



Europe can do better
How EU policy makers can strengthen
the Corporate sustainability due
diligence directive

Introduction

On February 23, 2022, the European Commission released its [proposal](#) for a Directive on Corporate Sustainability Due Diligence. FIDH and 22 of its member organisations from 4 continents¹ publish this joint analysis and recommendations to policy makers currently negotiating the text.

Our organisations welcome publication of the proposal. Current voluntary instruments and business self-regulation have failed to stop corporate abuse. Effective EU legislation, which would establish a corporate duty to respect human rights and the environment – clearly requiring companies to identify, prevent, bring to an end, and account for abuses and harm in their domestic and global operations – has been backed now for many years. In this regard, the adoption of such a Directive could be a landmark step forward in creating an enabling environment to prevent and remedy the negative impacts of businesses.

However, while the proposal contains some very good elements, it still falls short on numerous fundamental points. Moreover, it significantly deviates from international standards, principally the UN Guiding Principles on Business and Human Rights ([UNGPs](#)) and the OECD Guidelines for Multinational Enterprises ([OECD Guidelines](#)) and subsequent Due Diligence Guidance for Responsible Business Conduct ([OECD Guidance](#)). We regret that in drafting the proposal, the EU too often disregarded the existing globally agreed-upon set of best practice principles, which outline how corporations should ensure respect for human rights.

Before the Directive is adopted, the Council of the European Union and the European Parliament will discuss the text; they have the opportunity to introduce important improvements. FIDH recommends that they adopt at minimum the following:

- **Align the scope of the directive with international standards, remove exemptions, and ensure the proportionality of the regulatory measures.** Extend the list of conventions and instruments covered; better define the negative impacts that the companies have to prevent and remedy; ensure that due diligence applies to all companies and to their entire value chain; remove exemptions on the financial sector; ensure that high-risk operations bear enhanced due diligence; and establish that the scale and complexity of the means through which businesses meet their due diligence duties may vary according to factors such as their size and the severity of their impacts.
- **Reinforce the role of civil society and the place of affected populations in the due diligence process.** Provide for meaningful engagement of companies with the stakeholders; draw particular attention to indigenous people, human rights defenders, and vulnerable peoples or groups; and protect against reprisals.
- **Guard against adopting a box-ticking compliance approach to due diligence obligations.** Establish a prevailing obligation for companies to respect human rights and a duty to prevent harm; develop a less prescriptive approach to due diligence; and remove the overreliance on contractual assurances, industry initiatives, and third-party verification as due diligence methods.
- **Reinforce the measures on liability and guarantee better access to justice.** Place the burden of proof on defendant companies, provide access to injunctive measures that can be imposed before harm occurs, remove the overriding mandatory provision, and pay more attention to the obstacles faced by communities when seeking remedies.
- **Require enhanced due diligence when operating in conflict-affected and high-risk areas.** Include a specific provision on conflict-affected or high-risk areas, and clarify that in conflict-affected and high-risk area companies are required to respect internationally recognized human rights as well as the standards of international humanitarian law and international criminal law, and also required to carry out enhanced due diligence;
- **Ensure responsible disengagement,** and specify the requirements to that end.

1. Acción Ecológica (Ecuador), Al-Haq (Palestine), Al-Marsad-Arab Human Rights Center in Golan Heights (Syria), ALTSEAN-Burma (Burma/Myanmar), Association Marocaine des Droits Humains (Maroc), Bir Duino (Kyrgyzstan), Civil Society Institute (Armenia), Centro de Políticas Públicas y Derechos Humanos - EQUIDAD (Perú), Covenants Watch (Taiwan), Finnish League for Human Rights (Finland), Internationale Liga für Menschenrechte (Germany), Justiça Global (Brazil), Ligue Burundaise des Droits de l'Homme « Iteka » (Burundi), Ligue des Droits de l'Homme (France), League For Defence Of Human Rights (Romania), Manushya Foundation (Thailand), Observatorio Ciudadano (Chile), People's Watch (India), Regional Watch for Human Rights (Liberia), Syrian Center for Media and Freedom of Expression (Syria), Taiwan Association for Human Rights (Taiwan), Vietnam Committee on Human Rights (Vietnam)

1. Enlarge the scope of the Directive to better align with international standards

The proposal defines its scope restrictively on several points: the rights and norms covered by the duty of due diligence (its normative scope), the types of business relationships for which due diligence is required (its value chain scope), and the number and type of companies actually concerned by the Directive (its company scope).

