

Consultation for an Initiative on Sustainable Corporate Governance

Sherpa's responses

Section I: Need and objectives for EU intervention on sustainable corporate governance

Question 1: Due regard for stakeholder interests', such as the interests of employees, customers, etc., is expected of companies. In recent years, interests have expanded to include issues such as human rights violations, environmental pollution and climate change. Do you think companies and their directors should take account of these interests in corporate decisions alongside financial interests of shareholders, beyond what is currently required by EU law?

- Yes, a more holistic approach should favour the maximisation of social, environmental, as well as economic/financial performance.**
- Yes, as these issues are relevant to the financial performance of the company in the long term.
- No, companies and their directors should not take account of these sorts of interests.
- Do not know.

Please provide reasons for your answer:

In our view, the question is not whether companies should be legally required to “take account” of human rights violations, environmental pollution, or climate change in their decisions. The main issue is that, today, many companies incorporated or operating in the European Union benefit from activities performed in violation of human rights and/or that are detrimental to the environment and cannot legally be held accountable for these abuses.

Some companies knowingly or negligently rely on the fact that third countries do not properly guarantee the protection of human rights and the environment to set up subsidiaries or outsource their production of goods and services in those countries. When victims seek to hold them to account, these companies rely on legal concepts such as the corporate veil (that is, the fact that they are legally distinct from other entities in their corporate group) to shield themselves from the consequences of their activities on human rights and the environment. This results in double standards; whereby European companies engage in and profit from practices in third countries that they would never be allowed to perform in the European Union.

It is high time that European law properly addressed and regulated the value chains of European companies and companies operating in the European Union.

The mere obligation for companies and/or directors to “take account” of social and environmental factors is not sufficient. In France, the Law n°2019-486 of 22 May 2019 (known as “Loi PACTE”) has amended Article 1833 of the French Civil Code to provide that companies shall “take into consideration” social and environmental issues. Yet, as this is only an obligation to “consider”, nothing guarantees that these considerations will prevail. At best, companies are required to document the fact that they included these aspects in their decision-making processes. This is unlikely to change the fact that short-term economic benefits most of the time prevail over social and environmental considerations.

In order to ensure that companies indeed take account of social and environmental issues, the law must ensure that they are held accountable for social and environmental harms resulting from their value chain.

Question 2: Human rights, social and environmental due diligence requires companies to put in place continuous processes to identify risks and adverse impacts on human rights, health and safety and environment and prevent, mitigate and account for such risks and impacts in their operations and through their value chain.

In the survey conducted in the context of the study on due diligence requirements through the supply chain, a broad range of respondents expressed their preference for a policy change, with an overall preference for establishing a mandatory duty at EU level.

Do you think that an EU legal framework for supply chain due diligence to address adverse impacts on human rights and environmental issues should be developed?

Yes, an EU legal framework is needed.

No, it should be enough to focus on asking companies to follow existing guidelines and standards.

No action is necessary.

Do not know.

Please explain:

An EU legal framework is indeed needed to hold companies accountable for the human rights and environmental impacts of their value chains. However, in order for it to be effective, it cannot simply restate, in European law, soft law principles contained in the UNGPs or the OECD guidelines. Soft law and hard law pursue different objectives and are based on different mechanisms.

The French Law on the Duty of Vigilance has been a first step in addressing those issues in hard law. It did not simply restate the UNGPs or OECD Guidelines. It expressly provides that the vigilance measures adopted by the company must be “adequate” and “implemented in an effective manner”. Fundamentally, it has anchored the new corporate duty in the pre-existing notion of vigilance in French civil liability law, which means that the company’s lack of vigilance may trigger its civil liability.

Yet, many companies have misconstrued the French law on the duty of vigilance. They consider that they are simply required to adopt internal risk-management processes and publish them in a vigilance plan; and that they cannot be held liable if they do so. Litigations are currently underway to clarify the content of the duty of vigilance.

