

EU Mandatory Human Rights Due Diligence

AIM contribution to the debate

February 2021

Objective of this contribution to the discussion

- This paper seeks to provide constructive input by branded consumer goods manufacturers to the current EU-wide discussion on introducing mandatory human rights due diligence legislation (mHRDD), and to provide concrete suggestions for various elements of such legislation.
- Our starting principle is to ensure alignment of any future regulatory framework with the UN Guiding Principles on Business and Human Rights (UNGPs).
- We recognise that environmental impacts are also relevant in this debate, and we share our perspective further below in this paper.

Values and Mission

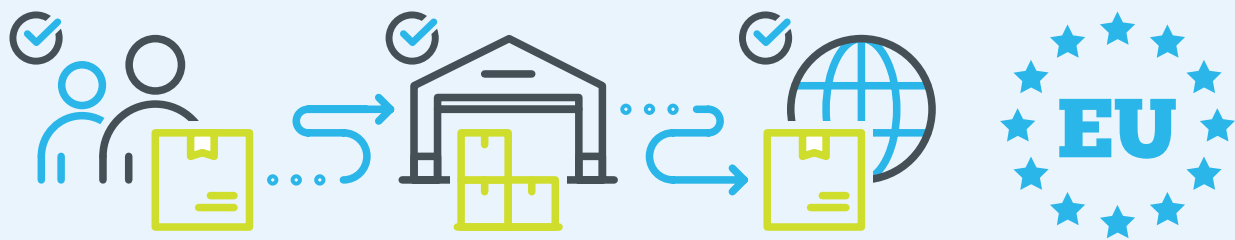
- The mission of [AIM-Progress](#), the global responsible sourcing initiative of [AIM – European Brands Association](#), is to “positively impact people’s lives and ensure respect for human rights, while delivering value to members and their supply chains”.
- AIM-Progress members are branded fast-moving consumer goods manufacturers and their common suppliers, working together to co-create solutions and share best practices to drive positive impact, quickly, efficiently and at scale. The key objective is to build capability so that member companies and their suppliers have the knowledge, confidence and ability to develop and execute robust responsible sourcing programmes.

Why brands are engaging in the mHRDD discussion

- Both in Europe and globally, the discussion on mandatory human rights due diligence (mHRDD) is progressing with multiple stakeholder groups contributing their perspectives. Consumer goods brands are committed to, and have experience with, responsible business conduct and implementing the UNGPs. We would like to play a proactive role in contributing to the discussions on the legislative landscape, specifically in the EU.
- Our recently updated [AIM-Progress strategy](#) is about putting people and respect for human rights at the centre of everything we do. We aim to support and inform our members in implementing their commitments to applying the UNGPs and the Human Rights Due Diligence processes they set out.
- Considering the role of consumer brands in driving sustainability and positive social impact, we are interested to engage in discussions that aim to improve outcomes for people in the context of our business activity.
- We believe that mHRDD legislation has a role to play in promoting respect for human rights, among a broader range of approaches where all businesses and states need to meet their respective responsibilities and/or duties – particularly in the context of the COVID-19 crisis. Such legislation will require businesses to address their actual and potential human rights impacts and, where legally permissible, scale up collaboration between brands, suppliers and other stakeholders to improve the sustainability of supply chains. States also need to fully realise their “duty to protect” by ensuring relevant laws and policies are in place and implemented.



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Potential benefits of mHRDD at EU level

We acknowledge the findings of the [January 2020 study commissioned by DG JUST](#) on due diligence requirements through the supply chain, where many stakeholders expressed the view that mandatory due diligence as a legal standard can have the following potential benefits, in particular:

- To create a **level playing field** by holding all businesses to the same standard, beyond mere reporting obligations.
- To provide **more leverage¹ with business partners** to deliver on human rights commitments throughout the supply chain.
- To increase **legal certainty** for businesses by setting a harmonised and predictable EU-wide legal framework for how EU member states and companies are expected to transpose and implement the UNGPs.

Essential considerations for new legislation

- Future EU HRDD legislation should be based explicitly on the international standard of the UNGPs, and the UN and ILO conventions underpinning them².
- A mHRDD framework should **encourage robust HRDD processes that are fully embedded in governance and company culture**, ultimately leading to better outcomes for people, rather than a mere “tick-the-box” exercise.
- **mHRDD legislation should align with the UNGPs in setting a standard of conduct for companies.** This means that **companies should be expected to demonstrate that they are taking reasonable steps to prevent and address human rights impacts that they are or could be involved with through their own activities or their business relationships across the value chain.** It also means that, as the UNGPs themselves recognise, even with the best policies and processes, companies may not be able to prevent all impacts. Legislation should therefore encourage ongoing improvement in company approaches over time and recognise the importance of encouraging efforts to address the root causes of human rights harms.
- mHRDD legislation **should address the responsibility of businesses to provide remedy³** where a business causes or contributes to human rights harm, while bearing in mind the role of the State in setting the foundations for effective remedy.
- mHRDD legislation should **encourage and promote increased transparency within companies’ supply chains.**
- **mHRDD should also encourage collaboration by companies within and across sectors**, including through multi-stakeholder initiatives and collaboration with civil society and trade union partners, as a means of using leverage to tackle systemic human rights challenges, within the confines of competition law⁴.
- mHRDD legislation should **be developed as part of a smart mix of measures by States** – mandatory and voluntary, national and international. States should use

mutually reinforcing policy tools to not only require but also incentivize and support businesses to respect human rights. This means that States should complement any new mHRDD measures with approaches that foster business respect for human rights, such as trade preferences and development policies. States should also be required to implement HRDD in their own public procurement approaches. In addition, the EU and Member States should exert direct leverage and support enabling environments to advance better human rights outcomes in their relationships with partner countries.

