

How to make corporations effectively respect the environment and climate

Key elements for EU binding legislations

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Introduction

This briefing is intended to set out recommendations for how and why the EU should enshrine obligations for corporations to respect the environment and the climate in its law making. Of particular relevance is the forthcoming EU legislation on sustainable corporate governance which will include a legal obligation to conduct due diligence¹. Civil society has already made substantial contributions on the need for this EU due diligence legislation to include robust environmental and climate obligations for companies². The recommendations in this briefing are however not limited to due diligence obligations, which while being important, are not a silver bullet for environmental harm or human rights violations. For damages related to the environment or the climate crisis such as deforestation or pollution, broader policies are needed that address the root causes of those harms such as our economic models predicated on endless growth and consumption.

This briefing focuses on: defining a general obligation for companies to respect the climate and the environment in their global value chains (**part 1**); concrete and effective obligations and criteria for companies to limit GHG emissions in their global value chains (**part 2**); robust civil liability and access to justice provisions to guarantee remedy and restoration in cases of harm (**part 3**); and stronger legal accountability for environmental crimes committed outside the EU (**part 4**).

Environmental and climate harms are often connected with human rights violations. At the same time, there is an intrinsic value to ecosystems and they should have a right to effective protection. In addition, the causal link between individualized human rights violations and environmental damage - which must often be established in civil law cases – is often extremely difficult to make due to the unfair burden of proof on victims. This further underlines the need to create a distinct environmental liability regime.

¹ Also of relevance is the forthcoming legislation on deforestation, however this will not be the focus of this briefing: <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12137-Deforestation-and-forest-degradation-reducing-the-impact-of-products-placed-on-the-EU-market>

² <https://corporatejustice.org/wp-content/uploads/2021/05/Putting-the-Environment-in-Human-Rights-and-Environmental-Due-Diligence.pdf>

Recommendations

- A **general standard of care** for companies to respect the climate and the environment
- A legal obligation for companies to reduce their GHG emissions
- EU and member states to set **criteria by sector in law for corporate climate targets** including concrete targets for GHG emission reductions
- An obligation for companies to set **short and medium as well as long term targets** for reduction of GHG emissions
- **Sanctions** for when corporations fail to respect the climate or the environment, including **administrative, civil and criminal liability**
- The possibility of **injunctive relief** before harms occurs
- **Absolute liability** in cases where a harm is caused by an entity the company jointly or exclusively controls to guarantee remedy and restoration
- **Liability for environmental harms in companies' value chains**, unless they can prove they took all measures to avoid the harm happening
- Improved **access to justice** for people affected by harms occurring outside the EU
- The EU to work towards the **recognition of ecocide** for serious environmental harms
- **Criminal liability** of EU companies in some cases of serious localised or cumulative harms committed outside the EU

Part 1: Environmental standard of care

Environmental obligations should focus on creating a **general duty of care for companies with respect to their value chain for which they can be held liable**, rather than on defining and detailing due diligence procedures (such as respecting a list of environmental norms/standards or putting in place mandatory environmental management systems).

To define or clarify the duty of care, the legal texts should refer to key principles of international and EU environmental law, such as the precautionary and polluter-pays principles. It should make general reference to obligations to adhere to international law, as well as local (host state) standards and EU standards. Where multiple standards apply, the most protective should be applied. As recommended by the German Environmental Agency³, **a general reference to standards can be mixed with reference to specific standards to show the intention of the law**, however such references must be non-exhaustive; a reference should preferably be made in the preamble to the legislation. Under no circumstance should the inclusion of standards be interpreted as limiting or undermining standards that provide higher levels of protection under national or international law.

Definition of environmental harm

Legislation could adopt a general definition of environmental harm that refers to actual or potential non-negligible harm or damage to the environment and/or ecosystems including the elements comprising ecosystems: (a) all fauna and flora; (b) land, soil, water, air; and (c) the atmosphere; the functions and interrelationships of ecosystems, and the collective benefits for humankind⁴.