Regarding **norms**, the proposal sets up obligations to prevent adverse impacts on human rights and the environment (Article 3). Human rights are defined by reference to a list of international conventions and instruments (Annex, part 1, section 2) and the “*adverse impacts*” that the companies have to prevent and address are defined as being the “*violation*” of certain specifically enumerated rights or prohibitions. By the use of a “catch-all clause,” the “adverse impacts” to be dealt with by the companies may also be the violation of any of the other rights enshrined in the conventions and instruments listed, but only provided that the violation “*directly impairs a legal interest protected*,” and that the company “*could have reasonably established the risk [...] and any appropriate measures to be taken [...] taking into account all relevant circumstances of their operations*” (Annex, part 1, section 1, point 21).

FIDH and its members consider that listing certain rights and prohibitions may lead the companies to discriminate among human rights in contravention of the indivisibility principle, or to encourage companies to focus on these rights only, even if this would not be justified in practice. Defining the negative “impacts” on human rights as linked to a “violation” of an international convention or other instrument is too restrictive, as it may impose an additional, unnecessary burden on the victim in courts, and is not in line with international standards. The catch-all clause lacks clarity.

FIDH and its members recommend that the Council and the Parliament:

- Extend the list of conventions and instruments (to add for example the UN Declaration on Human Rights Defenders and the International Convention for the Protection of All Persons from Enforced Disappearance);
- Decouple *adverse impacts* on human rights from the *violation* of protected rights, and rather define them as any negative consequence for the enjoyment of human rights, *as enshrined in the international law instruments* listed in the annex to the Directive; and
- Ensure that the list of human rights instruments is non-exhaustive and can be easily revised.

Regarding the **company scope**, Article 2 requires full due diligence from *very large companies* only (those having both more than €150 million net turnover and more than 500 employees, this threshold being adapted for non-EU companies operating in the internal market). It also imposes more limited due diligence obligations on *smaller, but still large companies* (those having both more than €40 million net turnover and more than 250 employees – once again adapted for non-EU companies), on the further condition that they operate and make the majority of their net turnover in one of three *sectors* defined as being *high-risk*. Only three sectors are concerned: textiles, agriculture, and the extraction of minerals. Finally, and without due explanation, the very large and large companies of the banking sector are subject to even lighter obligations and several exemptions (Articles 6(3), 7(6) & 8(7)). Regarding the **scope of the operations** covered by the due diligence requirements, the Directive is foreseen to be applied to the large and very large companies *in their own operations, the ones of their subsidiaries, and, in the whole value chain, in their “established business relationships”* (Article 1). The “established” character of the relationship being “*a business relationship, whether direct or indirect, which is, or which is expected to be lasting, in view of its intensity or duration and which does not represent a negligible or merely ancillary part of the value chain*” (Article 3). Thus, business relationships that are not (or that are not expected to be) lasting, in view of their intensity or duration, would fall outside the scope of the obligation set up by the Directive. Moreover, “business relationships” are also defined to include only entities with which the company has a commercial agreement of some kind, which would exclude, for instance, situations where a company’s operations are intimately linked to a State’s activities, but the relationship is not commercial in nature.

