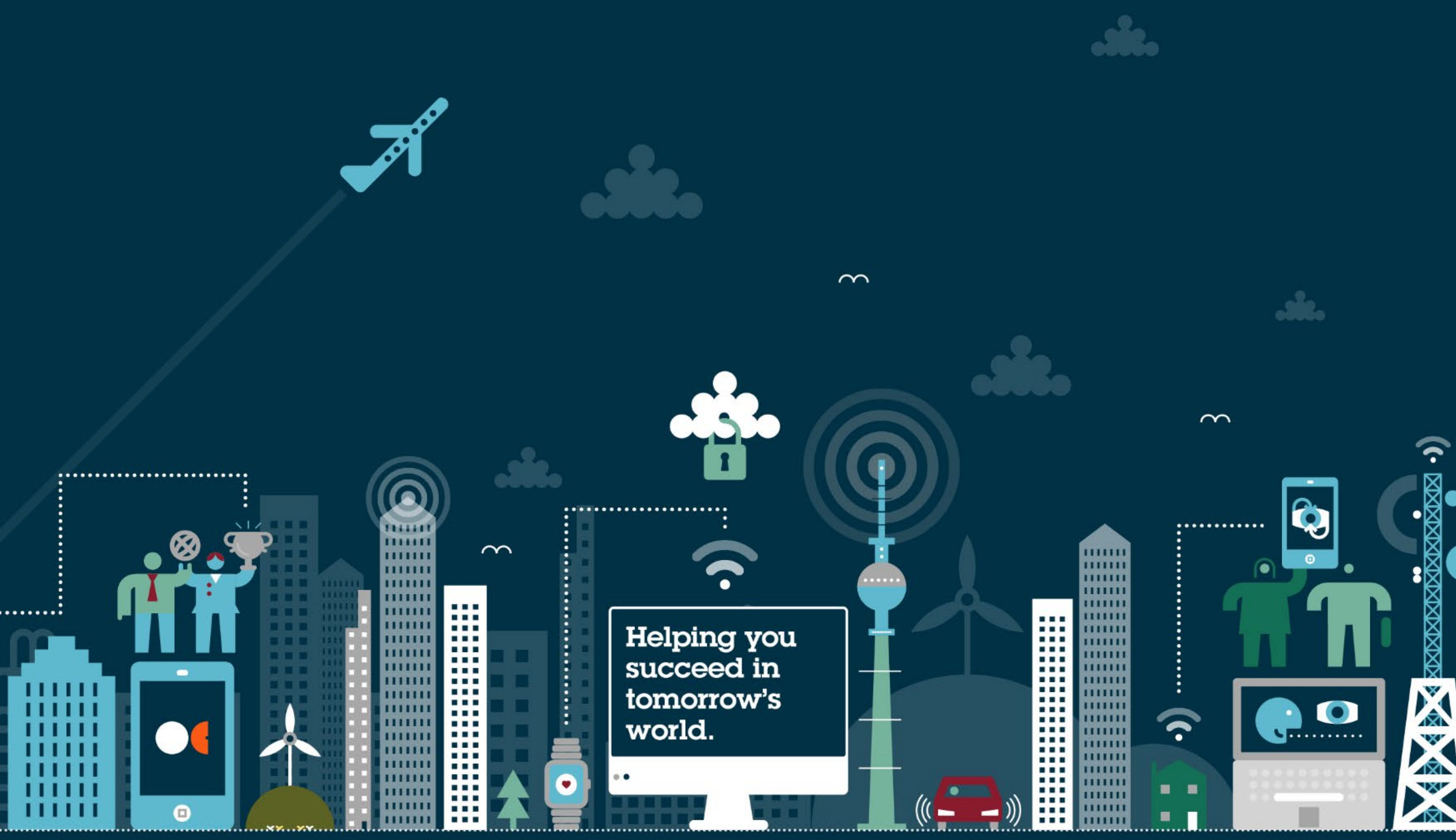
The 'duty of vigilance' regulation in four European countries compared with the draft EU directive and the UK Modern Slavery Act 2015



INTRODUCTION

Increasing focus is being given across Europe to human rights due diligence, supply chain transparency and modern slavery risks.

In March 2021, the European Parliament adopted a resolution with recommendations to the European Commission and a draft Directive on Corporate Due Diligence and Corporate Accountability calling on the European Union to legally require companies to respect human rights and the environment in their supply chains.

The European Parliament's draft Directive proposes an EU law requiring companies to monitor, identify, prevent and remedy risks to human rights, the environment and governance in their operations and business relationships.

Some countries in Europe have already adopted their own regulation. For example, France has had its Duty of Vigilance Act since 2017. The UK, Germany and Norway have also enacted laws relating to transparency obligations. A similar act in the Netherlands will come into effect in 2023.

This table compares existing regulation placing proactive expectations on corporates to take actions relating to the prevention human, social and environmental violations.

