

DEVELOPMENTS IN THE FIELD

The Norwegian Transparency Act, Renewable Energy and Extractive Industries: Towards a Just Transition for the Indigenous Sámi People

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Abstract

Norway is, in many aspects, at the forefront of the global energy transition. Nevertheless, a human rights paradox in Norway's energy transition plan is that while addressing climate-related human rights impacts, it might come at a high cost to the rights of the Indigenous Sámi People. Mining operations and renewable energy developments in the Sámi ancestral lands have already threatened reindeer husbandry, on which certain Sámi communities rely for a living, and which represents an integral component of their cultural identity. Resolving this paradox is crucial to achieving a just transition that leaves no one behind. Against this backdrop, the piece examines how the Norwegian Transparency Act—a mandatory human rights due diligence initiative—can address the impacts on Sámi rights caused by companies involved in renewable energy and extractive developments on Sámi lands.

Keywords: extractive industries; human rights due diligence; Indigenous Sámi rights; Norwegian Transparency Act; renewable energy

1. Introduction

In many aspects, Norway is at the forefront of the global energy transition.¹ Nevertheless, a human rights paradox in Norway's energy transition plan is that while addressing climate-related human rights impacts, this might come at a high cost to the rights of the Indigenous Sámi People. Mining operations and renewable energy developments in the Sámi ancestral lands have already threatened reindeer husbandry, a vital source of livelihood and an integral part of cultural identity for certain Sámi communities.² Resolving this paradox is crucial to achieving a just transition that leaves no one behind.

Against this backdrop, the piece examines how the Norwegian Transparency Act³—a mandatory human rights due diligence initiative—can address the impacts on Sámi rights

¹ David R Boyd, United Nations Special Rapporteur on human rights and the environment, 'Norway - End of the Mission Statement' (23 September 2019), <https://www.ohchr.org/en/statements/2019/09/norwayend-mission-statement> (accessed 10 January 2025).

² Ibid; Rasmus K Larsen et al., 'The Impacts of Mining on Sámi Lands: A Knowledge Synthesis from Three Reindeer Herding Districts' (2022) 9 *The extractive industries and society* 101051.

³ Act relating to enterprises' transparency and work on fundamental human rights and decent working conditions (Transparency Act), LOV-2021-06-18-99.

caused by companies involved in renewable energy and extractive developments on Sámi lands. **Section II** explains the human rights paradox in Norway's energy transition, identifying the risks these companies' activities pose to the livelihood and cultural rights of the Sámi People. **Section III** examines the Act's due diligence requirements and obligations, which apply to such entities, along with their practical implications for protecting Sámi rights. Lastly, **Section IV** summarizes the strengths and weaknesses of the Act for resolving this human rights paradox in Norway's energy transition plan.

II. Norway Energy Transition and Sámi Rights: A Human Rights Paradox

Norway is considered a frontrunner in the transition to a decarbonized economy. Its domestic electricity system is almost emission-free due to its hydropower capacities and the growing presence of wind farms on its territory.⁴ The wind power industry has experienced a significant expansion in the last twenty years, linked to Norway's commitments to international climate policies and the European Union's (EU's) renewable energy objectives.⁵ Norway also has large deposits of minerals and metals essential for developing green energy technologies. The current Norwegian mineral strategy supports the implementation of projects for extracting critical raw materials with the aim to 'achieve green Norwegian and European value chains' and 'for Norway to be a stable longterm supplier of minerals for the green transition.'⁶

Despite its potential, Norway's energy transition agenda is met with a human rights paradox in that it aims to tackle climate change as the ultimate risk to human rights while, at the same time, undermining the livelihood of the Indigenous Sámi communities and the protection of their fundamental rights. Not only are Sámi communities more vulnerable to the effects of climate change, but they are also severely affected by the expansion of mining operations and renewable energy developments in their pastoral lands.⁷

Reindeer husbandry is vital to Sámi culture, identity, and language and sustains thousands of Sámi in Norway. It is protected by several legal instruments, including the 2007 Reindeer Herding Act, Article 108 of the Norwegian Constitution safeguarding the Sámi language, culture, and way of life, and the International Covenant on Civil and Political Rights (ICCPR), Article 27 on the right of minorities to practice their culture. Furthermore, Norway has endorsed the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and ratified the International Labour Organization (ILO) Convention No. 169 concerning Indigenous and Tribal Peoples.⁸