The cumulative threshold based on turnover and the number of employees may have the perverse effect of seeing companies adapting their structure to escape their responsibilities. By limiting its application to very large and large companies only, the Directive is expected to be directly relevant for only 1% of European companies and very few of the foreign companies operating in the EU market. The European

Commission services estimated that the Directive would potentially apply to fewer than 13,000 EU companies, and around 4,000 non-EU companies. This approach is highly problematic. The proposal fails to provide consistent rationales for why certain companies, operations, or relations fall within, whereas others fall outside the scope of the Directive. One distinction is grounded on the idea that SMEs may face important capacity constraints, making implementation of certain aspects of due diligence more challenging. However, by excluding SMEs, the proposal falls short of aligning with international standards, and fails to recognize that human and environmental negative impacts do not primarily depend on the size of the enterprise, but rather depend on the conduct of the operations and the precautionary measures taken. It fails to align with the UN Guiding Principles, which, like the OECD guidance, insist on the fact that the responsibility of business enterprises to respect human rights *applies to all enterprises regardless of their size, sector, operational context, ownership, and structure*. Taking into account SMEs' constraints should not lead to exonerating them of duties under the Directive; rather, as stated by the UNGPs, it is *the scale and complexity of the means through which enterprises meet that responsibility [that] may vary according to these factors, and with the severity of the enterprise's adverse human rights impacts*.

In addition to the proposed text not being in line with international principles, the objectives intended to protect SMEs may fail, in practice, to do so. As drafted, the Directive might actually significantly affect them. Indeed, large clients to which the requirements laid down in the Directive will apply, are allowed – in the proposed text – to comply by simply contracting assurances with their partners, requiring for example SMEs to comply with their code of conduct and due diligence plans, consequently shifting their responsibility to them. In practice, SMEs may then be in the position of being required by their counterparts to implement several due diligence action plans and codes of conduct – perhaps as many as the large companies they contract with. It is obvious that the proposed Directive, by formally excluding SMEs from its scope, but putting in place an architecture that may have a strong impact on them, may thus have serious perverse effects. In the end, assuming that they are subject to prescriptive contractual requirements, SMEs might find themselves in a worse situation than if they were afforded the latitude to develop their own approaches to due diligence, managing their own responsibilities independently, instead of being held hostage to the various requests of more powerful companies. FIDH and its members strongly warn against generic or partial exclusions of enterprises below certain size thresholds in legislation. In line with the OECD, we must stress the significant disadvantages this approach may entail, and recommend instead adopting another approach consisting in requiring risk-based and proportional obligations, scaling expectations, and offering better support.²

Like the company scope, the proposal's **value chain scope** is grounded on the ease with which businesses can carry out due diligence, here focusing on proximity to the parent or lead company, and on the “established” nature of relationships, rather than on the risk or severity of impacts. FIDH and its members regret that these parameters are not in line with international standards, and that they even affect the efforts already made by the private sector in practice. Limiting the value chain to established business relationships – and otherwise to their own operations or their subsidiaries only – may push companies to ignore impacts in remote parts of the value chain, whatever the severity of the impact may be there. It also allows companies to manage their value chain relationships in such a way as to escape or circumvent the rules. The focus on “established business relationships” may encourage companies to rely on informal relations or precarious contracts and commitments, thereby enhancing vulnerability and human rights risks. It is paramount that the value chain scope clearly cover informal working schemes, as well as unofficial subcontracting and self-employed workers. There is in addition no reason to exclude activities that are linked to a company's operations but are not commercial in nature, like activities of States that are directly linked to companies' operations. For example, in a situation where human rights defenders documenting business impacts are facing State-led repression, this exclusion would fail to foster adequate prevention and action plans.

It is of primary importance to ensure that the law proposed by the EU is aligned with the legal EU requirement for legislative acts to be justified, proportionate, and non-discriminatory. As it is, we encounter the risk of seeing businesses with different structures (like franchises for example), or of SMEs that operate in a non-lasting or unstable “business relationship” with very large companies, completely escaping from the application of the Directive. The proposal thus introduces a non-proportionate and unjustified difference of treatment with other SMEs that are in fact operating in an established business relationship with large companies, and that as a result will have to apply due diligence indirectly. This difference of treatment would result from the restrictive definition of the value chain scope without being justified in terms of human rights, or representative of the operations and their risks. The scope, as defined, fails then to really foster a level playing field, despite its stated goals. The proposal creates

2. <http://mneguidelines.oecd.org/PMRT-2021-background-note-SMEs-and-due-diligence.pdf>

loopholes that are detrimental to competitiveness in certain circumstances, and that cannot be justified as being proportional to the objectives pursued.

