison Falls national park and Lake Albert) would be covered by the limited list of international conventions attached as an annex to the Commission's proposal and the text adopted by the Council.

→ Likewise, with regard to the **Casino** case, deforestation and conversion of ecosystems would not be considered an "adverse environmental impact", and could potentially only be covered as "adverse human rights impacts".

Although the Parliament's version also features the problematic approach of referring to annexed international conventions, it shows significant progress in a number of areas when compared with the Commission and Council texts. The text adopted by Parliament includes a greater number of conventions (including, for example, the Paris Agreement), as well as a list of environmental harm categories allowing for broader definitions of "adverse environmental impacts" (e.g., climate change, biodiversity loss, pollution of air, water and soils, deforestation).

This category-based approach is consistent with that followed in European legislation (see: CRSD, Green Taxonomy, Batteries Regulation and Environmental Impact Assessment Directive (EIA).

RECOMMENDATIONS

→ The definition of "adverse human rights and environmental impacts" covered by the future European legislation must **not be conditional upon the violation of an international convention,** but must cover all current or potential types of harm caused to persons, the environment and its different components.

→ The Parliament's version – and its annexes – must prevail in the negotiations. It is essential to **include environmental impact categories**, in line with the European legislation in force.

→ To ensure visibility and consistency, it is also recommended to **move the list of categories of "adverse environmental impacts" to the body of the directive** (rather than attaching it as an annex), as adopted by the Parliament's environment committee.

→ Finally, an obligation for the Commission to regularly **update the list of international conventions** must be added to the directive, to reflect legislative developments in the area of human rights and environmental protection.

Climate

BACKGROUND

In the context of the climate emergency, companies must take the necessary steps to reduce their emissions in accordance with the Paris Agreement, aiming to limit global warming to 1.5°C. Company objectives in terms of reducing greenhouse gas emissions must be set in the short, medium and long term and expressed as an absolute value, unlike reductions in "carbon intensity" alone, which would allow them to continue increasing their emissions.

LEGISLATIVE PROPOSAL

Damage to the climate impacts could be addressed in two ways in the proposed directive: via "adverse environmental impacts" (article 3b and the annex defining these impacts), and via a new obligation for companies to set up and implement a "climate transition plan".

→ *Climate change as an "adverse environmental impact"*

- Neither the Commission's proposal nor the Council's General Approach include the impact of economic activity on the climate in the definition of an "adverse environmental impact". The text adopted by Parliament has made some progress on this point, by including an explicit reference to climate change and the Paris Agreement in the annex and defining the types of "adverse environmental impacts".

- However, it is essential that due diligence obligations for companies also cover the risks to the climate resulting from their activities. While the transition plans set out in article 15 take a forward-looking approach (i.e actions taken by a company to reduce its future emissions), the due diligence obligations set out in articles 6 to 8 also provide for the identification, prevention and mitigation of damage to the climate via the adoption of appropriate measures.

- Moreover, the absence of a clear reference to climate change and its consequences in the definition of "adverse environmental impacts" could exclude these from the scope of civil liability (article 22). Although corporate climate liability is likely to result from the application of general civil liability principles under national law, Member States may have no obligation under the directive to ensure that companies are held liable for the lack (or inadequacy) of their climate due diligence measures, or harm to the climate which may result from their activities and the use of their products.

→ *Climate transition plans*

- In the Parliament's version, article 15 provides that companies must adopt climate transition plans to guarantee that their economic model and strategy complies with the objectives of the Paris Agreement and with existing European climate legislation. However, this provision may enable companies to implement strategies with the purpose to evade their obligations linked to the impact of their activities on the climate.