This confirms that the future European legislation should make clear that the duty of vigilance is not an obligation for companies to put in place certain processes, to “make reasonable efforts” or “to use their leverage”. What companies today present as due diligence processes are ineffective and only serve to shield them from any kind of accountability: codes of conduct; contractual clauses; audits; certifications have all proven to be insufficient to prevent human rights violations and environmental harms.

A mandatory duty established at the EU should therefore require undertakings to take all necessary and adequate measures to ensure that they do not benefit from environmental harms and/or human rights violations.

Undertaking should be considered to benefit from environmental harms and/or human rights violations when these occur in their value chain.

The “value chain” of an undertaking shall be defined as including the activities carried out: (a) by the undertaking itself; (b) by the entities that the undertaking jointly or exclusively controls; (c) by the entities in which the undertaking holds an investment; (d) by the entities that directly or indirectly supply products or services to the undertaking or to entities described in (b) or (c) where these activities relate to those products or services; and (e) by the entities that receive products or services from the undertaking or the entities described in (b) and (c) where these activities relate to those products or services. Environmental harms and/or human rights violations shall be considered to occur in the value chain of an undertakings when they result from the activities in question.

Secondly, the EU legal framework shall provide that companies shall be liable for environmental harms and harms resulting from human rights violations in their value chain, unless they can prove that they took all necessary and adequate measures to ensure that these harms do not occur in their value chain. An undertaking shall not be able to invoke this defence when the harm resulted from their own activities or from the activities of entities that they jointly or exclusively control (a and b above). In these latter situations the obligation to ensure shall be an obligation of result.

Thirdly, even before a harm occurs, upon the request of any interested party including public prosecutors, the competent judicial authorities shall be entitled to order the undertaking to take certain prevention measures.

Question 3: If you think that an EU legal framework should be developed, please indicate which among the following possible benefits of an EU due diligence duty is important for you (tick the box/multiple choice)?

- Ensuring that the company is aware of its adverse human rights, social and environmental impacts and risks related to human rights violations other social issues and the environment and that it is in a better position to mitigate these risks and impacts
- Contribute effectively to a more sustainable development, including in non-EU countries
- Levelling the playing field, avoiding that some companies freeride on the efforts of others
- Increasing legal certainty about how companies should tackle their impacts, including in their value chain
- A non-negotiable standard would help companies increase their leverage in the value chain
- Harmonisation to avoid fragmentation in the EU, as emerging national laws are different
- SMEs would have better chances to be part of EU supply chains
- Other

Other, please specify:

Regarding the first objective proposed, it is worth clarifying that due diligence legislation should not be aimed at ensuring company’s awareness of impacts and risks, or of its position with regard to them, but rather to increase corporate accountability to encourage them to effectively prevent and mitigate them, and to hold them liable when they fail to do so.

Furthermore, this list omits an essential element of corporate accountability: access to justice for victims and organisations that defend human rights (including workers’ rights) and the environment.

An EU legislation on corporate accountability shall enable victims of human rights violations and environmental harms to obtain redress from the undertakings that benefitted from the violations of

their rights. The legislation should allow victims, in and outside the EU, to hold enterprises civilly liable for harm before EU courts.

Question 3a. Drawbacks

Please indicate which among the following possible risks/drawbacks linked to the introduction of an EU due diligence duty are more important for you (tick the box/multiple choice)?