Notwithstanding the legal protection, the main area of conflict between Norway's energy transition agenda and Sámi rights relates to the impacts on Sámi reindeer herding. Developments like wind farms, hydropower plants, powerlines, and extractive operations have fragmented and encroached on pastoral land, while proposed developments threaten to further reduce the areas available for grazing.⁹ The Norwegian Supreme Court also ascertained such impacts in the landmark ruling of 11 October 2021 (the Fosen judgment), finding that the construction of two wind power plants on the Fosen peninsula—a traditional Sámi grazing area—violated the Sámi herders' right to enjoy their own culture under Article

⁴ Boyd, note 1.

⁵ Mikaela Vasstrøm and Hans K Lysgård, 'What Shapes Norwegian Wind Power Policy? Analysing the Constructing Forces of Policymaking and Emerging Questions of Energy Justice' (2021) 77 *Energy Research & Social Science* 102089, 4.

⁶ Norwegian Ministry of Trade, Industry and Fisheries, *Norway Mineral Strategy* (21 June 2023) 3.

⁷ Qaraman Hasan et al, 'Stepping into the Just Transition Journey: The Energy Transition in Petrostates' (2024) 113 *Energy Research & Social Science* 103553,7.

⁸ Eva M Fjellheim, 'Wind Energy on Trial in Saepmie: Epistemic Controversies and Strategic Ignorance in Norway's Green Energy Transition' (2023) 14 *Arctic Review on Law and Politics* 140, 143.

⁹ Boyd, note 1.

27 of the ICCPR.¹⁰ To avoid direct impacts on Sámi rights, the 2023 Norway Mineral Strategy foresees an early and constructive dialogue with stakeholders, involving a robust framework for dialogue and adequate information on the herders' use of the land and specific mineral activities on Sámi lands.¹¹

Resolving this human rights paradox is crucial to ensuring that Norway's energy transition is also just. In theory, the concept of a just transition encompasses five elements of justice: distributive justice, procedural justice, recognition justice, restorative justice, and cosmopolitan justice. Recognition justice ensures that the interests of marginalized groups, such as Indigenous Peoples, are recognised and protected while moving toward a low-carbon economy. It thus involves acknowledging and addressing the inequities faced by the Sámi communities due to Norway's energy transition policies.¹² Although the Norwegian state has the primary duty to protect Sámi rights, companies interfering with Sámi reindeer herding shall nevertheless address their adverse impacts on Sámi rights.

III. The Norwegian Transparency Act: Addressing the Paradox in Renewable Energy and Extractive Industries

The Norwegian Transparency Act was adopted in 2021 and came into force in July 2022. The Act mandates human rights due diligence for certain larger companies and is grounded in the UNGPs and the OECD Guidelines for Multinational Enterprises.¹³

A. Substantive Scope and Personal Scope of the Act

The due diligence obligations of the Act cover all fundamental rights and decent working conditions (Section 1). According to the Act, fundamental rights mean the internationally recognised human rights enshrined, among other places, in the ICCPR, the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the ILO core conventions on fundamental principles and rights at work, which form the basis of the UNGPs and the OECD Guidelines for Multinational Enterprises (Section 3[b]). The preparatory works also contain a specific reference to the UNDRIP and the ILO Convention no. 169 on Indigenous and Tribal Peoples, thus including the rights of the Indigenous Sámi communities within the substantive scope of the Act.¹⁴

The Act applies to 'larger enterprises' registered in Norway and offering goods and services in and outside Norway, including foreign enterprises subject to taxation in Norway (Section 2). Larger enterprises are defined as those covered by Sections 1-5 of the Accounting Act or those exceeding two of the following thresholds: sales income of NOK 70 million, balance sheet total of NOK 35 million, 50 full-time employees in the accounting year or equivalent (Section 3(a)). This excludes small and medium-sized enterprises involved in mineral activities or renewable energy developments in Sámi grazing areas. Such exclusion is inconsistent with the UNGPs and the OECD Guidelines for Multinational Enterprises, which recommend that all companies carry out due diligence regardless of size. Nevertheless, the Government still expects

¹⁰ *Statnett SF et al. v Sør-Fosen sjite*, HR-2021-1975-S (2021).