- mHRDD legislation should **recognise the efforts deployed by business to respect human rights** in situations where States may fall short of their duty to protect human rights. This can pose a challenge, as instances may arise where national law and international human rights standards do not align. Where national law falls short of international standards, companies should seek to follow the higher standard. Where they conflict, HRDD legislation should not penalise businesses complying with national law and exploring alternative ways to respect international human rights standards to the greatest extent possible in the circumstances.



Further considerations on content of legislation

1. Scope of legislation: which businesses should it apply to?

- **All businesses, including SMEs and state-owned enterprises, as well as State entities engaging in public procurement,** should be covered by mHRDD legislation. This is necessary in order to achieve a level playing field, and because all businesses may be involved with negative human rights impacts. The means through which a business is expected to meet this responsibility should be proportional to its size, but also to the risk of it being involved with severe human rights impacts.

2. What should companies be required to do?

- The legislation should require companies to **respect human rights in line with the UNGPs. This means that the scope of the responsibility to respect** should cover a company's operations, including its own activities, as well as all its business relationships, throughout the value chain⁵.
- According to the UNGPs, companies should be expected to meet this responsibility by:
 - Embedding respect for human rights into policies and broader corporate systems;
 - Undertaking ongoing human rights due diligence processes:
 - Assessing actual and potential adverse impacts in their own operations and across their business relationships in the value chain;
 - Integrating and acting on the findings, including by preventing, mitigating and remediating impacts as appropriate;
 - Tracking the effectiveness of their efforts;
 - Communicating about their efforts.
 - Implementing effective grievance mechanisms to help address impacts early and remediate them as appropriate.
- Consistent with the UNGPs, **companies should be expected to take appropriate action depending on their involvement in an impact** as follows:
 - If a company **has caused or may cause an impact**, it should be expected to prevent or mitigate the impact and remediate any harm if the impact has occurred.
 - If a company **has contributed or may contribute⁶ to an impact**, it should be expected to prevent or mitigate its own contribution to the impact, and use or increase its leverage with other parties to prevent or mitigate it. It should also contribute to remediating the harm if the impact has occurred, to the extent of its contribution.
 - If a company **has not caused or contributed to an impact, but may have its operations, products or services linked to an impact through a business relationship**, it should be expected to use or increase its leverage with other parties, including suppliers, to seek to prevent or mitigate the impact. If an impact has occurred, the company has no responsibility to provide remedy but may choose to do so.
- These expectations should apply to potential or actual impacts on all internationally recognised human rights, as defined in the UNGPs. Where businesses **prioritise their due diligence efforts, they should do so based on the severity of the actual or potential harm to people. Legislation should allow for such prioritisation.**
- Legislation should **specify the importance of meaningful stakeholder engagement in carrying out HRDD.** Stakeholder engagement should be defined as an ongoing process of interaction and dialogue between a company and its actually or potentially affected stakeholders that enables the company to hear, understand and respond to their interests and concerns, including through collaborative approaches⁷. Where direct engagement with affected stakeholders or their legitimate representatives is not possible, companies should be able to engage with credible proxies who can help convey insight into their views.
- We recognise that **human rights and environmental issues can be interlinked.** We believe it would be important in the consultation process to bring clarity to which environmental standards are relevant and how due diligence obligations would interrelate with existing environmental management approaches.

3. How would the HRDD obligation be enforced?

- If legislation is in place, we recognise it would need to be complemented with **an appropriate and proportionate set of enforcement rules and incentives for companies to carry out robust HRDD across the value chain.**
- The legislation should allow for **appropriate ramp-up periods**, to allow sufficient, but not excessive, time within which companies can establish or strengthen due diligence processes and systems.
- We believe that **the scope of the responsibility of business enterprises to respect human rights should be distinct from the scope of legal liability** under any new legislation. For enhanced predictability for business it is necessary to have a clear understanding of the role and limits of liability.
 - **A narrow focus on liability may overlook other accountability mechanisms⁸** that would incentivize companies to carry out HRDD across the full scope of their activities and value chains, and be transparent about their progress and the challenges they face.
 - If future EU legislation were to include liabilities, in our view, companies should **be held liable for failure to establish and maintain a reasonable HRDD process, or for knowingly making false or misleading statements** about their process, supported by appropriate sanctions commensurate with these obligations.
 - If the legislation were to include **liability for current and future harms, that liability should be clearly framed as civil liability and be limited to severe human rights harms caused by the company's own activities or activities of controlled companies⁹**, which could have been prevented

had the company fully complied with the requirement to conduct human rights due diligence¹⁰. What constitutes a “severe human rights harm”, a “controlled company”, and “a reasonable HRDD process” would need to be defined in the legislation or interpretative guidance following constructive dialogue among all relevant stakeholders, and taking account of already existing legal frameworks. However, **where national law conflicts with international human rights standards, companies should not be held liable for complying with national law** while also seeking to respect the principles of international human rights standards to the greatest extent possible in the circumstances.