- Increased administrative costs and procedural burden
- Penalisation of smaller companies with fewer resources
- Competitive disadvantage vis-à-vis third country companies not subject to a similar duty
- Responsibility for damages that the EU company cannot control
- Decreased attention to core corporate activities which might lead to increased turnover of employees and negative stock performance
- Difficulty for buyers to find suitable suppliers which may cause lock-in effects (e.g. exclusivity period/no shop clause) and have also negative impact on business performance of suppliers
- Disengagement from risky markets, which might be detrimental for local economies
- Other

Other, please specify:

If the new obligation is defined as an obligation to adopt due diligence processes (as opposed to an obligation to ensure that environmental harms and/or human rights violations do not occur in their value chain, see the answer to Question 2 above), there may be a number of drawbacks associated with this legislation, including:

- Administrative burden on companies, which will be required to formally document an ever-growing number of internal processes;
- Lack of meaningful accountability, as this compliance exercise will not guarantee that the company took all necessary measures to ensure that human rights violations and environmental harms would not occur in its supply chains (including in choosing to use a certain product or service in the first place, in choosing a country of production or a commercial partner, and in setting the price or and contractual conditions);
- Development of social auditing firms or other self-regulation practices that are fraught with conflicts of interests and only serve to perpetuate violations;
- The risk that, parent and lead companies end up passing the additional costs to their suppliers and subcontractors, and ultimately to the most vulnerable parts of the value chains, without adapting own purchasing practices.

Companies will only adopt useful prevention processes if they know that they will effectively be held liable if a harm occurs in their value chain.

Section III: Due diligence duty

For the purposes of this consultation, “due diligence duty” refers to a legal requirement for companies to establish and implement adequate processes with a view to prevent, mitigate and account for human rights (including labour rights and working conditions), health and environmental impacts, including relating to climate change, both in the company’s own operations and in the company’s the supply chain. “Supply chain” is understood within the broad definition of a company’s “business relationships” and includes subsidiaries as well as suppliers and subcontractors. The company is expected to make reasonable efforts for example with respect to identifying suppliers and subcontractors. Furthermore, due diligence is inherently risk-based, proportionate and context specific. This implies that the extent of implementing actions should depend on the risks of adverse impacts the company is possibly causing, contributing to or should foresee.

Question 14: Please explain whether you agree with this definition and provide reasons for your answer.

We do not agree with this definition.

An EU legislation is indeed needed to hold companies accountable for the human rights and environmental impacts of their value chains. However, in order for it to be effective, it cannot simply restate, in European law, soft law principles contained in the UNGPs or the OECD guidelines.

If this legal framework is to be effective, the obligation should not be for companies to put in place certain processes, to “make reasonable efforts” or to “use their leverage”. What companies today present as “due diligence” processes are ineffective and only serve to shield them from any kind of accountability: codes of conduct; contractual clauses; audits; certifications have all proven to be insufficient to prevent human rights violations and environmental harms.

An EU legal framework should require undertakings to take all necessary and adequate measures to ensure that they do not benefit from environmental harms and/or human rights violations. Undertaking should be considered to benefit from environmental harms and/or human rights violations when these occur in their value chain.

The “value chain” of an undertaking shall be defined as including the activities carried out: (a) by the undertaking itself; (b) by the entities that the undertaking jointly or exclusively controls; (c) by the entities in which the undertaking holds an investment; (d) by the entities that directly or indirectly supply products or services to the undertaking or to entities described in (b) or (c) where these activities relate to those products or services; and (e) by the entities that receive products or services from the undertaking or the entities described in (b) and (c) where these activities relate to those products or services.

Environmental harms and/or human rights violations shall be considered to occur in the value chain of an undertakings when they result from the activities in question.

The “business relationships” of an undertaking shall mean the different entities in its value chain.

This definition of the new corporate duty is crucial to hold companies accountable for human rights violations and environmental harms occurring in their value chain. Indeed, in most cases companies argue that they already “make efforts” but that they do not have the leverage or market power to actually prevent the adverse impacts caused by their value chain from happening. In the meantime, they continue to benefit from these violations.

