

**FOR INFORMATION**

May 13, 2020

# POLICY BRIEF

---

**European Union Commitment to Introduce Legally Binding Corporate Human Rights and Environmental Due Diligence: Implications for Canada**

**CORE**

CANADIAN  
OMBUDSPERSON  
FOR RESPONSIBLE  
ENTERPRISE



## Purpose

Part of the Canadian Ombudsperson for Responsible Enterprise's (CORE) approach to promoting the United Nations Guiding Principles (UNGP) on Business and Human Rights is to regularly inform our public, private, and plural stakeholders of global developments in implementation and their implications for Canada.

This brief provides a summary of a study by the European Commission on due diligence requirements through the supply chain (1) and key points regarding the relevance of its findings to Canada.

## Background

The CORE's four-part mandate "*promote, advise, review, and recommend*" was created in the context of Canada's endorsement of the UNGPs, which is among other things, a blueprint to assist Member States in meeting their legislative obligations regarding ratified international human rights and labour treaties (2). Within the UNGPs framework "*protect, respect, and remedy*", Canada has taken the following steps in implementation:

- **Protect (Guiding Principles #1-10):** Canada has ratified 7 human rights treaties, in addition to other relevant treaties with the United Nations, International Labour Organization, Organization of American States, and humanitarian law (3). Domestically, Canada has enacted the Extractive Sector Transparency Measures Act (4) and recently, Bill S-211 "An Act to enact the Modern Slavery Act and to amend the Customs Tariff" (5) and Bill C-423 "An Act respecting the fight against certain forms of modern slavery through the imposition of certain measures and amending the Customs Tariff" were proposed (6).
- **Respect (Guiding Principles #11-24):** A nation-wide consultation was carried out to identify corporate responsibility trends, barriers, and opportunities in Canada. The report identified concrete actions arising from this study (7).<sup>1</sup>
- **Remedy (Guiding Principles #25-31):** Canadian Ombudsperson for Responsible Enterprise (CORE) and National Contact Point (NCP) have complementary roles in addressing human rights in responsible business conduct.

---

<sup>1</sup> This project was led by Responsible Business Practices Division at Global Affairs Canada and Community Development and Homelessness Partnerships Directorate's Horizontal Policy Unit within Employment and Social Development Canada.

On April 29, 2020, the European Union (EU) Commissioner for Justice committed to introducing legislation on mandatory human rights and environmental due diligence obligations for EU Companies in early 2021. The statement was made during a [webinar](#) organized by the [EU Responsible Business Conduct Working Group](#)<sup>2</sup> to discuss the findings of a comprehensive study on due diligence requirements throughout the supply chain completed for the European Commission.

This study highlights the increasing uptake and implementation of the UNGPs among governments, particularly the legislative requirement for businesses to ensure human rights due diligence are integrated in their operations. This trend reflects an emerging consensus among businesses, governments, and civil society organizations. The findings of this study may inform consideration of Bill S-211 and implementation of the UNGPs.

## Considerations

### *Relevance of the Study*

- The study identifies and examines a number of different options for enhancing due diligence, with the most stringent option being mandatory due diligence requirements.
- The study notes that the creation of oversight bodies would have **significant resource implications** for states, due to the scope of what would need to be monitored.
- The study acknowledges that currently, victims affected by adverse company impacts have a lack of access to effective remedy (p. 228-229), but does not consider how the proposed judicial or non-judicial remedies and oversight would address those barriers, let alone include specifications to address those barriers.
  - The European Coalition for Corporate Justice’s legislative recommendations included provisions regarding fair distribution of the burden of proof in remedy mechanisms as one way to help address those barriers (but beyond this, their recommendations are also limited in terms of addressing barriers)
  - The UN Human Rights Council working group’s legally-binding instrument includes provisions to protect the rights and safety of victims and ensure non-discriminatory access to justice and effective remedy (Article 4), including assistance with administrative costs and burden of proof requirements.

---

<sup>2</sup> The European Parliament Working Group on Responsible Business Conduct is a non-official body comprised of members of the European Parliament that promotes responsible business conduct by fostering collaboration with experts, stakeholders, and Members of the European Parliament.