Part 2: Climate obligations of companies

Although climate, environmental impacts, and human rights impacts, are inter-related, specific climate obligations should be treated separately.

New EU legislation should set out and effectively enforce legal obligations on companies to reduce and account for their impacts on the climate, including but not limited to their own greenhouse gas

³ <https://www.umweltbundesamt.de/publikationen/environmental-due-diligence-in-eu-law>

⁴ Examples of such definitions can be found in the following recent reports on environmental obligations: <https://corporatejustice.org/wp-content/uploads/2021/05/Environmental-Due-Diligence-in-Global-Value-Chains-Prof.-Dr.-Colin-Mackie.pdf> And: <http://extranet.greens-efa.eu/public/media/file/1/7036>. See also the definition in 2004 EU Directive on environmental liability with regard to the prevention and remedying of environmental damage, ART 2; <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02004L0035-20190626&qid=1568193390794&from=EN>.

(GHG) emissions through their entire global value chains. In addressing climate impacts, it is essential that companies are required to adhere to the Precautionary Principle.

The need for tougher and more concrete climate targets has been noted by EU decision makers following the release of the 2021 IPCC report on climate change⁵. To ensure that companies are legally obliged to set concrete plans of action to bring them in line with the 1.5-degree scenario of the Paris Agreement, **EU law should specify criteria by sector for corporate climate targets including concrete targets for GHG emission reductions in absolute percentage, types of activities that should be ceased or no longer developed, and deadlines for meeting these targets**. A general responsibility with reference to EU climate goals and the Paris Agreement should apply to all companies, though targets can be proportionate to the specificities, size and impacts of particular companies.

To ensure credible long-term strategies for reducing emissions, and to prevent future breaches of their legal obligations, companies must set **short-, medium- and long-term targets to reduce emissions to zero along the pathways in line with the 1.5-degree target**.

Reduction targets of companies must be absolute reductions as opposed to 'intensity' reductions: **the use of offsetting or technologies like carbon capture and storage should be excluded from the reduction calculations**. Meeting targets should include the cessation of activities and investments that are significantly exacerbating the climate crisis. The closure of facilities should include social measures to ensure a just transition for workers, who must be consulted and involved in the whole process.

Climate obligations must be an obligation of results, not only of effort. Companies should be liable both preventively, for failing to put in place adequate emission reduction plans, and to remedy or compensate harms related to climate impacts. **There should be a mix of administrative sanctions and liability, as well as civil and criminal liability**.

Climate litigation and the Shell climate case

The ongoing growth of climate litigation often depends on the interaction of human rights and climate and environmental harms. The obstacles faced by plaintiffs - like proving causation between

⁵ <https://www.business-humanrights.org/en/latest-news/eu-calls-on-worlds-biggest-economies-to-set-tougher-climate-targets-ahead-of-cop26-summit/>

emissions and specific damages - shows the need to improve access to justice e.g., by reversing the burden of proof to have companies demonstrate that they have met their obligations.

In the recent court case against Shell in the Netherlands, plaintiffs did not seek compensation but instead asked the courts to oblige Shell to cut its GHG emissions. Despite two decades of promises to reduce emissions, it took a court case to order Shell to comply with its responsibility. Shell has appealed the decision, but the appeal has no suspensive effect, meaning the company has to begin implementing the court's order immediately.

This landmark decision clearly **shows the need for a corporate duty of care for human rights and environmental and climate impacts at the EU level, including enforcing obligations of companies via courts**. For future EU legislation, it is crucial that all EU-based corporations can be taken to court, in their home country, for environmental, climate and human rights violations.

Part 3: Civil liability for environmental and climate harms

Business enterprises must be liable for human rights, environmental and climate harms occurring in the course of their global operations, those of companies they control or are able to control directly or indirectly, and in their value chains and investments.

Due diligence obligations are independent from companies' liability for harms: while companies should be liable for the failure to conduct due diligence, having conducted due diligence must not absolve them from their separate liability for harm.