¹¹ Norwegian Ministry of Trade, Industry and Fisheries, note 6, 30.

¹² Hasan et al, note 7, 6–7.

¹³ For a complete overview of the Act and the liability regime of the act under Norwegian Tort law, see: Liv Monica Stubholt, Moe T Sørffonn, and Nina Stærnes, 'The Norwegian Legislation on Social Sustainability: An Overview of the Transparency Act' (2024) 2 *Oslo Law Review* 1–15; Giuditta Cordero-Moss, 'Corporate Social Responsibility and the Norwegian Transparency Act: the Importance of Choice of Law' (2024) 2 *Oslo Law Review* 1–14.

¹⁴ Prop. (Proposal to the Parliament) 150 L (2020-2021) 15–17, 37, 106.

companies outside the scope of the Act to comply with the UNGPs and the OECD Guidelines and their due diligence mechanism.¹⁵

Unlike its scope, the perimeter of the due diligence obligations envisaged by the Act aligns with international standards. The due diligence duty extends to the activities of the relevant undertaking, its supply chains, and business partners (Section 4[b]). In accordance with the UNGPs, the supply chain is defined as any entities in the chain of suppliers and subcontractors that supply or produce goods, services, or other input factors included in an enterprise's delivery of services or production of goods from the raw material stage to a finished product (Section 3[d]). It follows that relevant renewable energy and mining undertakings must address the impacts on Indigenous rights associated with any upstream and downstream actors in their value chains.¹⁶

B. The Due Diligence Requirements

The Act requires enterprises to carry out due diligence in accordance with the OECD Guidelines for Multinational Enterprises (Section 4), while the preparatory works clarify that alignment with the Guidelines when performing due diligence also implies accordance with the UNGPs.¹⁷ Following the OECD Due Diligence Guidance for Responsible Business Conduct, due diligence for the Act entails six steps: embedding responsible business conduct into the enterprise's policies; risk mapping of potential and actual impacts on fundamental rights and working conditions caused by, contributed to, or directly linked to the enterprise's operations, products or services via the supply chain or business partners; risk assessment and risk mitigation by implementing appropriate measures to cease, prevent and limit the adverse impacts; monitoring the results and the implementation of the measures adopted in the process of risk mitigation; communication with affected stakeholders on the due diligence exercise; cooperation in remedy and compensation where it is required (Section 4).

In the case at hand, the due diligence duty thus entails a risk assessment of the developments in line with article 27 of the ICCPR and that companies stop their implementation when these significantly infringe on the Sámi right to practice their culture.¹⁸ Pursuant to the Act, due diligence must be an ongoing process in proportion to the business's size, nature, and operating context and the likelihood and severity of the impacts on human rights and decent working conditions (Section 4). This means that renewable energy and extractive companies must continuously identify, assess, and remedy their impacts on Sámi rights over time and at every stage of the project, providing evaluations of how they can responsibly conduct their impact assessments and consultations in accordance with the Sámi Act.¹⁹

As explained in the preparatory works, the reference to the OECD Guidelines in Section 4 requires companies to follow the OECD Due Diligence Guidance methods and standards, and any relevant sector-specific OECD guides when performing due diligence. Companies must also conduct due diligence according to the latest versions of the OECD Guidelines and other guidance materials.²⁰

This is relevant to determining how companies, according to the Act, must engage with Sámi communities throughout the due diligence stages. The recent OECD Guidelines

¹⁵ Ibid, 31.

¹⁶ Ibid, 50,106.

¹⁷ Ibid, 107.

¹⁸ Norwegian National Human Rights Institution, *Human Rights Protection Against Interference in Traditional Sami Areas* (2021) 79.

¹⁹ Ibid.