- **Conducting appropriate human rights due diligence should help business enterprises** show that they took every reasonable step to avoid involvement with an alleged human rights abuse and **address the risk of legal claims** against them.

- **Key features of the HRDD standard**, based on the UNGPs, **should be defined at EU level** to help ensure consistency in its transposition into national laws.
- In addition, it will be essential to have **authoritative entities in each Member State with the resources, mandate and expertise to provide guidance, monitor uptake and help develop HRDD** as a predictable standard of conduct. The European Commission should help ensure ongoing harmonisation of implementation across Member States.
- We believe that **independent verification and assurance of how business implements HRDD** can play a supportive role. At the same time, we recognise that the standards governing the provision of such services will themselves need to evolve to better reflect what is unique about HRDD.

Recommendations for forward EU process

Following the [initial study](#), we would expect the EU to

- **Organise a multi-stakeholder and expert consultation process**; AIM, representing leading consumer goods brands, is committed to engaging in this process to inform the approach and share insights and lessons learnt.
- **Complement the findings of the DG JUST study with a full impact assessment** of potential policy options, including mHRDD.
- **Clarify the scope and obligations of a potential environmental dimension** within a cross-sectoral mandatory due diligence requirement. There needs to be due consideration for potential risks of duplication or contradiction with existing environmental and climate-related EU legislation and international standards, including clarification of which environmental standards companies should be held to as stated above.
- **Ensure coordination between consultations** on mHRDD, the revision of the non-financial reporting Directive, on minimising the risk of deforestation and forest degradation associated with products placed on the EU market, as well **consistency with** the development of the EU taxonomy on sustainable finance.
- **Identify and strengthen the operational synergies with other policy areas**, in particular trade and development, cooperation with third countries, as well as EU competition rules, to complement mHRDD legislation and **support enabling environments** for collaboration globally to advance better human rights outcomes.



About AIM

AIM is the European Brands Association representing brand manufacturers in Europe on key issues which affect their ability to design, distribute and market their brands.

AIM comprises 2500 businesses ranging from SMEs to multinationals, directly or indirectly through its corporate and national association members. Our members are united in their purpose to build strong, evocative brands, placing the consumer at the heart of everything they do.

AIM’s mission is to create for brands an environment of fair and vigorous competition, fostering innovation and guaranteeing

maximum value to consumers now and for generations to come. Building sustainable and trusted brands drives investment, creativity and innovation to meet and exceed consumer expectations. AIM’s corporate members alone invested €14 billion in Research & Development in Europe in 2014, placing them fifth in the EU ranking of R&D investment.

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This paper has been updated from the version released in October 2020

1. We understand leverage to mean, in line with the UNGPs, a company’s ability to effect change in the practices of another.
 2. The UNGPs are grounded in internationally-recognised human rights as defined in the International Bill of Human Rights (consisting of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights), and the principles concerning fundamental rights in the eight ILO core conventions, as set out in the Declaration on Fundamental Principles and Rights at Work.
 3. In the UNGPs, remedy refers to both the processes of providing remedy for an adverse human rights impact and the substantive outcomes that can counteract, or make good, the impact. These outcomes may take a range of forms, such as apologies, restitution, rehabilitation, financial or non-financial compensation, and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition.
 4. EU Competition law is affecting companies’ ability to collaborate on sustainability and human rights. The EU is currently revising the Horizontal Block Exemption Regulation (HBER), which frames how companies can effectively

cooperate on important issues whilst remaining compliant with competition law. Facilitating collaboration by companies in order to tackle sustainability and human rights issues forms part of the EU’s current review.
 5. As elaborated in the OHCHR interpretative guide, *ibid*
 6. The OHCHR interpretative guide gives the example of a company “[c]hanging product requirements for suppliers at the eleventh hour without adjusting production deadlines and prices, thus pushing suppliers to breach labour standards in order to deliver”, available at https://www.ohchr.org/Documents/publications/hr.pub.12.2_en.pdf.
 7. As elaborated in the OHCHR interpretative guide, *ibid*.
 8. The publication “Accountability as part of Mandatory Human Rights Due Diligence: Three Key Considerations for Business” (Snift, October 2020) discusses how robust HRDD may be incentivized through accountability measures that include liability, as well as a range of other measures by the State.
 9. The definition of “controlled company” should exclude third parties from its scope.
 10. mHRDD should not detract from any existing liabilities and responsibilities of business for human rights harms