

Downstream value chain in the European directive on due diligence for companies

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1. What is downstream due diligence?

Adverse human rights and environmental impacts can arise from business activities across the entire value chain. This includes once the product or service has left the company, also referred to as the “**downstream**” part of the value chain.¹ This part encompasses all the steps from the production to the selling phase and beyond, including the delivery, storage, utilisation, resale and end-of-life of a product or service.² **Downstream due diligence** thus seeks to ensure that products and services are sold or provided and used in a way that **respects** human rights and the environment, as well as the **safety** of workers, consumers, end users and communities.³

Companies are already responsible for respecting human rights across their full value chain through voluntary due diligence measures as set out by the [UN Guiding Principles](#) on Business and Human Rights (UNGPs) and the [OECD Guidelines](#) for Multinational Enterprises (OECD GL). Yet, these authoritative frameworks have proven their **limitations**. Thus, a binding legislation such as the currently negotiated EU Directive (CSDDD) is needed to set out obligations for companies to **identify, prevent, and put to an end** adverse impacts in their own operations, the operations of their subsidiaries and across their entire value chain, upstream as much as downstream.

1.1 What scope of obligation does the CSDDD propose?

In its February 2022 proposal, the [European Commission](#) foresaw due diligence obligations across the **entire** value chain. Yet, it limits them to the company’s operations and its “**established business relationships**” (Article 3(g)). Limiting obligations to lasting business relationships is problematic as it may encourage companies to seek precarious contracts and informal relations in order to bypass the directive, which would increase risks of violations.⁴

The Parliament and Council adopted a different approach than the Commission. They propose to extend due diligence obligations beyond established business relationships. However, it is by specifying the activities across the value chain for which due diligence is required that they remain careful not to extend obligations unlimitedly. Both institutions still obligate companies in their own operations, the operations of their subsidiaries and across their value chain, but limit the activities included in the value chain. These refer to the production, design, sourcing, and manufacturing of a product or service, as well as its distribution, transport, storage and waste management (Art. 3.1.g of the EP, and Art.3(g) of the Council). While some of these operations are linked to the downstream value chain, accounting for this part in both institutions’ positions remains limited. For instance, they omit an explicit reference to **product use**, although the Parliament mentions the **sale** of products or services (Art.3.1.g(ii)). Council also leaves out due diligence efforts on **services** at the downstream level (Art. 3(g)(ii)).

Moreover, the Council restricts due diligence obligations to the activities of a company’s upstream and downstream “**business partners**”, which overlooks various actors from the value chain (Art. 3(g)). This contrasts with the Parliament’s broader scope considering due diligence obligations for “**entities involved in**” a company’s activities (Art. 3.1.g).

1.2 How can downstream due diligence be strengthened by the CSDDD?

Many companies have already adopted due diligence processes in their full value chain, with some focusing on the downstream. EU legislation should thus encourage and sustain these efforts instead of putting a halt to it. The following good practices demonstrate some of the actions already adopted by companies:

1. Gabrielle Holly et al. “Due Diligence in the Downstream value chain. Case studies of current company practice”, The Danish Institute for Human Rights. 2023, pp. 4-5.

2. GBI “Effective downstream human rights due diligence: Key questions for companies”. 2023, p. 5.

3. Gabrielle Holly et al. “Due Diligence in the Downstream value chain”, The Danish Institute for Human Rights. 2023, p.8.

4. FIDH “Europe can do better. How EU policy makers can strengthen the Corporate Sustainability due diligence directive”, June 2022, p. 4.

Identify downstream risks	<ul style="list-style-type: none"> • There are companies that developed tools to identify risks in their downstream value chain, such as surveillance and violations to end users' privacy or freedom of expression.⁵ Through these tools, sales opportunities are analysed to flag high risks relating to product, purpose, customer, and country criteria. Their integrated risk-based approach may define higher or lower levels of restrictions based on risk thresholds.
Limit downstream risks	<ul style="list-style-type: none"> • Contractual clauses and specific terms of sale, after-sales, or service contracts provisions can be considered to limit the use or distribution of products and services in ways identified as implying risks of violations.⁶
	<ul style="list-style-type: none"> • European mining equipment manufacturers⁷ introduced product circularity approaches that establish sustainable and recyclability design criteria for products to limit impacts in the utilisation and end of life phases.⁸

The processes put in place are still lacking efficient enforcement processes⁹ and not tackling all harmful practices. It is thus important that the directive incentivises downstream due diligence instead of putting on hold all efforts made.

1.3 What are the risks of omitting downstream due diligence?

For some industries (surveillance, mining machinery, arms and pesticides supplies), impacts are **more severe downstream** than upstream the value chain.¹⁰ These impacts may result from labour standards violations in the distribution and delivery stage of the value chain; from the misuse, irresponsible or unintended use of a product or service once sold or distributed; or from inadequate or absent end-of-life measures.¹¹

Thus, a legislation that does not include the downstream part of the value chain, suggesting that due diligence can be neglected in this part, will necessarily result in the continuation of harmful environmental and human rights practices and operations.¹²

5. Holly et al. "Due Diligence in the Downstream value chain", The Danish Institute for Human Rights. 2023, p.18.

6. Charlotte Junghus et al., "A little downstream goes a long way". Swedwatch et al., April 2023, p. 4. and GBI "Effective downstream human rights due diligence: Key questions for companies". 2023, p. 20.