Still regarding the scope of the Directive, the definition of **high-impact sectors** has been claimed to cover sectors for which OECD guidance documents exist. In fact, it fails to fully cover the financial sector (for which an OECD sectoral guidance does exist), or to build on previous guidance developed by the European Union itself for sectors previously considered as being high-risk (oil and gas, ICT, and employment and recruitment agencies). FIDH and its members regret that the proposal leaves out high-risk businesses like, for instance, construction, infrastructure, and ICT, and that it is based on a restrictive understanding of high impacts, one that fails to take into consideration the context of operations (such as conflict and post-conflict areas, weak governance zones, and repressive regimes). FIDH and its members consider that high-risk activities should be identified by the companies themselves, and recommends renouncing this restrictive approach linked to predefined high-impact sectors. High risks should be a defining element of the content and prioritisation of due diligence measures, and not an element in defining the scope of the Directive. At minimum, companies operating in high-risk sectors cannot be subject to fewer obligations than the ones operating in other sectors. On the contrary, higher risks require stronger and enhanced due diligence. FIDH and its members also regret that due diligence obligations are limited for companies in the **banking sector**. By restricting their due diligence to the pre-contractual phase of relationships and to the activities of large corporate clients, the proposal departs from the UN Guiding Principles and other international standards, and ignores the efforts already made in the sector.

We recommend that the Directive revert to UN and OECD standards, adopt a risk-based approach, and use severity and the likelihood of human rights and environmental adverse impacts as the central concepts of due diligence, without discriminating between different types of business relationship or structures, such that the Directive:

- Obliges the member states to ensure that all companies respect human rights as enshrined in the international conventions, regardless of their size, sector, operational context, ownership, and structure; and that all companies conduct human rights and environmental due diligence, taking appropriate measures to identify and address adverse human rights and environmental impacts along their value chain. The Directive, instead of excluding SMEs, should instead allow for flexibility, giving a margin of appreciation in defining the extent and the nature of the adequate measures to be concretely taken, while broader obligations, prescriptive procedures, and additional monitoring rules could indeed be imposed on bigger companies;
- Defines “business relationships” in line with international standards and requires that due diligence be carried out throughout the full value chain;
- Obliges financial institutions to conduct due diligence to the same extent as every other company included in the scope; and
- Requires companies to themselves assess the risks, and to conduct enhanced due diligence if high risks are identified. Any list or enumeration of high risks should be non-exhaustive, provide for regular and flexible revision, and be extended in order to cover new sectors like ICT and infrastructure. In addition, the identification of risks should not only be thought of in terms of sectors, but be built also on other factors like the local context (conflict, authoritative regimes, harassment of human rights defenders, etc).

2. Reinforce the role of civil society and the place of affected populations in the due diligence process

The proposal contains a few references to the obligation for companies to consult with affected stakeholders as a part of their due diligence obligations (Articles 6.4, 7.2, and 8.3).³ But in general, stakeholder consultation, a critical pillar of corporate due diligence and a central element of the OECD Guidelines and UNGPs, is largely absent. On the one hand, the text suggests that consultations are to be conducted “where relevant,” and seems to leave at the company’s discretion to choose the situations in which it deems consultation justified. On the other hand, only a limited number of steps in the due diligence process are concerned with the obligation to consult: specifically, when identifying impacts

3. Preamble recital (64) also states that the company’s directors are responsible for putting in place and overseeing the due diligence actions and adopting the company’s due diligence policy, taking into account the input of stakeholders and civil society organisations, and integrating due diligence into corporate management systems.

and when developing prevention and corrective action plans. Stakeholder consultation is not required in Article 10 on monitoring,⁴ while Article 11 adopts a very restrictive approach to “communication,” which refers only to formal reporting. This runs contrary to international instruments which reflect a broad understanding of the term, encompassing communication to affected stakeholders in a diversity of formats. The Directive’s definition of “stakeholders” is itself problematic, as it doesn’t explicitly refer to NGOs and human rights defenders, and should thus be amended.