Potentially affected persons or any (moral or physical) person with a legitimate interest, must have the **possibility, in line with the precautionary principle, to request injunctive relief** *before* environmental and climate harm occurs. People affected by those harms must have access to timely, adequate and effective remedies, and have the rights to pursue a case through some form of collective redress, akin to a class action in the courts of the home country of the company.

When environmental harm has resulted from its own activities or from the activities of entities that they jointly or exclusively control, there shall be an obligation of result on companies to ensure that human rights violations or environmental harms do not occur. Companies should be held responsible for providing remedy, compensation or restoration, irrespective of any

fault or negligence. Companies should also be liable for environmental harms in their value chain, unless they can prove that they took all necessary and adequate measures to ensure that these harms would not occur (**reversal of the burden of the proof**).

The law should include provisions about connected claims, so that companies and entities they control or are able to control directly or indirectly, or distinct companies involved in the same violations can be brought before the same court. There should also be a provision ensuring companies are both jointly and independently fully liable for harms (**joint and several liability**), which places the largest responsibility on the parent or outsourcing companies, but also recognises the (possibly lesser) liability of the subsidiaries and subcontractors.

Connected to this, **a rebuttable presumption of control** is necessary, like in the European Court of Justice's jurisprudence on EU Competition law⁶, where companies are a priori considered to have control or influence over a subsidiary or other companies in their global value chains unless they can prove otherwise.

Access to justice

The civil liability regime should include strong provisions to facilitate access to justice in the EU for people affected by human rights violations or environmental and climate harms under this law, whether harm occurred inside or outside the EU.

The law should also include longer time limitations for affected people's transnational claims, taking into account the delays in the manifestation of environmental impacts. Statutes of limitation should apply calculations like those set out in existing international instruments⁷, and only run from the date on which the plaintiff knew or reasonably should have known of the damage and the identity of the person in control.

The EU should clarify that the applicable law should be the one most favourable to protecting affected people's rights, and the choice of applicable law should be made by the affected person. To achieve this, Article 7 of Rome II (which recognises the right of victims of environmental damage to elect whether the court will apply the law of the State in which the harm occurred or that of the State in which the event that gave rise to the harm took place) should be expanded to cover the interaction of human rights violations and environmental harm. Article 7 should also be amended to

⁶ https://ec.europa.eu/competition/publications/cpn/2010_1_9.pdf

⁷ https://unece.org/fileadmin/DAM/env/civil-liability/documents/protocol_e.pdf

clarify that victims can select either the courts of a State where the damage occurred, where the activity causing the damage took place, or where the defendant has its permanent residence. A law that is more advantageous to the victims should be applied,⁸ in particular for statutes of limitations, to ensure effective access to justice.

In addition, as mentioned in article 16 of the Rome II, future EU Human Rights and Environmental Due Diligence (HREDD) legislation should contain a provision confirming that relevant provisions of the **legislation on liability of companies for harms shall be considered over-riding mandatory** and member states shall ensure that this when transposing the legislation.

Part 4: Criminal Liability

EU legislation must require that, subject to their legal principles, member states ensure that their domestic law provides for criminal or functionally equivalent liability of legal or natural persons for environmental abuses including those occurring transnationally.

Criminal liability can function as one of the strongest incentives for corporations' compliance with obligations and an effective deterrent against violations. The Fundamental Rights Agency of the EU has noted⁹ the role of criminal liability in providing “redress, namely by providing public and official recognition of the wrongdoing and conveying the message that justice is done”. And in the absence of rules reversing the burden of proof in civil cases, it also has the advantage of delegating the costs and burden of collecting evidence to the public prosecutor, though the independence and commitment of the public prosecution is essential.

As current legislations in the EU on environmental liability and environmental crime are not designed to cover environmental harms caused or contributed to by EU-based companies but occurring outside the EU, criminal liability should be included in the due diligence legislation covering EU companies' value chains. At the same time, conformity and alignment should be ensured between EU due diligence legislation and other legislations on environmental crime.

