FIDH's recommendations for the trilogue for the Directive on Corporate Sustainability Due Diligence (CSDDD)

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On February 23, 2022, the European Commission published its proposal for a Directive on Corporate Sustainability Due Diligence aimed at establishing a corporate duty to respect human rights and the environment by requiring companies to identify, prevent, bring to an end, and account for harms arising from their operations and those of their subsidiaries across their value chain, both at the domestic and international level. On 1 December 2022, the Council of the European Union published its General Approach, which departs in some key respects from the Commission's position. On 1 June 2023, the European Parliament (EP) adopted its own position, amending the Commission's proposal in several aspects. Finally, on 8 June 2023, the Commission, the Council, and the European Parliament began their trilogue with the aim of reaching an agreement on the final text of the directive by the end of the year. In order to ensure that the objectives of the legislation are achievable, several points in the negotiated draft need to be highlighted and examined in detail.

1. COMPANY SCOPE

Although the three institutions participating in the trilogue differ in their positions, they all unfortunately fail to align with UN and OECD standards, which insist on the responsibility of all companies to respect human rights, regardless of their size, sector or structure. Due diligence requirements normally admit a degree of flexibility by taking into consideration the company's size, context, and risks inherent in its activities when defining the extent and nature of the concrete measures to be taken. Thus, international standards refuse to exclude the responsibility of certain companies and, instead, recognize that the size, structure and context influence what can reasonably be expected from companies in terms of due diligence obligations. This may entail broader obligations, prescriptive procedures, and additional monitoring rules for bigger companies. Regrettably, both the Commission and the Council have tried to limit the due diligence burden on companies by reducing the scope of application of the directive instead of allowing for flexibility in the requirements themselves, as proposed by the UNGPs and OECD standards. Indeed, they propose applying the directive only to very large companies instead of distinguishing between the due diligence obligations themselves. This could lead to the risk of companies modifying their structure to avoid coming under the application threshold of the directive without necessarily protecting SMEs. Companies subjected to the directive could also simply pass on their due diligence responsibility to their subsidiaries across their value chain, notably via contractual mechanisms.

We recommend:

- To explicitly recognize that all companies – regardless of their size – should respect human rights and the environment even if their obligations in this respect may vary depending on the number of employees and turnover, as defined in the directive;
- To prefer lower size thresholds for the application of the due diligence obligations defined by the directive – aligning at least with the European Parliament's proposal.

2. NORMATIVE SCOPE

International standards stress that companies have the obligation to respect all human rights. All three institutions currently define the obligations of companies by setting out specific rights to be respected and including a list of international legal instruments. The normative scope of the directive is probably one of the most important aspects determining the level of commitment of the EU legislators and its Member States to the protection of human rights. In this regard, it is of primary importance to reflect the acquis, ensure that companies respect all human rights, and include a broad list of conventions in the directive. Furthermore, it is important to ensure that

this list is non-exhaustive. The removal of several international instruments like the Convention on the Prevention and Punishment of the Crime of Genocide; the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; the International Convention on the Elimination of All Forms of Racial Discrimination; and the United Nations Declaration on the Rights of Indigenous Peoples would send the wrong signal to the private sector and should therefore be avoided. Human rights linked to land use, indigenous peoples' rights and the rights of human and environmental rights defenders – especially to protest, to freedom of assembly, gathering and expression – are among the most commonly affected by business activities and should be expressly protected.

It is equally important to pay careful attention to how the directive defines the damage that companies should prevent, address, and remedy. The Commission and the Council define these "adverse impacts" as the "violation" or "abuse" of a list of clearly identified rights and prohibitions. Yet, the approach outlined in their directives call for a prioritisation of adverse impacts and define the circumstances in which disengagement may not necessarily be required. Such a definition may lead to an inadmissible derogation from international law, which could amount to condoning violation. It is important to distinguish violation from damage, which should rather be defined as any action having a negative impact on the enjoyment of human rights (see the European Parliament position).