²⁰ Prop. 150 L (2020-2021) 107.

introduce significant updates on stakeholder engagement, while the OECD Due Diligence Guidance for Meaningful Stakeholder Dialogue in the Extractive Industries includes a specific annex on engagement with Indigenous people. Commentary 28 of the Guidelines defines meaningful stakeholder engagement as a key component of the due diligence process, involving interactive engagement processes with relevant stakeholders through meetings, hearings, or consultation proceedings. Stakeholders' engagement refers to an ongoing engagement that is two-way, in good faith, and responsive to stakeholders' views. For engagement to be meaningful and effective, companies should ensure that it is timely, accessible, appropriate, and safe for stakeholders and should identify and remove potential barriers to engaging with stakeholders in positions of vulnerability or marginalization, including Indigenous people. The commentary also stresses that engagement is particularly important in the planning and decision-making of projects or other activities involving the intensive use of land and water due to the significant potential impacts on local communities. That is the case of renewable energy and extractive developments interfering with Sámi grazing areas.²¹

Concerning engagement with Indigenous people, the OECD Guidance for the extractive sector states that enterprises, throughout project planning, should anticipate that Indigenous Peoples will expect to be consulted to obtain their Free Prior and Informed Consent (FPIC) and that risks may arise if these expectations are not met. Moreover, in jurisdictions like Norway, where FPIC is not explicitly mandated, companies should develop an engagement strategy that meets Indigenous expectations without violating domestic law. Key steps include agreeing on a consultation process for FPIC; determining what constitutes consent in accordance with Indigenous governance and customary practices; securing early and iterative dialogue rather than a one-off discussion; providing clear and understandable information; documenting agreements and terms of consent; and determining what to do if negotiations are refused or consent is denied.²²

Although the Transparency Act includes such recommendations through the reference in Section 4, it does not provide actionable criteria for how stakeholder engagement should be conducted, especially with Sámi communities, nor does it mention or include procedures for FPIC in consultation proceedings. The vague requirements for stakeholder engagement and the lack of focus on the needs and specific rights of the Sámi People may result in companies adopting a box-ticking and superficial approach to consultations, which may ultimately lead to mistrust from Sámi communities and an increase in real or perceived impacts on their interests.

C. Duty to Report and the Right of Information

In line with the OECD Guidelines and the UNGPs, Section 5 of the Act requires companies to disclose information on their due diligence exercise, including a general description of the enterprise's structure, area of operations, and the general risk-management policies to address potential or actual adverse impacts. The reporting duty extends to information on the identified adverse impacts and the measures undertaken by the company to cease, prevent, or mitigate adverse impacts and the results of these measures. The report must be made easily accessible on the company webpage and updated each year or in case of significant changes to risk assessments. The preparatory work specifies that the reporting requirement

²¹ OECD, *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct* (Paris: OECD Publishing, 2023) 20.

²² OECD, *OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector* (Paris: OECD Publishing, 2017) 96–8.

covers information on stakeholder dialogue with particularly vulnerable groups, such as Indigenous Peoples.²³

Section 6 of the Act introduces an unprecedented disclosure mechanism on the demand. Upon written request, any person has the right to information from a company regarding how the company addresses actual and potential adverse impacts on human rights and decent working conditions pursuant to Section 4. The information requested may, therefore, exceed what follows from the disclosure requirements pursuant to Section 5.²⁴ The provision does not require the applicant to justify why the request has been made, while the company has a duty to respond to information requests, subject to the exceptions in Section 6.

Through access to information regarding the companies' due diligence measures, civil society actors, such as non-governmental organizations (NGOs), could function as public watchdogs and inflict reputational damage on enterprises that fail to meet their moral and legal obligations, thus increasing corporate accountability for impacts on Sámi rights.²⁵ For instance, the NGO Amnesty International Norge has already requested information from Fosen Vind DA—the company behind the wind power plants deemed illegal by the Fosen judgment—about how it addresses potential and adverse impacts on Sámi rights caused by the development at Fosen.²⁶