FIDH and its members recommend the inclusion of a **specific article** on consultation of stakeholders, in particular affected persons and communities, trade unions, workers’ representatives, and human rights defenders.⁵

- This article should make clear that consultations should be “**meaningful**,” gender-responsive, and that the views expressed by those affected should be adequately taken into account. Information shared by companies should be **accessible** and shared in a timely manner.
- The involvement of stakeholders, including human rights defenders and trade unions, should happen at **all stages of a project** design, implementation, and monitoring, and at different levels of the value chain. It should also be warranted when designing and implementing remedial mechanisms.
- The core provisions of the Directive should include an obligation to respect the **free, prior, and informed consent** of indigenous peoples.
- The text needs to provide a specific provision on the protection of victims and the **risk of reprisals faced by human rights defenders**, trade union members, and local communities. FIDH and its members recommend that companies be prohibited from retaliation and SLAPP actions, and that they be required to adopt measures to prevent the risks such stakeholders face as a result of their legitimate activities.⁶

In the same vein, and in addition:

- Civil society organisations and defenders working on human rights and environmental protection should be recognised as interested parties for the purposes of submitting complaints. They have to be entitled to make full use of the grievance mechanisms that companies must set up, regardless of whether they are active in a specific area of the value chain (see Article 9 of the proposal); and
- A specific article dedicated to access to information also needs to be added. It should allow stakeholders, along with human rights and environmental defenders, to request and obtain information on due diligence assessments, value chains, measures taken, contractual assurances obtained, corrective and preventive plans adopted, and audits realised, for example, beyond the information that companies are requested to provide under Article 11.

3. Guard against a box-ticking compliance approach to due diligence obligations

The proposal seeks to set up common and harmonised rules obliging companies to carry out due diligence in their global value chains, with the aim to identify, prevent, mitigate, bring to an end, or minimise the extent of human rights and environmental adverse impacts. The due diligence process includes the six steps defined by OECD guidance. Nonetheless, the approach chosen by the proposal is, as explained below, often poorly aligned with internationally-recognised standards such as the OECD Guidelines on Multinational Enterprises and the UN Guiding Principles on Business and Human Rights.

Worryingly, the text suggests that due diligence obligations would be fulfilled “in accordance with” a list of very limited corporate procedures based on company codes of conduct; contract clauses between a

4. It is worth noting that the Directive makes no mention of consultation in the context of monitoring due diligence measures, *while strongly relying on third-party audits and verification*.

5. This was the approach taken by the European Parliament in its own-initiative report.

6. In this respect, we welcome the fact that the proposal provides for a revision of Directive (EU) 2019/1937 on whistleblowers, in order to extend its application to persons reporting breaches of due diligence.

company and its suppliers or business partners; audits; third-party verifications; and industry initiatives. On the one hand, there is ample evidence that such mechanisms often fail [to adequately protect](#) human rights and the environment. On the other hand, such a compliance-based approach – being prescriptive in nature, and which is explicitly encouraged by the text as the means to implement due diligence – could allow companies to focus more on process and less on the impacts on the ground, and it may incentivise companies to shift the burden of due diligence to the next tier company, or to use cascading to escape liability. Some of the six steps of the due diligence process, moreover, are interpreted in a very restrictive manner, particularly those relating to communication and remedy. The choice to make due diligence explicitly an “*obligation of means*,” and the imprecise mingling of terms such as *mitigation*, *prevention*, *minimisation*, *neutralisation*, and *putting to an end*, also weaken the standard of conduct.