- Although the text adopted by Parliament provides welcome clarifications concerning what should be included in transition plans (particularly indirect "scope 3" greenhouse gas emissions and emission reduction objectives with clear deadlines), neither the Commission's proposal nor the Council's General Approach explicitly refer to "scope 3" emissions, which represent 90% of total emissions in the oil and gas sectors.[17]

17 CDP, "The Carbon Majors Database, CDP Carbon Majors Report 2017", p. 5.

CASES

BNP Paribas and **Total** have been taken to court in France for their major contribution to climate change based on the duty of vigilance law. However, if other companies were to face legal proceedings in other Member States based on the framework set by the directive, they could argue that they are fulfilling their climate due diligence obligations as long as they have a formal transition plan in place, even if these plans do not include indirect emissions ("scope 3"), or emissions reduction objectives with absolute values.

RECOMMENDATIONS

→ To prevent climate due diligence from being reduced to a mere formality, the future legislation must not only focus on the adoption of transition plans – it must also:

- **Include the climate in the definition of "adverse environmental impacts"**, as proposed by the Parliament. This approach means that companies would be obligated to adopt measures to identify, prevent and mitigate the risks of damage to the climate linked to their activities.

- **Require companies to effectively implement the climate transition plans** they adopt. Companies must be required to (i) set short, medium and long term objectives to reduce their emissions in absolute values and throughout the whole value chain (i.e., scope 1, 2 and 3),[18] (ii) identify and provide detail on their high-risk activities (coal, gas and oil) and (iii) specify implementation actions and the related financial and investment plans to enable these emission reductions in absolute values.

D. Content of the due diligence duty

Appropriate measures and industry initiatives

BACKGROUND

Companies currently rely on formal measures which were initially non-binding (compliance) to prove they have fulfilled their duty of vigilance: inclusion of contractual clauses in their contracts with suppliers, use of social or environmental auditing firms, participation in industry initiatives, etc. The inefficiency of these tools has long been criticised, as they do not challenge the economic models and business practices which are the real cause of harm. If the definition of due diligence is limited to these types of measures, there is a risk that companies will continue to use a tick-the-box approach and could thus evade all responsibility.

LEGISLATIVE PROPOSAL

The proposed directive focuses excessively on the formal measures used by companies, which have already proved to be ineffective.

The Commission's proposal states that companies must take "appropriate measures" to "identify real or potential adverse impacts" and "prevent and mitigate as well as bring to an end and minimise the extent of potential and actual adverse impacts". However, the scope of this obligation is immediately limited by the inclusion in the list of acceptable due diligence measures of companies' participation in industry initiatives, the obtention of contractual clauses with business partners, as well as audits carried out by third parties, contracted (and paid) by the company. According to the Commission's proposal, if harm results from the activities of an indirect partner, the use of these tools can constitute grounds for a liability waiver.

18 As recommended by the High Level Expert Group on Sustainable Finance (HLEG) created by the European Commission.

Although the Parliament's position also assigns an important role to these tools, it also includes a non-exhaustive list of other more relevant due diligence measures, such as the adaptation of companies' economic models and strategies, including purchasing practices. Importantly, it states that carrying out audits, participating in industry initiatives and signing contractual clauses are not sufficient grounds to exempt a company from liability.

CASES

In the **Total Uganda** case, none of the company's vigilance plans contain specific measures to mitigate the few risks that are mentioned in its mapping and to prevent human rights violations and environmental damages. The only evidence the company provides about the fulfilment of its obligations is a mere list of audits and impact assessments carried out for the Tilenga and EACOP projects. However, as in many other cases such as Rana Plaza in Bangladesh, or the collapse of a dam at the Brumadinho mine in Brazil, the claimants have revealed the weaknesses of these instruments – conflicts of interest, serious methodological shortcomings, profound lack of understanding on the part of the contracted third parties of the damages in question, as well as shaky conclusions. Letting companies off the hook simply because audits have been carried out or contractual clauses enabling transfer of due diligence obligations to others have been stipulated is therefore particularly dangerous, and contrary to the very spirit of due diligence.