Question 15: Please indicate your preference as regards the content of such possible corporate due diligence duty (tick the box, only one answer possible). Please note that all approaches are meant to rely on existing due diligence standards, such as the OECD guidance on due diligence or the UNGPs. Please note that Option 1, 2 and 3 are horizontal i. e. cross-sectorial and cross thematic, covering human rights, social and environmental matters. They are mutually exclusive. Option 4 and 5 are not horizontal, but theme or sector-specific approaches. Such theme specific or sectorial approaches can be combined with a horizontal approach (see question 15a). If you are in favour of a combination of a horizontal approach with a theme or sector specific approach, you are requested to choose one horizontal approach (Option 1, 2 or 3) in this question.

Option 1. “Principles-based approach”: A general due diligence duty based on key process requirements (such as for example identification and assessment of risks, evaluation of the operations and of the supply chain, risk and impact mitigation actions, alert mechanism, evaluation of the effectiveness of measures, grievance mechanism, etc.) should be defined at EU level regarding identification, prevention and mitigation of relevant human rights, social and environmental risks and negative impact. These should be applicable across all sectors. This could be complemented by EU level general or sector specific guidance or rules, where necessary

Option 2. “Minimum process and definitions approach”: The EU should define a minimum set of requirements with regard to the necessary processes (see in option 1) which should be applicable across all sectors. Furthermore, this approach would provide harmonized definitions for example as regards the coverage of adverse impacts that should be the subject of the due diligence obligation and could rely on EU and international human rights conventions, including ILO labour conventions, or other conventions, where relevant. Minimum requirements could be complemented by sector specific guidance or further rules, where necessary.

Option 3. “Minimum process and definitions approach as presented in Option 2 complemented with further requirements in particular for environmental issues”. This approach would largely encompass what is included in option 2 but would complement it as regards, in particular, environmental issues. It could require alignment with the goals of international treaties and conventions based on the agreement of scientific communities, where relevant and where they exist, on certain key environmental sustainability matters, such as for example the 2050 climate neutrality objective, or the net zero biodiversity loss objective and could reflect also EU goals. Further guidance and sector specific rules could complement the due diligence duty, where necessary.

Option 4 “Sector-specific approach”: The EU should continue focusing on adopting due diligence requirements for key sectors only.

Option 5 “Thematic approach”: The EU should focus on certain key themes only, such as for example slavery or child labour.

None of the above, please specify

Please specify:

These different options are problematic. As mentioned above (Answer to Questions 2 and 14), the new obligation for undertakings shall not be to put in place processes. It should require undertakings to ensure that they do not benefit from environmental harms and/or human rights violations, that is, to ensure that these harms do not occur in their value chain.

Question 15a: If you have chosen option 1, 2 or 3 in Question 15 and you are in favour of combining a horizontal approach with a theme or sector specific approach, please explain which horizontal approach should be combined with regulation of which theme or sector?

N/A

Question 15b: Please provide explanations as regards your preferred option, including whether it would bring the necessary legal certainty and whether complementary guidance would also be necessary.

Environmental harms shall be defined as harms caused to the environment. The environment should be defined as including (a) all fauna and flora; (b) land soil, water and air; (c) all layers of the atmosphere; and (d) natural ecosystem equilibrium. The definition of ecological damage provided for in Article 1247 of the French Civil Code could also be relevant.

Regarding human and labour rights, due diligence legislation should at least cover all internationally recognized standards, understood, at a minimum, as those expressed in

- the International Bill of Human Rights, consisting of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights
- customary international law,
- International humanitarian law,
- international human rights instruments on the rights of persons belonging to particularly vulnerable groups or communities (including the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, the Convention on the Rights of Persons with Disabilities, the United Nations Declaration on the Rights of Indigenous Peoples, the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities) and
- the principles concerning fundamental rights set out in the ILO Declaration on Fundamental Principles and Rights at Work, as well as those recognised in the ILO Convention on freedom of association and the effective recognition of the right to collective bargaining, the ILO Convention on forced labour, the ILO Convention on the abolition of forced labour, the ILO Convention on the worst forms of child labour, the ILO Convention on the elimination of discrimination in respect of employment and occupation and ILO Convention on equal remuneration; and other rights recognised in a number of ILO Conventions, such as freedom of association, minimum age, occupational safety and health, living wages, indigenous and tribal peoples' rights, including free, prior and informed consent (ILO Convention on indigenous and tribal peoples), and
- the rights recognised in the African Charter of Human and Peoples' Rights, the American Convention on Human Rights, the European Convention on Human Rights, the European Social Charter, the Charter of Fundamental Rights of the European Union, and
- national constitutions and laws recognising or implementing human rights.