⁸ Regarding the notion of “event giving rise to the harm”, the Dutch court which ordered Shell to reduce emissions applied Dutch law in that case, pursuant to Article 7, after finding that “RDS' adoption of the corporate policy of the Shell group constitutes an independent cause of the damage, which may contribute to environmental damage and imminent environmental damage”. See the [Judgment of the Hague District Court on Royal Dutch Shell](#) dated 26 May 2021, para. 4.3.6.

⁹ https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-business-human-rights_en.pdf

The European Union Agency for Criminal Justice Cooperation - provides an overview¹⁰ of crimes and criminal activity related to the environment including: “illegal trading in and poaching of wildlife and plants; `illegal, unreported and unregulated fishing; `illegal dumping of, disposal of and trading in waste and chemicals; `illegal trading in ozone-depleting substances; `pollution crime; `illegal mining and trading in precious metals and minerals; illegal logging/deforestation and associated timber trading; `environmental crime associated with illegal construction; `environmental crime associated with hazardous contamination in food.”

EU laws must ensure criminal liability for EU-based companies linked to any of these criminal activities, and any and all environmental crimes listed in international, EU and domestic legal instruments – including and especially those occurring transnationally/extra-territorially within global value chains.

Ecocide

The independent expert panel commissioned by the Stop Ecocide Foundation has defined ecocide as the “unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts.”¹¹

The inclusion of ecocide in law aims to prohibit mass damage and destruction of the Earth and creates a legal duty of care to prevent, prohibit and pre-empt both human-caused ecocide and natural catastrophes. Harms rising to the level of ecocide are often caused by the direct or systemic violations by companies operating transnationally. These can be **localised cases** of systematic violations or present **broader cumulative impacts** having resulted of historic operations of companies in particular those operating transnationally (see examples below).

Aside from addressing individual criminal offences such as small-scale deforestation or trafficking, criminal law must be equipped to address the role of EU companies who contribute to or are linked to¹² environmental crimes that cumulatively lead to large scale damage in the long term – a

¹⁰ https://www.eurojust.europa.eu/sites/default/files/2021-01/report_environmental_crime.pdf

¹¹ <https://static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/60d7479cf8e7e5461534dd07/1624721314430/SE+Foundation+Commentary+and+core+text+revised+%281%29.pdf>

¹² See also the detailed description of modes of liability in Art. 25 of the ICC Rome Statute on Individual Criminal Responsibility: <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>

framework that can look beyond individual crimes to the long-term impact (of e.g., pollution, deforestation, pesticide use).

The Commission should act on the recommendation of the European Parliament, which notes “Member States’ increasing commitment to working towards the recognition of ecocide at national and international level” and “asks the Commission to study the relevance of ecocide to EU law and EU diplomacy”.¹³

Examples of environmental harms by corporations that should be subject to criminal liability

Broader cumulative impacts:

1) Deforestation: Casino’s slaughterhouse suppliers in Brazilian Amazon

In March 2021, NGOs filed a lawsuit under the French *devoir de vigilance* law against the French retailer Casino Groupe: The lawsuit alleges “systemic violations of human rights and environmental laws in Groupe Casino’s supply chains in Brazil and Colombia over a long period of time. According to evidence compiled and analysed by the Center for Climate Crime Analysis (CCCA)¹⁴ for this case, Groupe Casino regularly bought beef from three slaughterhouses owned by JBS, a giant meatpacker. The three slaughterhouses sourced cattle from 592 suppliers responsible for at least 50,000 hectares of deforestation between 2008 and 2020. The deforested area is five times the size of Paris.”¹⁵

The cumulative impact of these small-scale acts of deforestation will have tragic and irreversible long-term consequences on the climate. **Corporations like Casino with control and power along the supply chain who contribute to or are linked to this crime should be criminally liable for this broader impact.**

¹³ European Parliament report on the liability of companies for environmental damage: https://www.europarl.europa.eu/doceo/document/A-9-2021-0112_EN.pdf

¹⁴ See www.climatecrimeanalysis.org

¹⁵ <https://www.asso-sherpa.org/amazon-indigenous-communities-and-international-ngos-sue-supermarket-giant-casino-over-deforestation-and-human-rights-violations>

2) Air pollution: Gas flaring in Nigeria

Gas flaring in Nigeria is the biggest source of carbon dioxide emissions in Sub-Saharan Africa. Nigerian gas flares – many of which are linked to the operations of companies like Shell, Total and ENI - emit as many greenhouse gases as 18 million cars.

