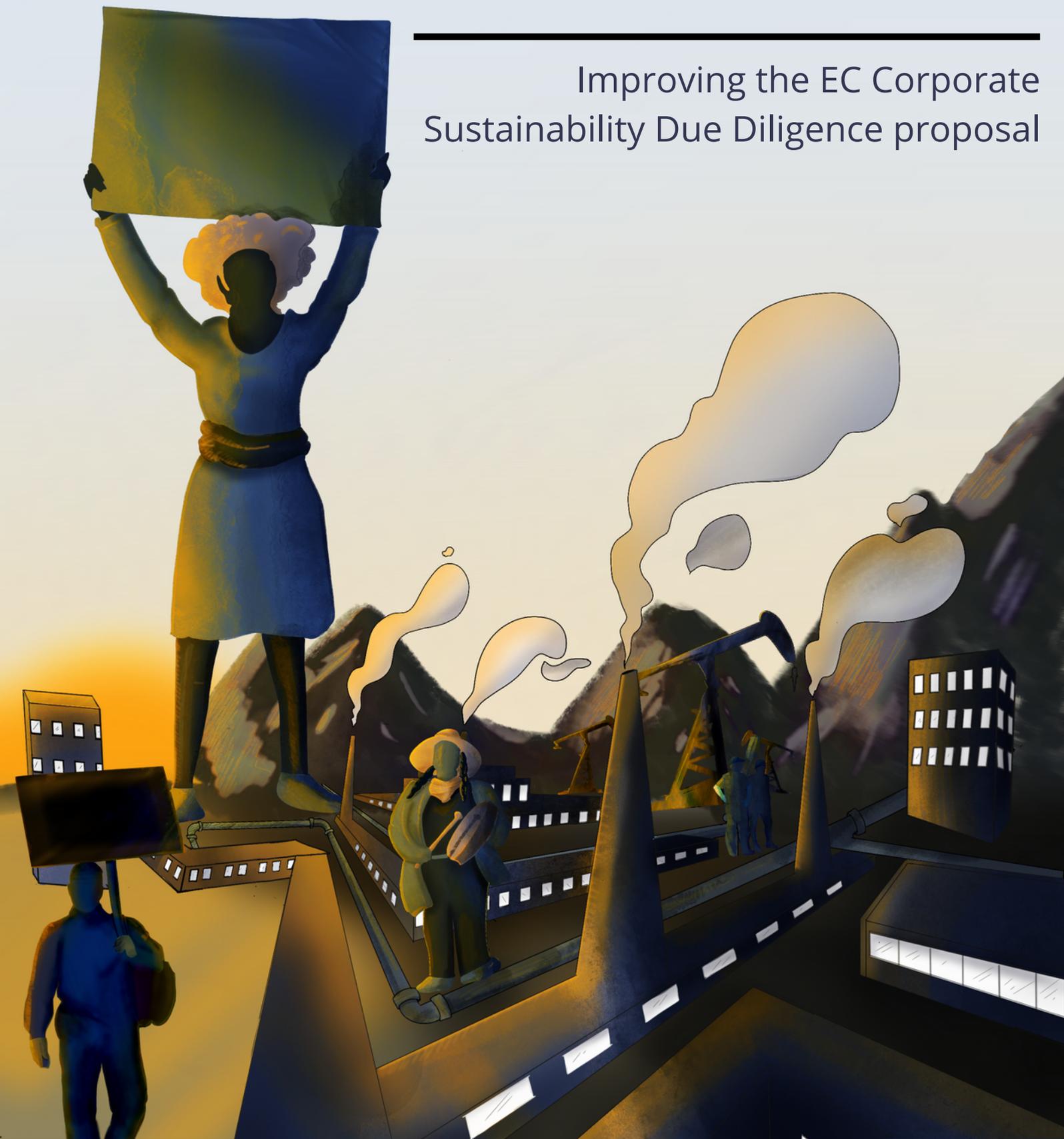


RAISING THE STAKES FOR PEOPLE AND THE PLANET

Improving the EC Corporate Sustainability Due Diligence proposal



Printed in May 2022
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Cover illustration: Giuseppe Cioffo, CIDSE

This document can be found at www.cidse.org and will shortly be available in Italian and Spanish.

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1. RAISING THE STAKES FOR PEOPLE AND THE PLANET: A MISSED OPPORTUNITY

Three years after [the disaster that stole the lives of at least 272 people in Brumadinho, Minas Gerais, Brazil](#), CIDSE and the Commission of Bishops' Conferences at the European Union (COMECE) hosted a caravan from Latin America, including survivors of that tragedy. Despite the unprecedented violence and trauma that it unleashed on the local communities' present and future generations, the company that was mainly responsible for the disaster, VALE, has mostly been allowed to escape its responsibilities. Yet, responsibility for the tragedy is shared internationally, as the German auditing company which certified the dam operated by VALE to be safe, TÜV SÜD, is [currently being sued in Germany by victims](#).