FIDH and its members therefore recommend that:

- The future Directive reshape the due diligence standards by aligning them with a general standard of conduct similar to the UNGPs and OECD guidelines. In order not to encourage a box-ticking approach, the Directive should clarify that the main obligation for the companies is to identify, prevent, and bring to an end human rights and environmental impacts, and that the blueprint for evaluating whether a company fulfils its due diligence obligation should be the effective implementation of its duty to respect human rights on the ground, not its compliance with a restrictive checklist of corporate procedures (contracts, codes of conducts, etc.);
- Company obligations relating to the prevention of potential impacts and the ending of actual impacts (7 and 8) should mirror 7§1, 7§2a and 8§1 of the proposal, while the rest of these articles should be optional guidance and non-exhaustive recommendations. To make this clearer for the duty-holders, FIDH and its members recommend that the Directive suggest other ways to seek assurances from partners than mere contractual assurances. It should be clear that due diligence is a standard of conduct that companies should embrace in order to comply with their duty to respect human rights, not a simple “obligation of means”; and
- The wording of Article 8 should be clarified with regard to the “bringing to an end” and “minimization of the extent” of actual impacts. In the proposal, it seems to be left to the company’s discretion to decide if an impact cannot be prevented, in which case it would be presumed to pursue a strategy of minimization. When a company identifies an impact in its value chain or its own operations, the Directive should instead make clear that a company’s due diligence measures should seek to bring that impact to an end and prevent any further impact, while providing redress to those affected. The objective of due diligence measures should never be simply to minimise the extent of an impact. In other words, “minimising” human rights violations is not acceptable; only preventing and ending violations should be envisaged as proper objectives of due diligence measures. Minimization may have a place, but only in situations where, despite efforts to prevent them, an impact has still occurred. In such cases, a company can adopt a temporary strategy to minimise that impact while working to bring it to an end. There may be cases where a company will not achieve that objective – for instance, in situations in which a company lacks leverage over the impact – but such an outcome should not change the purpose of due diligence measures.

4. Reinforce the measures on liability and guarantee better access to justice

FIDH and its members welcome the inclusion of a civil liability provision in the proposed text. As we have [repeatedly affirmed](#), any legislation seeking to regulate corporate behaviour, in order to be effective, needs to contain strong liability provisions, both civil and criminal, that allow victims to seek redress and obtain effective remedy in case of abuses.

Article 22 of the proposal requires member states to define civil liability rules for damages that occur as a consequence of a company’s failure to comply with the due diligence requirements of the Directive. Art. 22.1 foresees liability in case of “damages” that would have occurred because of an “impact” that the company should have been able to prevent or brought to an end by respecting the Articles 7 and 8 of the proposal. This introduces restrictive liability, which is assessed in regard to limited procedural steps and requires a high burden of proof, based on fault and a causal link. As highlighted by the EU

Fundamental Rights Agency, member states' rules on the burden of proof constitute a major barrier, and are exacerbated by very limited access to information and disclosure. On these points further efforts should be made. To this already restrictive liability, Art. 22.2 further details that companies may escape responsibility for harms caused by indirect partners if they have sought contractual assurances, and accompanied them with appropriate measures to verify compliance. Art 22.2 excludes the benefit from this exemption only if it was unreasonable to expect that the actions taken would be adequate to prevent, minimise, or end the impact.

These provisions can open the door to several risks. First, there is an important risk that due diligence becomes a mere "box-ticking" exercise intended to limit the liability of corporations, which would subvert its role as an ongoing preventive mechanism. Second, it could create further obstacles for victims in court, focusing the discussion on proving that internal procedures were not sufficient to prevent the harm, without guaranteeing victims access to the documents needed to prove their case.

Finally, Art. 22.5 states that "Member States shall ensure that the liability provided for in provisions of national law transposing this Article is of overriding mandatory application in cases where the law applicable to claims to that effect is not the law of a Member State." Overriding mandatory provisions can be useful in providing solutions when the application of private international law norms would oblige the judge to apply a law to the case that does not contain enough safeguards and protections for people who are harmed by corporate abuses. However, FIDH and its members warn against the risk that such a provision could transform the EU Directive into a *de facto* global regulatory instrument that trumps other national regulations, present or future. This can be useful only if the European legislation is strong and effective in preventing and redressing abuses committed by corporations. However, we are worried that this could prevent a stronger national regulatory framework from emerging outside Europe. We are convinced that to regulate corporate behaviour at the global level, the EU should better invest in existing legitimate multilateral spaces such as the UN Working Group on the issue of human rights and transnational corporations and other business enterprises, where the EU so far has not yet constructively participated.