Finally, the normative scope should be made sufficiently clear so that the legal certainty of the directive is enhanced. Additions made by the Council ambiguously restrict the scope of the value chain or set out new conditions.. Once again, nothing justifies the undermining of the normative scope since the flexibility foreseen in the scope of obligations is itself sufficient to protect companies from unreasonable expectations.

We recommend:

- To adopt an extended and non-exhaustive list of international conventions and instruments (including the UN declaration on the Rights of Indigenous Peoples and the UN declaration on Human Rights Defenders);
- To delete the reference made to "violations" so as to differentiate between damage and violation of the rights and prohibitions;
- To distinguish between the applicable conventions and the content of the obligations pertaining to the due diligence or the liability regime.

3. DOWNSTREAM VALUE CHAIN

The three institutions adopted different positions on the value chain scope of the directive. The Commission and the EP, to more or less the same extent,[1] require due diligence on the entire supply chain, while the Council largely excludes the downstream part of the value chain. In fact, the Council's position exempts companies from due diligence obligations in case of human rights violations they caused or contributed to, even when they would have been able to avoid or put an end to them, under the pretext that the violation would occur downstream the value chain. Such exemptions are highly problematic and cannot be justified. It seems clear that the Council has chosen to limit the scope of the directive instead of relying on the principles of due diligence, which state that companies should not be held responsible if they have carried out appropriate due diligence measures. The EU must then recognize that companies do dispose of the necessary tools on their subcontractors and franchises and that they must consider stopping the provision

1. Notably due to the reference made by the commission to "the established business relationship"

of maintenance services to clients whose use of their product violates human rights, for example[2]. Deciding otherwise would seriously undermine existing domestic and international standards.

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 lability.
- That the EU legislators should not let companies think that human rights violations are acceptable or can simply be ignored when they occur downstream.

4. ON THE FINANCIAL SECTOR

All three institutions restrict the obligations applicable to the financial sector. The Council's approach is the most radical in that it excludes the entire financial sector from the scope of the directive, leaving it up to each Member State to decide later on. The argument put forth for excluding or limiting the obligations on the financial sector is that it is an essential sector for the economy and that, because of its extreme volatility and mobility compared to other sectors based in the real economy, the EU cannot regulate it "without putting itself at great risks". In reality, by excluding the financial sector, the EU is encouraging all actors to align with the lowest bidder, reinforcing unregulated competitive effects, and impeding the sector's ability to favour sustainable businesses. Conversely, it could also discourage investments in emerging markets taking steps towards more sustainable financial regulation. Such a restriction will risk putting a halt to the numerous efforts already made by the financial sector in this domain.

We recommend:

- To recognize that the financial sector may cause and contribute to human rights violations or environmental impacts and that there is no reason to not explicitly oblige it to prevent, put an end to, and remedy potential damages;
- To ensure the financial sector remains an adequate and relevant driver to promote sustainability, requiring it to identify, address the risks, and use its leverage on its business relations.

5. ON THE DUE DILIGENCE DUTIES

All three institutions define due diligence and detail companies' obligations to identify, prevent, and put to an end the impacts they may have on human rights and the environment. They require companies to assess the effectiveness of their plans and measures, set up grievance mechanisms, and communicate on their due diligence policies. However, institutional positions differ on what the definition of adequate measures should be and how they can be achieved.

We recommend:

- To ensure that the proposed measures are not part of a fixed list but set out as examples of tools available so that companies may innovate and adapt to the specific context of their operations, instead of simply complying with a list of requirements. Obliging companies to achieve a list of predefined actions or requirements would inherently increase the administrative burden without guaranteeing efficiency.

2. See also https://www.ohchr.org/sites/default/files/documents/issues/business/2022-09-13/mandating-downstream-hrdd.pdf

The directive would then inevitably miss its objective of shifting business practices towards sustainability.

- To adopt a definition of appropriate measures that reflects the risk-based approach and that measure the probability of a damage, its seriousness, and the degree of involvement of the company in its occurrence, while specifying the different measures to be taken depending on whether the company causes, contributes or is simply linked to the damage;
- To ensure that the appropriateness of the measures is assessed during the processes on administrative and civil liability.