In the **Casino** case, the company's arguments are mainly based on the beef purchase policy of its Brazilian subsidiary, stating that 100% of its suppliers have had to formally sign up to this policy, otherwise their contract will be terminated. It also relies on audits and on its participation in different industry initiatives. The company therefore considers that it has complied with its "minimum" duty of vigilance, despite hundreds of cases of deforestation found throughout its beef supply chain based on samples of products sold in supermarkets.

Similarly, in the **Yves Rocher** case, the company relies, amongst other, on a social audit, carried out before the purchase of its subsidiary, which apparently found "no specific risk". The company also relies on the fact that the group's Code of Conduct was shared with the subsidiary, an assessment of the group by EcoVadis, which appears to have ranked it within the "top 10% of best-rated companies in terms of corporate social responsibility" in 2021, as well as the award of a "Great Place to Work" certificate to its Turkish subsidiary in 2022.

RECOMMENDATIONS

➔ Due diligence must be defined as the **obligation to take all necessary, reasonable, appropriate and effective measures** to avoid violations and damages arising in the value chains or subsidiaries of a company.

➔ If audits, contractual clauses or industry or multi-stakeholder initiatives are to be part of these due diligence measures, it must be **ensured that these measures are conditional upon a criterion of effectiveness**, that the list is not exhaustive (to avoid a tick-the-box approach), and that they do not **enable companies to evade liability.**

Prioritisation

BACKGROUND

It is envisaged that the possibility for companies to "prioritise" the handling of risks will be incorporated into the directive, meaning that defendant companies will be able to absolve themselves of responsibility by referring to the existence of more probable risks or more serious damages that had to be addressed as a priority.

Allowing a company to shirk responsibility for harm caused through its own fault or negligence by stating that it had the right to prioritise the

prevention or termination of a more serious or more probable damage is incompatible with French civil liability law. The directive would therefore constitute a step backwards in comparison with rules on civil liability for damages in certain national legislations. This also seems incompatible with OECD Guidelines, which state that in all cases companies must provide redress for all negative impacts they have caused or to which they have contributed.

This concept seems all the more dangerous for the fact that the assessment of "priority" risks largely relates to and depends on information held exclusively by the defendant company.

LEGISLATIVE PROPOSAL

The Council's position and that adopted by the Parliament have introduced the concept of "prioritisation", which could enable companies to postpone their duty to prevent or put an end to certain violations on the grounds that they have prioritised more serious or more probable violations.

CASES

Such an approach, which is not compatible with the notion of human rights, could allow companies faced with a legal challenge to evade responsibility by referring to the existence of more probable risks or more serious damages to be dealt with as a priority.

For example, in the **Casino** case, the company explained that it had not included the risks resulting from its meat supply activities in Colombia in its vigilance plan as it was focusing on the risks linked to its Brazilian subsidiary, where it considered that the risks were more significant.

Similarly, in the **Yves Rocher** case, the company claimed that it had not included the activities of its subsidiaries – including of its Turkish subsidiary – in its initial vigilance plans as it considered that the most significant risk was at supplier level.

RECOMMANDATION

→ Bearing in mind the diversity of risks caused by companies' activities, the **possibility for companies to prioritise "adverse impacts"** and therefore to evade their due diligence obligation regarding violations and damages considered "low priority" should be removed from the draft directive.

Main recommendations

In the light of the legal proceedings undertaken before French courts, the directive adopted after negotiations between the three European institutions must:

- Guarantee effective access to justice for affected persons, including by facilitating their access to evidence.
- Establish a civil liability regime covering all obligations set out in the directive, and enabling both parent and outsourcing companies to be held liable.
- Not allow companies to evade liability by using ineffective tick-the-box mechanisms (industry initiatives, audits, contractual clauses, prioritisation of risks, etc.).
- Define “adverse environmental and human rights impacts” in broad terms.
- Require companies to implement climate transition plans, including objectives for the reduction of greenhouse gas emissions in absolute values with clear deadlines.
- Apply without limitation to all financial actors and services.

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