On 15 January 2022, Peru experienced one of the most significant environmental disasters in its history. During a transport operation, about [1.65 million tons of crude oil were spilled](#) into national waters along the coast of La Ventanilla (Callao region), located 30 km north of Lima and famous for its marine biodiversity hosted by two protected reserves. The oil was destined to a refinery owned by the Spanish company Repsol and was being transported by Italian tanker Mare Doricum. It is unclear what the long-term effects of the spills will be, but local fisherfolk and communities are already enduring a loss of livelihoods and the destruction of their environment.

Our brothers and sisters from Brazil and Peru are not alone, as the negative impacts of corporate activities are a reality for people and communities around the world. EU companies, inserted in global value chains of production and extraction, bear significant responsibilities for such abuses.

The negative impacts of corporate activities on human rights and the environment are not the hazardous and occasional externalities of business activities; they are the consequence of an economic system that puts profit over people and extraction of wealth over care for the planet, even in the context of an epoch-defining climate crisis. For too long, decision-makers and business leaders have asked us to trust the market and the rationality of economic actors. Yet, we are faced with the irrational reality of business as usual, while the Intergovernmental Panel on Climate Change (IPCC) warns us that catastrophic climate change is inevitable.

Survivors of corporate abuse and civil society organisations were promised that voluntary guidelines and principles would provide business actors with some much-needed guidance, and yet, ten years after the adoption of the United Nations' Guiding Principles on Business and Human Rights (UNGPs) and the OECD Voluntary Guidelines for Responsible Business Conduct, the situation of human rights violations remains more urgent than ever.

It is clear we need systemic change in the way businesses carry out their operations if we want to prevent and redress adverse impacts on human rights and the planet and offer remedy and justice to those affected.

For years, CIDSE, its members and allies have been advocating for the introduction of mandatory human rights and environmental due diligence (mHREDD) legislation in the European Union that also facilitates access to justice for those affected by corporate abuses. In 2020, [more than 230 Catholic Bishops](#) joined civil society

groups and [citizens](#) in asking for mandatory human rights and environmental due diligence legislation.

The European Commission (EC)'s Corporate Sustainability Due Diligence (CSDD) proposal represents an important step towards meaningful legislative actions to address the threat of corporate activities to human rights and the planet. However, **it will fail to trigger transformative and significant changes if major shortcomings of the text are not addressed.** In particular, the law needs to move away from a bureaucratic approach to prevention and termination of the harmful risks and impacts of corporate activities and it should instead align with the risk-based approach already set in international standards. In the proposal, a companies' obligation to prevent harm focuses too much on contractual clauses and certification mechanisms, which have proven to be highly ineffective. While the proposal establishes the civil liability of companies for harm they cause by failing to comply with due diligence obligations, it fails to address the imbalance of power, resources and information between companies and claimants. Thus, it fails to ensure meaningful access to justice.

Most importantly, **the voices of those who have survived and experienced corporate abuse, human right defenders, indigenous people and women on the frontline are almost entirely absent from the proposal.** It is in the spirit of Pope Francis' call to heed the cry of the earth and the cry of the poor that we offer the recommendations contained in this paper, for a directive that can truly respond to the needs of our time.

By doing so, together with our members, we call on the European Parliament and Member States to substantially improve the text so to get the European economy on track to true sustainability and set a global example.

The CSDD could be a game-changer, or it could be yet another opportunity for companies to turn sustainability and social impact into marketing tools, only paying lip service to the demands of indigenous people, experts, activists and non-governmental organisations. It is down to the co-legislators now to live up to their expectations.

Josianne Gauthier
Secretary General

2. SHORT OVERVIEW

The following sections provide an overview of CIDSE's analysis of the CSDD proposal. While it is not the purpose of this document to provide a comprehensive analysis of the text proposed by the European Commission, we focus on elements that are key to CIDSE's members and partners: the material scope of due diligence obligations and the specific impacts and risks covered, civil liability and access to justice for those affected by corporate abuse, environment and climate change, the role of stakeholder engagement, human rights defenders, women and indigenous people, as well as enforcement and the scope of companies covered by the proposal. For each of these topics, we provide practical suggestions to improve the text. At time, we advance more than one option, so as to provide lawmakers with space to find common ground, while still pursuing the ultimate objective of providing protection, remedy and justice to those affected.

