European Parliament

To:
European Commission President Ursula Von der Leyen
Commissioner for Justice, Didier Reynders
Commissioner for Internal Market, Thierry Breton

27 October 2021

Request to address barriers to justice for victims of corporate abuse in global value chains in order to enable private enforcement of future Corporate Due Diligence rules.

Dear President Von der Leyen and Commissioners Reynders and Breton,

On behalf of the Responsible Business Conduct Working Group, we would like to draw your attention to what we believe should be an essential component of the proposal for a directive the European Commission is currently preparing under the Sustainable Corporate Governance initiative.

As the proposal, originally expected in June 2021, has now been delayed, and little is known yet about its specific provisions, we would like to stress, one more time, the utmost importance that the text address a number of barriers to justice, currently preventing victims of business-related human rights abuses and environmental harm from accessing judicial remedy in the EU.

In March 2021, the European Parliament sent a clear message to the European Commission to develop an ambitious regulatory framework including a civil liability regime and addressing existing barriers to justice in order to enable private enforcement of corporate due diligence requirements.

As shown by the responses to the Commission's public consultation, stakeholders overwhelmingly support this idea: at least half a million citizens, 200 NGOs and trade unions, 36 companies and 11 business associations consider "*judicial enforcement with liability and compensation in case of harm*" as the most (or one of the most) appropriate mechanism to enforce due diligence obligations. Public authorities from Germany, France, Belgium and the Czech Republic, as well as the United Nations Economic Commission for Europe, hold the same view.

We wish to reiterate our support for such an enforcement mechanism and highlight the main issues the future directive should address in order to remove major obstacles affected people are currently facing in their pursuit of justice. The recommendations below largely build on the lessons learnt from past and ongoing litigation against EU companies for their direct links with human rights abuses and environmental harm overseas, brought to us by a recent report[1] from the European Coalition for Corporate Justice (ECCJ) and presented by a panel of lawyers and legal experts in a recent hearing at the European Parliament.

1. **Parental and value chain civil liability**: Most national legal systems do not provide for parental and value chain liability for human rights and environmental harms, which has impeded victims down the chain from obtaining redress from the parent or lead company ultimately responsible for the abuses.

   However, this has started to change. The French Duty of Vigilance Law[2] established such liability regime in 2017. A Dutch court recently ruled in favour of legal liability for human rights harms arising from subsidiaries' and value chain's emissions, on the basis of the Dutch Civil Code.[3] And European courts, when applying Common Law, are beginning to acknowledge corporate liability for the breach of a duty of

[1] European Coalition for Corporate Justice, Suing Goliath: An analysis of civil cases against EU companies for overseas human rights and environmental abuses, 28 September 2021.
[2] Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre.
[3] Judgment of 26 May 2021 in the case of Milieudefensie et al. v. Royal Dutch Shell plc (ECLI:NL:RBDHA:2021:5339).

care for human rights and the environment, which extends to the activities of subsidiaries and other business partners.[4]

> The future directive must, in line with these developments, include a parent company and value chain liability regime that allows victims to claim damages as well as injunctive relief before EU courts, thus ensuring upward harmonisation in this field, as recommended by the European Parliament,[5] the European Economic and Social Committee,[6] and the EU Fundamental Rights Agency.[7]

2. Even where such accountability standards allow to hold corporations liable for harms they caused or negligently failed to prevent, claimants often face **insurmountable barriers to justice**:

   a) **Applicable law**: Under the Rome II Regulation, it is generally the law of the State where the harm occurred that applies to the case.[8] Foreign law rarely addresses the responsibility of parent or lead companies, which makes it impossible to obtain a positive verdict. Moreover, interpreting and applying foreign law entails serious complications and high legal uncertainty, as courts need to rely on the often contradictory information provided by foreign experts brought by both parties to the case.

   > The future directive must clarify that its provisions shall be considered overriding mandatory and therefore apply in any case, as recommended by the European Parliament.[9] Ideally, the Rome II Regulation should be reviewed so that choice of applicable law is possible for all types of business-related human rights abuses, as recommended by the EU Fundamental Rights Agency.[10]

   b) **Competent jurisdiction**: Under the Brussels I Regulation, national courts of EU Member States must accept jurisdiction in civil liability cases filed against a defendant domiciled in that State, regardless of where the damage occurred. However, where the business is not domiciled in the EU, jurisdiction will depend on domestic law. EU Member States' approaches to this vary.

   > Ideally, the Brussels I Regulation should be reviewed to allow national courts to (1) assert jurisdiction to decide a claim where there is no alternative available forum able to guarantee the right to a fair trial ('forum of necessity'), (2) hear a claim against an EU parent or lead company's foreign subsidiary or value chain partner, where both defendants are necessary party to the claim, and (3) hear a claim against the non-EU parent company of a corporate group with a strong presence in the EU.

   c) **Legal standing**: In most cases brought to EU courts so far, whether it relates to the collapse of the factory or the pollution of a river, harm is suffered by a collective of people. However, national legal systems do not always allow for a large number of claimants to seek compensation collectively. Instead, each claimant is considered as an individual party and each claim must be treated as a separate lawsuit, which exacerbates the costs for all parties and overburdens judicial administrations.