These provisions need to be significantly strengthened in order to represent a meaningful step forward in the protection of human rights from corporate abuses, and an improvement of the current regulatory framework, which has so far proved insufficient to provide victims with effective remedy. In this respect FIDH and its members recommend that the following points be incorporated in the next versions of the text before its adoption:

- The Directive should clarify that the burden of proof rests on the defendant company to demonstrate that it took every reasonable step to avoid causing or contributing to a human rights violation or abuse, or to prevent such violation or abuse.
- Injunctive measures that the court could take against a company at the request of a third party should also be included in the proposal, as they often represent the only solution to stop irreversible harms, such as for example in the case of pollution. In the French law on the duty of vigilance, remedies include an avenue whereby a civil judge can order injunctive measures if a company has failed to effectively implement a due diligence plan. This avenue does not require damage to have occurred before seeking a judge's intervention, and has proven to be a favoured track by victims.
- Remove the overriding mandatory provision and introduce a provision that allows claimants to opt for the law that is most favourable to them, as recommended by the EU Fundamental Rights Agency.
- The legislation should also pay more attention to the obstacles faced by communities when seeking remedy, whether practical or procedural, and should therefore ensure that a reasonable limitation period is set for civil liability cases; that claimants have access to collective redress mechanisms; and that member states support claimants with specific measures (particularly concerning legal costs) in order to address the imbalance of the parties in these types of cases.

5. Require enhanced due diligence for operating in conflict-affected and high-risk areas

The potential for involvement in abuses of a grave nature, including war crimes and crimes against humanity, and the likelihood and severity of human rights violations and abuses, are particularly high in conflict-affected areas, including situations of occupation. At the same time, the management of risks is harder in these areas, and holding to account perpetrators or those who contribute to crimes is more challenging. Vulnerable groups are generally also disproportionately affected, and in many cases stakeholder engagement is difficult, due to increased barriers to access. Therefore, companies cannot rely on a standardised and traditional approach.⁷

Because conflict-affected or high-risk settings are complex, and encompass a variety of actors, drivers, and motivations, it is important that companies have a thorough understanding of the conflict, and that they integrate conflict analysis into their human rights impact assessments.⁸ Companies should take various elements into account to define the appropriate measures, including the fact that, in many cases, host-state authorities are either directly responsible for the human rights violations occurring, or unable or unwilling to respect and protect human rights. To avoid being complicit in violations of international human rights, humanitarian, and criminal law, companies should carry out enhanced due diligence.

Yet the proposal falls short of even mentioning conflict-affected areas. This is all the more disappointing given that the EU has a strong history of appreciating the connections between business activity and conflict, as reflected in its involvement in the matter of conflict minerals in the extractive industry. Recent initiatives by member states such as Germany and France aimed at bolstering respect for international humanitarian law, as well as developments in transparency around arms sales, reflect a reaffirmation of this conviction.⁹ The European Parliament's own-initiative report on the Directive also featured two recitals providing that companies operating in conflict-affected areas should conduct appropriate due diligence and "respect their international humanitarian law obligations." Member states should be encouraged to monitor the businesses under their jurisdictions with operations or business relationships in conflict-affected areas, and take steps to protect rights in view of the "specific and salient risks" in such areas.

In consequence, the Directive should:

- Clarify that in conflict-affected and high-risk areas,¹⁰ companies are required to respect internationally-recognized human rights, as well as the standards of international humanitarian law and international criminal law,¹¹ and include IHL customary law and other standards (like the Four Geneva Conventions and their additional protocols) in the Annex (part 1, section 2), as applicable norms; and
- Include a specific provision on conflict-affected or high-risk areas, providing for a thorough, robust, and enhanced due diligence process in these types of contexts, in line with international standards.¹² Companies should be required to integrate conflict analysis into their human rights impact assessments, and to adopt stronger and more effective measures, adapted to the situation and its volatility, to prevent harms and to provide or cooperate in providing remedy.