The 'duty of vigilance' in Europe

	EUROPEAN UNION Draft Directive	FRANCE (Duty of Vigilance Act n° 2017-399, March 27, 2017)	GERMANY (Supply Chain Act of June 11, 2021)	NORWAY (Law of June 10, 2021)	NETHERLANDS (Responsible and Sustainable International Business Conduct Act of 11 March 2021, comes into effect on 1 January 2023)	UK Section 54 Modern Slavery Act 2015 (Transparency in Supply Chains)
Scope of the law	Human and social (social, labour and trade union rights), environmental rights (including contribution to climate change) and good governance.	Human, social and environmental rights.	Human, social and environmental rights.	Human and social and environmental rights.	Human, social and environmental rights.	Human rights (human trafficking, slavery, enslavement and forced or compulsory labour).
Targeted companies	All large companies governed by the law of a Member State or established in the territory of the Union. All publicly traded small and medium-sized enterprises and high-risk small and medium-sized enterprises. Companies located outside the territory of the European Union, but active on the EU market.	Public limited companies and their direct and indirect subsidiaries, as well as their subcontractors or suppliers.	Companies and their direct (first tier) suppliers. Their indirect suppliers are covered only if there are factual indications of human, social or environmental rights violations or threats of violations.	Norwegian "large companies" as well as foreign companies which sell goods or provide services in the country.	A duty of care applies to any company established in the Netherlands (including the BES (Bonaire, St Eustatius and Saba) islands), that knows or can reasonably suspect that its activities may have adverse effects on human rights, labour rights or the environment in a country outside the Netherlands. In addition to the duty of care, large Dutch companies are obliged to exercise due diligence. Both duties also apply for large foreign companies, which sell products on the Dutch market or carry out activities in the Netherlands.	Commercial organisations (a body corporate or partnership (wherever incorporated, which carries on a business, or part of a business, in any part of the United Kingdom), that supplies goods or services).
Applicable thresholds		• 5,000 employees at the end of two consecutive fiscal years by the company and its direct or indirect subsidiary s located in France; • 10,000 employees at the end of two consecutive fiscal years by companies which direct or indirect subsidiaries are located in France or abroad.	In 2023: companies with at least 3,000 employees working in Germany and employees based in Germany but posted abroad. Employees of subsidiaries are included in the parent company's employee count. In 2024: employee threshold is reduced to 1,000.	• Public limited companies. • Companies meeting at least two of the three criteria below: The turnover exceeds 70 million Norwegian kroner (about €7 million). A financial balance sheet exceeding 35 million Norwegian kroner (about €7 million). more than 50 full-time employees.	A company is considered to be large when on its balance sheet at least two of the three following criteria are exceeded: • Balance sheet total: €20 000 000; • Net turnover: €40 000 000; • Average number of employees during the financial year: 250.	Turnover of £36 million or more (including the turnover of any subsidiaries).

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Transparency and plan to implement	Implement measures to "*identify, assess, prevent, stop, mitigate, monitor and report potential and/or actual adverse impacts to human rights, the environment and good governance*", which notably means: • Consult stakeholders at all stages. • Strengthen the traceability of supply chains. • Assess vigilance measures which should be available to all individuals, including by publishing regular reports.	Implement and update the compliance program on their website. The vigilance plan must include five measures: • A risk mapping. • Procedures for regular due diligence of subsidiaries, subcontractors or suppliers. • Appropriate actions to mitigate risks or prevent serious harm. • A mechanism for collecting disclosures on the existence or occurrence of risks. • A system for monitoring the measures implemented and assessing their effectiveness.	Implement and update the compliance programme, which must be published on their website. The vigilance plan must include five measures: • A risk mapping (which must be annually conducted under the Supply Chain Due Diligence Act). • Procedures for regular due diligence of subsidiaries, subcontractors or suppliers. • Appropriate actions to mitigate risks or prevent serious harm (as a last resort, the company has to terminate business relations with suppliers where all other measures are ineffective or inadequate). • A mechanism for collecting disclosures on the existence or occurrence of risks. • A system for monitoring the measures implemented and assessing their effectiveness.	Implement and update the compliance program on their website. The vigilance plan must include five measures: • A risk mapping. • Procedures for regular due diligence of subsidiaries, subcontractors or suppliers. • Appropriate actions to mitigate risks or prevent serious harm. • A mechanism for collecting disclosures on the existence or occurrence of risks. • A system for monitoring the measures implemented and assessing their effectiveness.	The Act imposes a duty of care and a duty to exercise due diligence on companies. The duty of care means that companies are (amongst others) obliged to take all measures that can reasonably be required to prevent adverse effects on human rights, labour rights or the environment. To exercise due diligence, companies must (amongst others) publish a policy document that includes a due diligence plan in line with the following six measures: • Embed responsible business conduct into policies and management systems. • Identify and assess actual and potential adverse impacts. • Cease, prevent and mitigate adverse impacts. • Track implementation and results. • Communicate how impacts are addressed. • Provide for or cooperate in remediation.	The requirement is to publish a statement setting out the steps taken by the commercial organisation, in the last financial year, to ensure slavery and human trafficking is not taking place in any part of its business or any of its supply chains. The requirement can also be satisfied by a statement that the organisation has taken no such steps. The statement needs to be approved by the board of directors (or equivalent) and signed by a director (or equivalent), then published in a prominent place on the organisation's website. It is notable that organisations are not specifically required to take any substantive steps to ensure slavery and human trafficking is not occurring in their business or supply chains.