D. Enforcement and Sanctions

The Act entrusts the Consumer Authority—an independent administrative agency—with guidance, supervision, and enforcement functions (Section 8-11). As a supervisory body under the Act, the Consumer Authority shall, on its own initiative or upon complaint from others, seek to influence businesses to comply with the Act. In the case of a company's breach of obligations, the Authority shall obtain confirmation that the illegal act will cease or issue a decision. Appeals to the Authority's decisions are processed by the Market Council, an independent administrative body within the Ministry of Children and Family (Section 9). The Act further regulates the right of the Consumer Authority and the Market Council to demand information from companies (Section 10). Prohibitions and injunction decisions can be issued for violations of due diligence and information duties. Failure to comply with confirmations and decisions under Section 9 and the disclosure duty under Section 10 may result in enforcement penalties. Repeated breaches of information duties under Sections 5 and 6 can result in infringement penalties (Sections 11-14).

Infringement penalties cannot be applied to breaches of the due diligence duties under Section 4. Instead, the Consumer Authority can issue compliance orders and enforce penalties for non-compliance. However, Section 4 lacks specific material requirements for due diligence other than the reference to the OECD Guidelines. Consequently, the Consumer Authority may be unable to sanction insubstantial due diligence measures if the assessments meet the basic requirements of Section 4, as the principle of legality would restrict a liberal interpretation beyond the Act's explicit text.²⁷

Furthermore, the Consumer Authority's extensive functions raise concerns about whether it has sufficient resources and capacity to oversee corporate compliance adequately. The

²³ Prop. 150 L (2020-2021) 111.

²⁴ *Ibid.*, 112.

²⁵ Stubholt, Sørfonn, and Stærnes, *note* 13, 14.

²⁶ Fosenvind, 'Menneskerettigheter,' <https://www.fosenvind.no/barekraft/menneskerettigheter/> (accessed 29 November 2023).

²⁷ Rebekka Lae and Morten P Smørdal, 'Norway's New Transparency Act: An Overview in Light of International Trends' (2023) 2 *Oslo Law Review* 12.

Consumer Authority may need to depend on tips from the public to monitor corporate practices, shifting part of the oversight burden onto civil society.

IV. Conclusions

The Norwegian Transparency Act provides significant opportunities to address the impacts on Sámi rights associated with renewable energy and extractive companies, as its substantive scope covers Indigenous rights enshrined in different international instruments. The requirement to carry out due diligence in accordance with the OECD Guidelines and the UNGPs represents a strength of the Act. The reference to these international standards facilitates the implementation of the due diligence obligations and involves compliance with the OECD standards on meaningful stakeholder engagement, including specific recommendations for engagement with Indigenous Peoples. Nevertheless, the lack of explicit requirements for FPIC and stakeholder engagement in the Act might lead to companies adopting a box-ticking approach to consultations and affect Sámi interests.²⁸

A weakness of the Act is that it only applies to larger companies. However, the due diligence exercise covers the entire supply chain and business partners, including the impacts of smaller and medium-sized companies not directly covered by the Act.

The Act's information duties represent another strength. They contribute to increased transparency and accountability and to resolving power imbalances between companies and the Sámi People. For instance, had the Act been in effect during the Fosen wind project, it would have enabled civil society to access detailed information on the project's adverse impacts and how stakeholders' concerns were addressed in decision-making, thereby facilitating the identification and prevention of infringements on Sámi herders' rights.

Regrettably, the Act lacks a civil liability action, making it challenging for Sámi communities to obtain remediation for the violations they suffered. Despite this shortcoming, the Act's monitoring and enforcement mechanisms can still provide leverage for renewable energy and extractive companies to address their impacts on Sámi reindeer herding, though challenges in enforcement remain.

Competing interest. The authors declare none.

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²⁸ To read more about the connection between FPIC and mandatory due diligence, see Christopher Ewell, 'Reimagining the Renewable Energy Transition: The Potential for Mandatory Corporate Due Diligence to Ensure Respect for the Right to Free, Prior, and Informed Consent' (2022) 47 *Yale J Int'l L* 309. The study investigates how mandatory due diligence legislation can ensure respect for the right to FPIC and provides recommendations for FPIC provision into due diligence laws. Here, the case brought by Mexican Unión Hidalgo community against the French energy company EDF before the French Civil Court is analysed in detail as it represents the first attempt by an Indigenous community to enforce the right to FPIC under the French due diligence law.

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