Question 15c: If you ticked options 2) or 3) in Question 15 please indicate which areas should be covered in a possible due diligence requirement (tick the box, multiple choice)

- Human rights, including fundamental labour rights and working conditions (such as occupational health and safety, decent wages and working hours)
- Interests of local communities, indigenous peoples' rights, and rights of vulnerable groups
- Climate change mitigation
- Natural capital, including biodiversity loss; land degradation; ecosystems degradation, air, soil and water pollution (including through disposal of chemicals); efficient use of resources and raw materials; hazardous substances and waste
- Other, please specify

Other, please specify:

N/A

Question 15d: If you ticked option 2) in Question 15 and with a view to creating legal certainty, clarity and ensuring a level playing field, what definitions regarding adverse impacts should be set at EU level?

N/A

Question 15e: If you ticked option 3) in Question 15, and with a view to creating legal certainty, clarity and ensuring a level playing field, what substantial requirements regarding human rights, social and environmental performance (e.g. prohibited conducts, requirement of achieving a certain performance/target by a certain date for specific environmental issues, where relevant, etc.) should be set at EU level with respect to the issues mentioned in 15c?

N/A

Question 15f: If you ticked option 4) in question 15, which sectors do you think the EU should focus on?

N/A

Question 15g: If you ticked option 5) in question 15, which themes do you think the EU should focus on?

N/A

Question 16: How could companies'- in particular smaller ones'- burden be reduced with respect to due diligence? Please indicate the most effective options (tick the box, multiple choice possible)

This question is being asked in addition to question 48 of the Consultation on the Renewed Sustainable Finance Strategy, the answers to which the Commission is currently analysing.

- All SMEs should be excluded
- SMEs should be excluded with some exceptions (e.g. most risky sectors or other)
- Micro and small sized enterprises (less than 50 people employed) should be excluded
- Micro-enterprises (less than 10 people employed) should be excluded

SMEs should be subject to lighter requirements (“principles-based” or “minimum process and definitions” approaches as indicated in Question 15)

SMEs should have lighter reporting requirements

Capacity building support, including funding

Detailed non-binding guidelines catering for the needs of SMEs in particular

Toolbox/dedicated national helpdesk for companies to translate due diligence criteria into business practices

Other option, please specify

None of these options should be pursued

Please explain your choice, if necessary

Defining the new corporate duty as an obligation for undertakings to ensure that no environmental harms and/or human rights violations occur in their value chain rather than as an obligation to put in place processes or to report on them would precisely avoid the creation of such additional administrative burden for SMEs.

Despite arguments made in favour of a “business case” for responsible practices, it is undeniable that sourcing products and services from suppliers that respect human rights and the environment has a cost and that respect for that new duty is bound to prompt changes in corporate models and practices. This should be the very objective of this legislation.

However, this does not necessarily mean that SMEs will be disproportionately affected. Many SMEs may, depending on the nature of their business, not generate as many risks to human rights and the environment as larger businesses do, by virtue of the simple fact that their value chains are smaller. SMEs tend to have fewer suppliers and customers. SMEs also tend to spend more time selecting business partners and have a preference for longer-term relationships. These stronger relationships allow greater scope to integrate human rights and environmental issues.

Question 17: In your view, should the due diligence rules apply also to certain third country companies which are not established in the EU but carry out (certain) activities in the EU?

Yes

No

I do not know

Question 17a: What link should be required to make these companies subject to those obligations and how (e.g. what activities should be in the EU, could it be linked to certain turnover generated in the EU, other)? Please specify.