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Limit to transparency	Transparency requires the use of digital solutions to share information. However, limits to vigilance plan are compliance with the competition policy and internal commercial know-how. Vigilance plan should not create disproportionate barriers or financial burdens for businesses.	Protection of professional and business secrecy.	Protection of professional and business secrecy.	Protection of professional and business secrecy.	N/A	Commercial organisations are encouraged to voluntarily go beyond the legal minimum and provide further information, including information in the categories listed in section 54(5). The UK government has indicated that, amongst other things, it intends to strengthen s.54 by making reporting mandatory on the points identified in s.54(5).
Who can bring an action under the Act?	The victims of this breach. Any stakeholder defined as a person whose rights and interests may be affected by the company's decisions (workers, local societies, children, indigenous peoples, citizens' associations and shareholders, as well as organizations which purpose is to ensure respect for human rights, social rights, climate, environmental standards and good governance, such as trade unions and civil society organisations).	Any non-governmental organisation (NGO) for its own account.	Trade unions and NGOs, only on behalf of and with the mandate of a victim whose protected rights have been violated.	The law states that "*everyone has the right to be informed about how a company is performing with regard to fundamental human rights and decent work within the company and its supply chains*". Rejection and denial of a request for information may be appealed by complaint before the Consumer Protection Agency.	If a large Dutch company does not fulfil its obligations of due diligence, the supervisory authority has the right to enforce the Act by taking the following measures: • Impose an order subject to a penalty for noncompliance; • Impose an administrative penalty; • Issue a binding instruction before an administrative penalty.	Victims of modern slavery are unable to bring any action against the company under s.54 of the Modern Slavery Act. The secretary of state could bring bringing civil proceedings in the High Court for an injunction or, in Scotland, for specific performance of a statutory duty, to force a commercial organisation to make the required statement.

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Control (power of injunction)	Control entrusted to "*competent national authorities*". Member States should have a liability regime in place to ensure that companies redress *"any harm resulting from potential or actual adverse human rights, environmental or good governance impacts that they, or entities under their control, have caused or contributed to through their actions or omissions*".	Entrusted to the judge: The competent court (Commercial Court or Judicial Court) is the subject of a dispute before the Versailles Court of Appeal, which will have to determine whether a company's liability for failure to comply with its duty of vigilance falls within the jurisdiction of the Judicial Court or the Commercial Court.	Entrusted to an administrative authority: The Federal Bureau of Economics and Export Control.	Entrusted to an administrative authority: The Consumer Protection Agency.	A supervisory authority will be appointed.	As noted above, the secretary of state could bring bringing civil proceedings in the High Court for an injunction or, in Scotland, for specific performance of a statutory duty, to force a commercial organisation to comply.

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Sanctions	Administrative sanctions imposed by the competent and independent authorities of the Member State (with sufficient resources, skills and premises) with large power of sanction and investigation (Art. 13). Ban on the import of products when they are linked to "*serious human rights violations*". A company may be held liable for any breach of its duty of vigilance. Fines are based on the company's turnover, exclusion from public contracts and state aid or seizure of goods can also be imposed.	The company may be held civilly liable by the competent court. A company may be given formal notice to comply with the obligations provided for in the law of vigilance, within a period of three months. If the company does not comply with this time limit, the competent court may, at the request of any person having an interest in the matter, order, if necessary under penalty, to comply with the regulation. The competent court may also sentence the company to pay damages to the "victim" and order the publication, distribution or posting of the decision.	Financial penalties can be imposed by the administrative authority: • Turnover below €400 million: a fine of up to €8 million; • Turnover above €400 million: a fine of up to 2% of the worldwide (group) sales. A company can also be excluded from public contracts if the fine is final and binding. Entry in the competition register if the (final and binding) fine is at least €175,000.	Financial penalties can be imposed by the administrative authority.	Companies are first given the opportunity to correct an observed violation of appropriate due diligence obligations. Penalties or fines are a next step. Next to the administrative enforcement of the supervisory authority, civil enforcement (on the basis of an unlawful act) and even criminal enforcement (on the basis of the Economic Offences Act) can be chosen.	There is no specific legal penalty for non-compliance. As noted above, the secretary of state could bring proceedings to obtain an order requiring compliance.

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