6. ON CONFLICTS

In conflict-affected and high-risk areas, companies should be required to carry out heightened human rights due diligence, or 'hHRDD'. These range from areas experiencing full-blown armed conflicts or widespread violence, to contexts in which there is a significant risk of such scenarios emerging, and/or are defined in other EU instruments as "areas in a state of armed conflict or fragile post-conflict as well as areas witnessing weak or non-existent governance and security, such as failed states, and widespread and systematic violations of international law, including human rights abuses"[3].

As explained by the UNGPs, it is "because the risk of gross human rights abuses is heightened in conflict-affected areas" that companies should carry out a regularly updated analysis of the situation, including of the dynamics in which the belligerent parties operate, the systematic violations, and the conflict itself, as well as the mutual interactions between the conflict and their activities. Only the Parliament's proposal adequately points out the specificities conflict risks may have for companies. This addition should be retained in the directive.

We recommend:

- Retaining the Parliament's proposal which expressly underscores the need for companies to conduct heightened due diligence in the context of conflicts.

7. ON STAKEHOLDER ENGAGEMENT

Stakeholder and rights-holders' engagement is an essential element to inform companies and support them in defining adequate due diligence measures. All institutions have recognized the importance of consulting stakeholders, but only the EP has taken a comprehensive approach to this regard and provided an entire article dedicated to it.

It is well established now that meaningful consultations with stakeholders must be undertaken at all stages of the due diligence process (not only, for example, when companies adopt preventive or corrective plans). Importantly, stakeholder engagement should first include affected or potentially affected individuals, communities and populations, but also, and more broadly, human rights and environmental rights defenders, civil society organisations and human

3. Notably due to the reference made by the commission to "the established business relationship"
See also https://www.ohchr.org/sites/default/files/documents/issues/business/2022-09-13/mandating-downstream-hrdd.pdf
Regulation 2017/821, art. 2(f). For the updated list of conflict-affected and high-risk areas under Regulation 2017/821, please see: https://www.cahraslist.net/. For well-renowned and respected frameworks classifying all situations of armed violence and fragile contexts, please see https://www.rulac.org and http://www3.compareyourcountry.org/states-of-fragility/overview/0/, respectively.

rights institutions. Regardless of whether they are active or not in the sector of the company, stakeholder engagement should include actors who can share their knowledge on the issues at stake, on relevant geographical areas, and on tensions, local dynamics, conflict characteristics, etc. Their expertise would also help companies to further identify other stakeholders, affected peoples, vulnerabilities and the needs, opportunities, constraints, power dynamics, and networks of all relevant actors. These elements of information are needed to define the measures to be taken and assess their efficiency. Moreover, and as stated by the Parliament, consultation should go hand in hand with information and communication.

We recommend that stakeholder engagement:

- Is required to be meaningful;
- Encompasses a broad range of actors;
- Distinguishes between affected and vulnerable stakeholders, and recognizes in addition the role of trade unions, human rights defenders and environmental and human rights CSOs;
- Is culturally and gender-sensitive;
- Is continuous, transparent, and informed.

8. ON ENFORCEMENT MECHANISMS

One of the main reasons for the initiation of this legislative process is that voluntary norms have proven to be insufficient in ensuring that human rights and the environment are respected. It follows from this that efficient enforcement should be a key element of the directive. A right of initiative in complaint, monitoring, and remedial mechanisms should therefore be recognised for populations, communities, and affected individuals, as well as human rights and environmental defenders. These actors must be empowered to defend the environment despite the absence of individualised damage, and can supplement the individual efforts of other actors who may be hampered in their efforts due to specific situations such as threat of reprisals, economic difficulties, language obstacles, lack of access to information etc. In this respect, the position of the Parliament is by far the one ensuring the most legal certainty.