The obligation should apply to companies operating in the internal market (selling products or services, conducting activities).

Question 17b: Please also explain what kind of obligations could be imposed on these companies and how they would be enforced.

These companies shall be subject to the same obligations as companies incorporated in the EU Member States, with respect to the products, services and activities that are placed or undertaken in the EU internal market.

EU rules on conflict of jurisdiction should be amended to enable the courts of a Member State to have jurisdiction over claims brought against companies incorporated outside the EU that place products or services and/or undertake activities in that Member State where these claims are brought by victims of human rights violations and environmental harms that occurred in their value chain, with respect to these products, services or activities.

Question 18: Should the EU due diligence duty be accompanied by other measures to foster more level playing field between EU and third country companies?

Yes

No

I do not know

Please explain:

The EU should step up its efforts for the adoption of a UN binding treaty to regulate the activities of transnational corporations and other business enterprises and ask for a dedicated mandate to negotiate this treaty, which should reaffirm the primacy of international human rights law over other international legal instruments, outline human rights and environmental obligations for businesses and ensure the provision of effective and fair access to justice for affected individuals and communities.

Question 19: Enforcement of the due diligence duty

Question 19a: If a mandatory due diligence duty is to be introduced, it should be accompanied by an enforcement mechanism to make it effective. In your view, which of the following mechanisms would be the most appropriate one(s) to enforce the possible obligation (tick the box, multiple choice)?

Judicial enforcement with liability and compensation in case of harm caused by not fulfilling the due diligence obligations

Supervision by competent national authorities based on complaints (and/or reporting, where relevant) about non-compliance with setting up and implementing due diligence measures, etc. with effective sanctions (such as for example fines)

Supervision by competent national authorities (option 2) with a mechanism of EU cooperation/coordination to ensure consistency throughout the EU

Other, please specify

Please provide explanation:

Firstly, an EU legislation on corporate accountability for human rights violation and environmental harms should expressly provide for civil liability.

Companies shall be liable for environmental harms and harms resulting from human rights violations in their value chain, unless they can prove that they took all necessary and adequate measures to ensure that these harms would not occur in their value chain.

To meet its burden of proof, the company should be required to establish that it could not have foreseen the risk or, in case the risk was foreseeable, that it could not have prevented the human right violation or environmental from occurring in its value chain.

Importantly, an undertaking shall not be entitled to invoke this defence when the harm resulted from its own activities or from the activities of entities that they jointly or exclusively control. In those situations, the obligation to ensure that human rights violations or environmental harms do not occur shall be an obligation of result. The victim of a human rights violation or environmental harm should not have to bear the consequences of a company's decision to structure its corporate group through different subsidiaries.

The French Law on the Duty of Vigilance (Loi n°2017-399 of 27 March 2017) ("DV Law") has been a first step in linking a corporate duty of vigilance, i.e. a duty for a company to identify risks and prevent human rights and environmental violations resulting from its activities, and the activities of its subsidiaries, suppliers and subcontractors, to legal provisions on civil liability.

Yet, this reference to the existing fault-based (or negligence-based) liability regime under French tort law is insufficient.

First, most companies have misconstrued the content of the duty of vigilance. They consider that they are simply required to adopt internal risk-management processes and publish them in a vigilance plan; and that they cannot be held liable if they do so. Despite the wording of the DV law (which prescribes "*adequate*" and "*effective*" measures), the definition of the duty of vigilance as an obligation to establish, publish and effectively implement a vigilance plan has created confusion. There is a risk that judges will give deference to the vigilance measures chosen by companies, even if these measures were ill-adapted and insufficient to prevent harms from occurring in the company's supply chain.

This confirms that the future European legislation should make clear that it is not about an obligation to adopt processes.