It releases toxic substances in densely populated areas, damaging both the environment and the people in the Niger Delta. Ongoing flaring causes severe air pollution that leads to leukaemia, asthma and premature death. It causes acid rain which acidifies lakes and streams and damages the environment.

In 1984, gas flaring has been made technically illegal in Nigeria, but companies get around the law by paying a small penalty or fine. **It should be possible, before EU based courts, to hold EU companies like Shell, Total or ENI criminally liable for the severe long-term cumulative impacts of gas flaring.**

Localised environmental devastation

1) Oil pollution: Shell's negligence in Nigeria

The Niger delta in Nigeria is one of the most polluted areas in the world. Since the discovery of oil reserves in this densely populated tropical river delta in the fifties, crude oil has been leaking into the environment continuously, due to egregious negligence by Shell.

Most pollution is caused by leaking pipelines, due to poor maintenance or badly secured pipelines vulnerable to sabotage. Oil spills are often not cleaned up quickly or effectively, leading to widespread pollution of water, soil and air. Nearly 10 years after a clean-up was urged by UNEP for areas polluted by Shell and other oil companies in the Niger Delta, work had begun on only 11% of planned sites while vast areas remained heavily contaminated. A major scientific study shows that Nigerian babies growing up in oil-contaminated areas are twice as likely to die prematurely¹⁶.

A protracted series of individual oil spills has culminated in a localised environmental catastrophe in the Niger Delta. **Criminal law in the EU should be equipped to hold Shell accountable in its home country for this most egregious crime against people and planet.**

¹⁶ https://friendsoftheearth.eu/wp-content/uploads/2020/10/FoEE_Human_Rights_report_v15-pages-1.pdf

2) Water and land pollution: Brumadinho mining disaster

On 25 January 2019, a dam built to contain mining tailings of the Córrego do Feijão mine in Brazil broke, sending millions of cubic meters of mining waste down the Ferro-Carvão River. The waste buried the river along with more than 130 hectares of vegetation, houses, plantations and animals, eventually killing 272 people. The sludge flowed 220 km along the Paraopeba River, damaging aquatic life irreversibly and seriously damaging the local municipalities' ability to supply water to residents.

The mine was under the control of Vale S.A (Vale), with financing from EU banks, and had been inspected and cleared for operation by the German auditing company TÜV SÜD. Criminal charges – including for pollution – were brought against Vale employees and its former CEO in Brazil.

The seriousness of the corporate crimes involved in this case, and the role of EU-based TÜV SÜD and EU banks in the disaster, demonstrates that home states must hold companies accountable for their complicity in alleged criminal conduct abroad. **Home state criminal liability is critical to avoid impunity of foreign companies who play a critical role in an environmental crime in a host state.**

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Austria — **GLOBAL 2000**

Belgium (Wallonia & Brussels) — **Les Amis de la Terre**

Belgium (Flanders & Brussels) — **Climaxi**

Bosnia & Herzegovina — **Centar za životnu sredinu**

Bulgaria — **Za Zemiata**

Croatia — **Zelena Akcija**

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Germany — **Bund für Umwelt und Naturschutz Deutschland (BUND)**

Hungary — **Magyar Természetvédők Szövetsége**

Ireland — **Friends of the Earth**

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Rue d'Edimbourg 26 | 1050 Brussels | Belgium

EU Transparency Register no. 9825553393-31

Tel. +32 2 893 10 00 | info@foeeurope.org

www.friendsoftheearth.eu