Regarding monitoring by national supervisory authorities, the Parliament's proposal specifies that these bodies have the power to assess how companies prioritise adverse impacts and impose sanctions for non-compliance. It further requires these supervisory authorities to publish lists of companies subject to the directive as well as a list of investigations and remedial actions.

Regarding the liability regime, an important difference appears among the three institutions. The regime proposed by the Council introduces highly problematic restrictions, including that companies can only be held liable where they "intentionally" or "negligently" cause a "harm to a protected interest under national law." Such an approach runs the risk of introducing limitations that do not exist in some national systems and in other existing liability regimes, as well as of increasing legal uncertainty. On the other hand, the Commission and the Parliament do not require intention, neglect, nor introduce the concept of protected interest. In addition, the Parliament's proposal expands on the right to represent victims, makes provisions for easing access to documents, alleviates the burden of proof and addresses financial obstacles and limitation periods – all of which provide important guardrails to ensuring a coherent implementation of the final directive. This echoes the recommendations made by the Council, the FRA and the OHCHR to address the significant gaps that victims and rights-holders face in accessing remedies.

We recommend:

- To recognize the right of human rights and environmental CSOs to seize grievance mechanisms, supervisory authorities, and courts;

- To ensure that seizing a grievance mechanism or national authorities is neither a prerequisite nor an obstacle for having access to other forms of remedies, actions, or proceedings including judicial or non-judicial mechanisms;
- To provide supervisory authorities with injunction powers and detailed sanction regimes;
- To ease the burden of proof, facilitate access to documents, alleviate other procedural obstacles and protect against retaliation, including by allowing trade unions, human rights and environmental CSOs to represent victims.

9. ON THE LEVEL OF HARMONISATION

The EP is the only institution among the three to have considered the issue of harmonisation. Firstly, it proposes that "The Commission and the Member States shall coordinate during the transposition of this Directive and thereafter in view of a full level of harmonisation between Member States, in order to ensure a level playing field for companies and to prevent the fragmentation of the Single Market." Secondly, it envisages a full harmonisation after six years. This clause should be removed.

The full harmonisation proposal was originally put forth by the private sector on the grounds that ensuring a level playing field for all players would be essential to prevent the fragmentation of the EU single market. However, this assertion was made without any substantiation on its part. As a rule, legal harmonisation in the EU is achieved by way of minimum harmonisation. In exceptional cases, however, certain areas of EU law do require full harmonisation. The respect of the subsidiarity and proportionality principles require that the directive cannot go beyond the level of harmonisation necessary to achieve the outlined objective. This implies that the impact of the directive should be fully documented before deciding on "coordinating" "in view of a full level of harmonisation". Inputs and innovations from different Member States and regulators are welcome before any acquis can emerge. It is essential to ensure that the Directive shall not constitute grounds for ultimately reducing the level of human rights, environment or climate protection. Member States should retain and make use of their competence to set higher levels of protection and to be able to meet their own obligations to effectively protect human rights against the harmful actions and omissions of companies.

Legislative harmonisation in the EU is not an end in itself but must be understood functionally. It is not only used to reduce legal differences between Member States but also to achieve certain objectives of public policy. In that regard, it is highly problematic that the single market clause has been drafted referring only to the objective of ensuring a level playing field without taking other relevant objectives into account. These must include: a high level of protection of the quality of the environment and the climate, promotion of European core values, the necessity for companies to protect HR and the environment, the contribution of companies to sustainable development and to a just and sustainable transition, etc.

We recommend, following the opinion of the Council Legal Service according to which the proposed text by the EP is not legally sound, that the single market clause be simply deleted.

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Director of publication: Alice Mogwe
Editor: Éléonore Morel
Author of the report: FIDH
Design: FIDH/Noam Le Pottier

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CONTACT

FIDH
17, passage de la Main d'Or
75011 Paris - France
Tel: (33-1) 43 55 25 18
www.fidh.org
Twitter: @fidh_en / fidh_fr / fidh_es
Facebook:
https://www.facebook.com/FIDH.HumanRights/

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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.

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