Second, under the French DV Law, the burden of proving the element of civil liability (the lack of vigilance, the damage and causation) lies with the claimant. Given the difficulties for claimants to access to information and the fact that most of the elements are bound to be in possession of the respondent company itself, this is a major hurdle in establishing civil liability. The obligation for companies to publish a vigilance plan does not, in practice, alleviate this burden as most plans to date are mere compilation of vague statements listing, at best, pre-existing CSR measures.

As a consequence, the burden of proving the lack of vigilance should be shifted on to the respondent company, as it is the best placed to establish why the risk in question could not have been foreseen or why it could not possibly have prevented the harm from occurring in its value chain. If the company legally or factually controls the entity in question, it should not be able to invoke this defence.

Third, a mere reference to existing fault-based liability – including causation - appears insufficient to improve accountability in supply chains. Indeed, in most cases it is extremely difficult to prove that the company's lack of vigilance caused the harm or that, if the company had respected its duty of vigilance, the harm would not have occurred at all. Indeed, a company could still argue that even if it had decided not to buy any more from one of its suppliers, it would not have prevented that supplier from using child labour or from violating freedom of association, i.e. that it did not cause the harm per se. The notion of "contribution" as defined in the OECD guidelines raises the exact same issue.

In addition to civil liability, it is essential to provide for the possibility for judges to issue preventive injunctive relief, including interim measures. Even before a harm occurs, upon the request of any

interested party including public prosecutors, the competent judicial authorities shall be entitled to order the undertaking to take certain prevention measures.

Finally, supervision by a national authority in charge of assessing compliance seems inconsistent with the nature of the duty of vigilance. It risks creating a confusion between the duty of vigilance, which is a general standard of conduct, and mere formalistic, tick-the-box requirements.

Question 19b: In case you have experience with cases or Court proceedings in which the liability of a European company was at stake with respect to human rights or environmental harm caused by its subsidiary or supply chain partner located in a third country, did you encounter or do you have information about difficulties to get access to remedy that have arisen?

Yes

No

In case you answered yes, please indicate what type of difficulties you have encountered or have information about:

As an organisation that defends victims of human rights and environmental abuses caused by economic actors, Sherpa has faced a number of legal and practical obstacles when seeking to hold French companies accountable for abuses caused in their value chain.

This includes:

1. Limited access to evidence

In cases brought against corporations for human rights or environmental abuses in their value chains, most of the relevant evidence is likely to be in possession of the respondent company itself, creating a significant procedural hurdle for victims. Access to this evidence is indeed often crucial to bring judicial action.

The case brought by Sherpa and Friends of the Earth against Perenco however shows that traditional access to evidence mechanisms, such as *ex parte* measures under Article 145 of the French Civil Procedure Code, may be ill-adapted. In that case, Perenco simply refused to let the judicial officer enter its premises to enforce the decision ordered by the Paris Judicial Tribunal, and has faced to date no legal consequence (<https://www.asso-sherpa.org/continuing-opacity-the-court-denies-access-to-information-on-perencos-oil-activities-2>).

While the obligation for companies to publish a vigilance plan under the Law on the Duty of Vigilance was seen as a way to alleviate the victims' burden of proof, this has also proven to be inefficient. This disclosure exercise has caused confusion as to the nature of the duty of vigilance. Companies' vigilance plans often praise their own policies and are no remedy to the lack of access to crucial internal evidence.

2. Legal standing of non-governmental organisations

Another obstacle relates to the legal standing of non-governmental organisations in judicial actions. Although French law does enable NGOs to initiate civil actions and file criminal complaints, their admissibility is subject to certain rules that have recently been interpreted in a restrictive manner and have created legal uncertainty.

For example, Sherpa and ECCHR have been judged inadmissible for lack of legal standing in the case brought against Lafarge for its actions in Syria. The Court relied on a very restrictive reading of their by-laws, finding that the protection of human rights did not include the fight against crimes against humanity (<https://www.asso-sherpa.org/10533-2>).