### *Key findings of the EC Study*

- There are a number of existing laws<sup>3</sup> among EU member states that include due diligence requirements covering topics such as health and safety, product liability, employment, environment (p. 200)
- The study considers four options for regulatory proposals concerning due diligence through the supply chain: 1) no change, 2) new voluntary guidelines, 3) new reporting requirements, and 4) mandatory due diligence as a legal standard of care. The EU Commissioner for Justice committed to pursuing Option 4 (p. 250). The regulations will require companies to:
  - Identify, prevent, mitigate, and account for actual or potential human rights and environmental impacts in their own operations and throughout their supply chains.
  - Meet a certain “standard of care” for due diligence.
  - Demonstrate/defend that they have met this standard of care to escape liability.
  - Identify various factors that might affect the appropriate due diligence in a specific context, which include: severity/significance of impacts, company size, sector, operating context, company ownership structure, company resources, sector-specific standards of care, company leverage and whether that was exercised, what the company knew or ought to have known.
  - Due diligence as a legal duty (i.e. have they done all that can reasonably be expected of them) rather than procedural requirement (i.e. did they go through the motions, “ticked all of the boxes”).
  - Identify various factors including: which processes/steps were implemented, whether they were appropriate for the context, how they were implemented in practice.
  - Consider various scopes of application:
    - Narrow category of business, e.g. specific sectors or commodities (timber, minerals), or specific human rights (e.g. modern slavery, child labour), which was considered to limit broader due diligence.
    - Horizontal application across sectors, but:
      - Only for large companies.
      - For all companies regardless of size, recognizing that smaller companies do not necessarily have smaller impacts.
      - For all companies but with additional requirements for large companies.

<sup>3</sup> Examples of legislation are: Child Labour Due Diligence Law in the Netherlands, Modern Slavery Act in the UK, proposal in Germany for suggested mandatory human rights and environmental due diligence law

- The inclusion of statutory oversight and enforcement mechanism, and legal implications for companies to ensure compliance and support effectiveness of the provisions.
  - Access to judicial/non-judicial remedies oriented towards those affected (i.e. in a way that is meaningful to them, does not go to the government), who can provide remedies in the form of financial compensation, restoration to pre-harm conditions (e.g. for environmental damages), compensation for damages (quantified harm), preventive remedies (injunctions), compensation proportional to company-contribution to damage.
  - Creation of state oversight and enforcement bodies (EU and/or state level), either within or independent of state departments, with powers to issue enforcement measures like fines, appointing monitors, withdrawing licenses or trade concessions, or company dissolution, as well as criminal sanctions.

## Conclusions

### *Relevance for Canada*

- It analyzes the impacts of such legislation, which can guide consideration of Bill S-211 in Canada.
- The proposal identifies, targets, and seeks to address important challenges associated with current efforts to enhance due diligence, namely:
  - Targeting **actual** impacts of company actions to identify and address human rights impacts relevant to their operations, rather than superficial “check-box” actions.
  - Applying to the **entire supply chain**, rather than the company.
  - Emphasizing the need for **remedies oriented towards those affected**, and the need for oversight bodies to monitor compliance that are empowered to **directly apply enforcement measures** like fines.
- However, it still has a number of important limitations, specifically, with regards to addressing barriers to access.
- The EU’s adoption of this proposal (2-3 years from now) should address resistance from the Canadian private sector about competitiveness, given that it would apply to **millions** of businesses registered in the EU.

## Other Resources

- The European Coalition for Corporate Justice's<sup>4</sup> published a legal brief providing recommendations for model legislation on corporate responsibility and draft legally-binding instrument. This document also highlights EU and international support for human rights due diligence legislation (Available [here](#)).
- A draft human rights due diligence treaty is available titled "Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises" written by the UN Human Rights Council's open-ended intergovernmental working group on transnational corporations. (Available [here](#)).

## References

1. European Commission. (2020). Study on due diligence requirements through the supply chain. Retrieved from <https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en>
2. United Nations Office of the High Commissioner for Human Rights. (2014). If the guiding principles are not a legal instrument, are they just voluntary? In "Frequently asked questions about the guiding principles on business and human rights". Retrieved from [https://www.ohchr.org/Documents/Publications/FAQ\\_PrinciplesBusinessHR.pdf](https://www.ohchr.org/Documents/Publications/FAQ_PrinciplesBusinessHR.pdf)
3. Government of Canada: Human rights treaties. (Updated 2019). Retrieved from <https://www.canada.ca/en/canadian-heritage/services/canada-united-nations-system/treaties.html>
4. Parliament of Canada, First Session, 43<sup>rd</sup> Parliament. (2020). Bill S-211: An Act to enact the Modern Slavery Act and to amend the Customs Tarrif. Retrieved from <https://www.parl.ca/DocumentViewer/en/43-1/bill/S-211/first-reading>
5. Government of Canada: Justice Law Website. Extractive Sector Transparency Measures Act (S.C. 2014, c. 39, s. 376) Accessed on May 12, 2020 <https://laws-lois.justice.gc.ca/eng/acts/E-22.7/>
6. Parliament of Canada. (2018). Bill C-423 An Act respecting the fight against certain forms of modern slavery through the imposition of certain measures and amending the Customs Tariff. Retrieved from <https://www.parl.ca/DocumentViewer/en/42-1/bill/C-423/first-reading>
7. Strandberg Consulting. (2019). Corporate social responsibility in Canada: trends, barriers and opportunities. Retrieved from <https://corostrandberg.com/wp-content/uploads/2019/02/csr-in-canada-trends-barriers-opportunities-report.pdf>

---

<sup>4</sup> The European Coalition for Corporate Justice (ECCJ) is a multi-stakeholder coalition comprised of over 450 organizations across 16 countries seeking to promote corporate accountability.