7. International Alert (2018): "Human rights due diligence in conflict-affected settings," p. 10, 15, https://www.international-alert.org/sites/default/files/Economy_HumanRightsDueDiligenceGuidance_EN_2018.pdf.

8. UN Working Group on Business and Human Rights, "Business, human rights and conflict-affected regions: towards heightened action," para. 44.

9. See https://www.eeas.europa.eu/eeas/arms-exports-control-launch-online-database-increasing-transparency-eu-arms-exports_en.

10. The definition of "conflict-affected and high-risk" is broad. It does not only include situations of armed conflict, occupation, annexation or armed violence, but also post-conflict situations and contexts of social unrest, which can seem peaceful but are prone to conflict.

11. UN Working Group on Business and Human Rights "Business, human rights and conflict-affected regions: towards heightened action," A/75/212, 21 July 2020, <https://undocs.org/en/A/75/212>, para 9-12.

12. UN Working Group on Business and Human Rights, "Business, human rights and conflict-affected regions: towards heightened action," para. 14-21.

6. Ensure responsible disengagement

When businesses cannot establish and/or implement measures to prevent or address negative human rights impacts caused by their activities, they can decide to disengage. Though the Directive provides for the temporary suspension of commercial relations, or even their termination, if the measures adopted to prevent or mitigate an adverse impact have not had the desired effect, it neither refers to “responsible disengagement” nor establishes clear rules governing it. This shortcoming could make it easier for companies causing or contributing to adverse impacts to evade responsibility, by leaving conflict-affected countries in a way that is not consistent with their human rights obligations.

In consequence we recommend that the Directive:

- Explicitly establish that companies looking to exit must ensure responsible disengagement, and conduct dedicated human rights due diligence to identify the potential impacts of their exit and seek to prevent or mitigate them. Such impacts should not only include job losses and other economic impacts resulting from a hasty departure; they should also include assessment of the impact of the sale or cession of operations to a company with weak human rights policies, as well as the transfer of assets or funds that could enable a party to the conflict to commit human rights violations;
- Provide for the meaningful involvement of affected rights-holders, local communities, civil society activists, and other relevant stakeholders in the decision-making process related to the exit decision; and
- Clearly reaffirm that disengagement does not exempt companies from providing remedies to the victims of adverse human rights impacts to which they contributed.

Keep your eyes open

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Establishing the facts - Investigative and trial observation missions

Supporting civil society - Training and exchange

Mobilizing the international community - Advocacy before intergovernmental bodies

Informing and reporting - Mobilizing public opinion

For FIDH, transforming societies relies on the work of local actors.

The Worldwide Movement for Human Rights acts at national, regional and international levels in support of its member and partner organisations to address human rights abuses and consolidate democratic processes. Its work is directed at States and those in power, such as armed opposition groups and multinational corporations.

Its primary beneficiaries are national human rights organisations who are members of the Movement, and through them, the victims of human rights violations. FIDH also cooperates with other local partner organisations and actors of change.

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This report was realized with the financial support of Bread for the World and Agence française de développement. The contents of this publication are the sole responsibility of the authors and should not be interpreted as reflecting their view(s).

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FIDH is an
**international human rights
NGO**
federating **192** organisations
from **117** countries

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ABOUT FIDH

FIDH takes action for the protection of victims of human rights violations, for the prevention of violations and to bring perpetrators to justice.

A broad mandate

FIDH works for the respect of all the rights set out in the Universal Declaration of Human Rights: civil and political rights, as well as economic, social and cultural rights.

A universal movement

FIDH was established in 1922, and today unites 192 member organizations in 117 countries around the world. FIDH coordinates and supports their activities and provides them with a voice at the international level.

An independent organization

Like its member organizations, FIDH is not linked to any party or religion and is independent of all governments.