3. Applicable law

Civil cases brought against parent or lead companies for human rights abuses also raise complex issues of applicable law. Indeed, according to article 4(1) of Rome II Regulation, tort actions are in principle governed by the law of the place where the damage occurs, even though liability results from a negligence of a company incorporated in France.

This creates an additional procedural hurdle, and more importantly, some companies rely on this rule to avoid the application of more protective provisions that may be adopted in their home country. The Perenco case, mentioned above, illustrates this issue. The Paris Court of Appeal found that, despite the choice offered to the claimant under Article 7 of Rome II Regulation for environmental damages, the place of the event giving rise to the harm should be understood as the place of the emission of the polluting substances, so that French law would not be applicable.

4. Notion of “established commercial relationship”

Another obstacle that is worth mentioning here is the notion of “established commercial relationship” in the French Duty of Vigilance Law.

While the legislators made it clear before the adoption of this legislation that it intended to regulate the whole value chain of the French companies covered, some companies have relied on the notion of “established commercial relationship” to argue that their duty of vigilance is limited to tiers 1 suppliers and subcontractors. This is notably the case of French supermarket Casino following the formal notice sent by a coalition of NGOs and indigenous organisations with respect to the company’s failure to exclude beef sourced from deforested areas in Brazil and Colombia. While this question will have to be decided by the courts, the restrictive interpretation has given rise to legal uncertainty for victims and may limit their access to remedy.

5. Forum necessitatis

In the Comilog case, the Cour de Cassation spelt out extremely stringent requirements to the application of the forum necessitatis rule (14 September 2017, No. 15-26.737). On the first criterion (risk of denial of justice), the Court adopted a formalistic approach, finding that the impossibility for the employees to access to the competent judge was not established, while their case had been pending before the Congolese courts for more than 15 years. Similarly, regarding the second criterion (a sufficient connection with France) it held that the fact that the French company Eramet had acquired a majority in Comilog’s shareholding was not sufficient, failing to take into account the economic reality of multinational companies.

If you encountered difficulties, how and in which context do you consider they could (should) be addressed?

1. Access to evidence

The upcoming legislation should take into account the procedural imbalance regarding access to evidence when setting out rules on the burden of proof. It should not be for the victims to prove that a company did not take adequate measures to ensure that no human rights violations or environmental harms occur in its supply chain. The company should establish that it took all necessary measures to ensure that no such abuses would occur in its value chain.

In addition, the EU legislation should provide for a “right to know” or access to information procedure, enabling any person to request a company to share information on its value chain and the environmental and human rights impact of its value chain. As in freedom of information procedures, judicial mechanisms should be available to compel companies to comply if they refuse, including under financial sanctions.

For this to be effective, companies should not be allowed to rely on the Trade Secrets Directive with respect to information on their value chains.

2. Legal standing of NGOs

The EU legislation should make clear that, when transposing the upcoming Directive, Member States should clearly provide that non-governmental organisations defending human rights and the environment shall have legal standing to request injunctive relief against companies that do not comply with their obligations.

3. Applicable law

Including through a revision of Rome II Regulation, EU legislation should make clear that a claimant requesting compensation for an environmental harm or a human rights violation that occurred in the value chain of a European company has an option to rely on the law of the Member State where this company is domiciled.

4. Notion of “established commercial relationship”

The upcoming EU legislation should make clear that the new corporate duty applies to the entire value chains of companies. A limitation to direct suppliers or subcontractors (tier 1) would deprive the legislation of its effects. It would indeed merely incite companies to create an artificial additional layer in their value chain to avoid liability.

5. Forum necessitatis

The forum necessitatis exception should be introduced in European legislations on conflicts of jurisdictions, while specifying that (1) the risk of denial of justice (that is, the risk that the right to a fair trial or the right to access to justice may not in practice be respected) shall be assessed concretely, and (2) a mere connection with the Member State is sufficient (as opposed to a “sufficient” or “close” link).