7. Siemens. "Siemens Sustainability Report 2021", 2021 [online]. Available at: <https://assets.new.siemens.com/siemens/assets/api/uuid:4806da09-01c7-40b1-af91-99af4b726653/sustainability2021-en.pdf> [Accessed 01 August 2023].

8. Luisa Denter and Johanna Sydow. "Downstream due diligence in the European mining equipment industry" Germanwatch, 2023, p. 12.

9. Luisa Denter and Johanna Sydow. "Downstream due diligence in the European mining equipment industry" Germanwatch, 2023, p. 12.

10. Luisa Denter, Charlotte Junghus, Mathieu Vervynckt, and Joseph Wilde-Ramsing. "Downstream due diligence. A must-have for the EU's Corporate Sustainability Due Diligence Directive", March 2023, p. 1. And Luisa Denter and Johanna Sydow. "Downstream due diligence in the European mining equipment industry", Germanwatch. March 2023.

11. GBI "Effective downstream human rights due diligence: Key questions for companies". 2023, p. 7. And, Luisa Denter and Johanna Sydow "Downstream due diligence in the European mining equipment industry" Germanwatch 2023, p. 9.

12. Holly et al, 2023, "Due Diligence in the Downstream value chain". The Danish Institute for Human Rights, p.5.

CASE STUDY 1: TECH SURVEILLANCE OVER MIGRATION FLOWS

In 2021, Airbus was awarded contracts by Frontex to provide aerial surveillance services over the Mediterranean Sea.¹³ The EU border agency has been criticised¹⁴ for using surveillance technologies to facilitate interceptions of migrants, asylum-seekers and refugees and their deportation to Libya by the Libyan authorities, where it is well known that they face [torture, rape, and inhumane detention conditions](#).

The CSDDD should ensure that companies:

- › Conduct **enhanced** due diligence in conflict-affected and high-risk areas.
- › **Meaningfully engage** stakeholders to identify and prevent risks, as well as put an end to abuses.
- › Foresee **remedial measures** to restore victims when certain harms could not be mitigated.
- › **Communicate** to the public and rights holders on how they address downstream risks and impacts, which tech surveillance companies often fail to do given their willingness to preserve the opacity of their sector.

13. Business & Human Rights Resource Center, "Scrutinising migration surveillance. Human rights responsibilities of tech companies operating in MENA", September 2022.

14. Sunderland, Judith and Lorenzo Pezzani. "Airborne Complicity. Frontex Aerial Surveillance Enables Abuse". Human Rights Watch, 2022. <https://www.hrw.org/video-photos/interactive/2022/12/08/airborne-complicity-frontex-aerial-surveillance-enables-abuse>.

CASE STUDY 2: ENERGY SECTOR IN MYANMAR

In February 2021, the military junta seized power in Myanmar. By December 2021, “the junta had **killed** at least 1,384 people and **arrested** at least 11,289 politicians, human rights defenders, journalists, and other individuals engaged in perceived or actual dissent”.¹⁵ The UN Special Rapporteur on Myanmar qualified the perpetrated crimes as [war crimes and crimes against humanity](#). In situations of conflicts, companies involved in the country, notably oil companies, should conduct heightened due diligence and adopt adequate measures, since the risks of complicity or of having their operations contribute to and facilitate the commission of violations are significant. Indeed:

- › Revenues from the oil and gas sectors have allowed the government to sustain its military spending.¹⁶
- › Natural gas projects represent the single largest source of foreign currency revenue for the junta, amounting to US\$ 1 billion annually.¹⁷

In this context, energy majors **Total and Chevron** decided in January 2022 to **withdraw their activities** from Myanmar.¹⁸

The CSDDD should ensure that:

- › Companies whose downstream activities contribute to sustaining serious human rights violations **responsibly disengage** their operations where the prevention and mitigation of harms have proven impossible or unsuccessful.
- › Companies ensure responsible disengagement in order to **prevent and mitigate impacts** potentially arising from the **withdrawal** of their activities.

2. Recommendations

We recommend:

- That due diligence obligations cover the entire value chain since the purpose of the directive is to hold companies accountable and that due diligence standards already include indications to prevent unlimited corporate liability.
- That the EU legislators should not let companies think that human rights violations are acceptable or can simply be ignored when they occur downstream.

15. FIDH “Myanmar: Total and Chevron’s withdrawals should be followed by effective economic sanctions”. 21 January 2022. <https://www.fidh.org/en/region/asia/myanmar/myanmar-total-and-chevron-s-withdrawals-should-be-followed-by..>

16. Ibid.

17. Human Rights Watch, “Myanmar: TotalEnergies Withdraws; Junta Gains. US Sanctions Urgently Needed on Billions in Oil and Gas Revenue”. 19 July 2022. <https://www.hrw.org/news/2022/07/19/myanmar-totalenergies-withdraws-junta-gains..>

18. FIDH “Myanmar: Total and Chevron’s withdrawals should be followed by effective economic sanctions”. 21 January 2022. <https://www.fidh.org/en/region/asia/myanmar/myanmar-total-and-chevron-s-withdrawals-should-be-followed-by..>

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