   > The future directive must provide for collective redress in cases of business-related human rights abuses or environmental harm, making affected people automatically eligible to join a claim without complex registration procedures. In addition, it must provide for representative actions by civil society organisations and trade unions, as recommended by the EU Fundamental Rights Agency.[11]

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[4] Judgment of 29 January 2021 in the case of Fidelis Ayoro Oguru et al. v. Shell Petroleum NV et al. (Case A) and v. Royal Dutch Shell plc et al. (Case B) (ECLI:NL:GHDHA:2021:132).
[5] European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)). See Article 19 of the annex to the resolution.
[6] EESC opinion on 'Mandatory due diligence' (September 2020).
[7] Opinion 7 in EU Fundamental Rights Agency report on 'Business and human rights – access to remedy' (October 2020).
[8] Article 4(1) Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).
[9] European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)). See Article 20 of the annex to the resolution.
[10] Opinion 6 in EU Fundamental Rights Agency report on 'Business and human rights – access to remedy' (October 2020).
[11] Opinion 2 in EU Fundamental Rights Agency report on 'Business and human rights – access to remedy' (October 2020).

d) **Statute of limitations**: Some of the cases brought to EU courts so far have been dismissed due to the expiration of the statute of limitations under foreign law. In some EU countries, the time limit for a party to bring a tort claim is as short as one year, which makes it virtually impossible to bring transnational cases on time. Not only is it important that the time period is sufficient, but also that it does not begin to run before the impact has ceased and the claimants know or should have known that the defendant's conduct was causally relevant to their losses. This is especially relevant in cases of environmental harm, where impacts manifest only after a long delay.

The future directive must establish a harmonised statute of limitations that is reasonable and appropriate to the challenges claimants face in transnational cases of business-related human rights abuses or environmental harm, as recommended by the European Parliament.[12]

e) **Burden of proof:** Already at an early stage of the proceedings, claimants often need to demonstrate the defendant's breach, the harm, and the causal link between the two. Limited access to evidence, such as companies' internal documents, makes it extremely hard for claimants to substantiate their claims. It is particularly challenging for victims to demonstrate a foreign company's failure to act with due care and the causal relationship between such failure and the harm suffered.

The future directive must ensure that, at the request of a claimant that has presented reasonably available evidence, the court shall order that further evidence be presented by the defendant to determine the breach and the causal link, as recommended by the EU Fundamental Rights Agency.[13]

f) **Financial risk**: In cases of business-related human rights abuses or environmental harm, victims bear high costs (e.g. attorney fees, sourcing and producing evidence, translation, travel, expert opinions, witnesses' expenses) and face a massive imbalance between their resources and those of defendant companies. Limited use of third-party litigation funding in the EU,[14] the prohibition of lawyers from charging results-based fees in some Member States, and the lack of access for foreign claimants to legal expenses insurance or public legal aid schemes exacerbate this problem.

The future directive must provide, where a claimant wins, for legal costs to be fully recoverable from a defendant company, and, where a claimant loses, for costs incurred to be balanced by the court in light of the disparity of resources between the parties, as recommended by the EU Fundamental Rights Agency.[15] In addition, funds should be established to allow victims to take EU-based companies to court. Rules on legal aid and litigation funding should also consider the financial barriers victims face in these cases.

The future directive should not be limited to enshrining a corporate duty of care but should also establish consequences for non-compliant companies and ensure access to judicial remedy for victims when businesses fail to take action to identify, prevent and mitigate human rights and environmental harms. For that purpose, the proposal for a directive the European Commission must address the abovementioned obstacles to justice.

Access to courts is a fundamental right for EU citizens. When rights of non-EU citizens are harmed by EU-based companies, they should have equal access to EU courts. Such fundamental right cannot be limited on the basis of fears of frivolous litigation.

In fact, contrary to the claims of certain interest groups, ensuring liability and improving access to justice will not trigger abusive litigation. The available evidence dismisses such claims: since its adoption in 2017, only five court cases against four multinationals have been brought under the French Duty of Vigilance Law.[16] One cannot lose

[12] European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)). See recital 54 of the annex to the resolution.
[13] Opinion 1 in EU Fundamental Rights Agency report on 'Business and human rights – access to remedy' (October 2020).
[14] See EPRS European added value assessment on 'Responsible private funding of litigation' (March 2021). The European Parliament's Committee on Legal Affairs (JURI) is currently preparing a legislative-initiative report with recommendations to the European Commission on responsible private funding of litigation.
[15] Opinion 5 in EU Fundamental Rights Agency report on 'Business and human rights – access to remedy' (October 2020).
[16] As of this letter, lawsuits have been filed, on the basis of the French Duty of Vigilance Law, against TotalEnergies (October 2019, January 2020), Électricité de France (October 2020), Casino (March 2021) and Suez (June 2021).

sight of the fact that judicial proceedings are lengthy and costly, even more in transnational tort cases, and the usual disincentives against frivolous litigation will continue to apply, importantly including the loser-pays principle.

It is crucial that the European Commission addresses at least the major barriers to justice underlined above in order to enable private enforcement of corporate due diligence rules, so that affected people are given a last-resort avenue for remedy and companies are incentivised to comply with their human rights and environmental due diligence obligations. Without a real possibility to seek redress before EU courts, there will be little impetus for businesses to engage with victims and provide any sort of remedy, and we will continue to fail to deliver on our commitment to the third pillar of the UN Guiding Principles on Business and Human Rights.[17]

We encourage you to take these considerations into account. We look forward to the proposal and, as always, we remain, together with our advisory group, at your disposal.

Yours sincerely,

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[17] Under UN Guiding Principle 26, "*States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy*."