SUMMARY OF RECOMMENDATIONS

DUE DILIGENCE OBLIGATIONS	
Art. 1	In line with the UNGPs, establish a duty for all companies to respect human rights and the environment.
Art. 4	In line with the UNGPs, establish an obligation for all companies to adopt a policy commitment to human rights and the environment.
Art. 4, Art. 5	Ensure the lists of practical obligations are presented as non-exhaustive.
Art. 7, Art. 8	Explicitly include leverage as one of the strategy companies may consider when identifying and addressing actual and possible adverse impacts.
RISKS AND IMPACTS	
Art. 3	Human rights impacts must be defined as any impact that keeps right-holders from enjoying their rights, not as the violation of a particular convention or right.
Art. 3	Environmental impacts must be defined as in terms of concrete impact on the environment, not as violations of particular prohibitions.
Art. 3, Art. 4, Art. 5	Include an obligation for companies to assess climate change risks and impacts throughout their operations and value chains.
Annex I	Include the UN Declaration on Human Rights Defenders, ILO Convention 169 on the Rights of Indigenous and Tribal People, the International Convention on the Rights of all Migrants, the UN Declaration on the Rights of Peasants and Other People Working in Rural Areas and the UNHRC Resolution on the Human Right to a Safe, Clean, Healthy and Sustainable Environment to the list of Human Rights instruments in Annex I. The list must be purely indicative and non-exhaustive.
Annex I	Significantly expand the list of negative environmental risks and impacts to include water, air, soil and sea pollution. The list must be purely indicative and non-exhaustive.
CIVIL LIABILITY	
Art. 22	The text should direct Member States to adopt the necessary measures to ensure that in cases brought under Art. 22.2 the burden of proving the failure to prevent falls on the defendants.
Art. 22	The text should direct Member States to adopt the necessary measures so that legal fees, time limits, language and representation are not an obstacle for those seeking justice for corporate abuse.
STAKEHOLDER ENGAGEMENT, DEFENDERS, INDIGENOUS PEOPLE, COMMUNITIES	
	Meaningful engagement with affected stakeholders should be introduced in the text as an integral part of the due diligence process, to be always conducted on an ongoing basis and not only 'when appropriate'.
	Meaningful stakeholder engagement must include human rights defenders, workers and civil society groups, and pay particular attention to the situation of human rights and environmental defenders, and women.
	Companies must recognise indigenous peoples' right to Free Prior and Informed Consent (FPIC). Their inclusion in ongoing stakeholder engagement should not impact on their right to FPIC.
Art. 7, Art. 8	Introduce an obligation for companies to take into account the specific risks faced by women, men, children and minorities when assessing and addressing potential and actual risks and impacts.
Art. 19	Member States' Supervisory Authorities should ensure affected stakeholder and civil society groups can submit concerns in a secure and anonymous manner.

Annex I	Include the UN Declaration on Human Rights Defenders and ILO Convention 169 on the Rights of Indigenous and Tribal People.
	Ensure that companies operating in situation of conflict or occupation conduct enhanced due diligence as per international standards.
COMPANY SCOPE	
Art. 2	Introduce lighter obligations to carry out human rights and environmental due diligence for smaller companies, including small and medium-sized enterprises (SMEs), in a manner proportional to their size, structure, governance, sector and context.
Art. 2	Abandon high-risk sectors in favour of a generally risk-based approach or significantly extend the list to more high-risk sectors such as financial services, construction, transport, shipping, energy, logistics, electronics, tech, auditing and certification.
Art. 2	Clarify that while the duty to respect human rights and the environment is shared by all companies, particular human rights and environmental due diligence obligations (one of the ways in which companies fulfil that duty to respect) can apply differently to different profiles of companies.
VALUE CHAIN SCOPE, CONTRACTUAL CLAUSES AND VERIFICATION	
Art. 2, Art. 3 and throughout the text	Abandon the use of established business relationships and refer to all relationships.
Art. 7, Art. 8	Refer to contractual insurance as one possible tool to address risks and impacts in a company's value chain and that companies have to support suppliers in complying with human rights and environmental standards by adequate purchasing policies inter alia.
Art. 3, Art. 7, Art. 8	Explicitly state that third party verification audits should not be relied upon solely as mechanism to verify compliance.
Art. 3, Art. 7, Art. 8	Explicitly recognise that membership in an industry scheme shall not indicate compliance with the obligations set out in the directive.
ENFORCEMENT, SUBSTANTIATED CONCERNS	
Art. 20	Ensure harmonisation amongst Member States by explicitly stating the effective and dissuasive nature of pecuniary sanctions.
Art. 20	The list of non-pecuniary sanctions should be given as indicative and non-exhaustive, and should include ban from export credits, fiscal exemptions, subsidies, public procurement and other forms of state aid.
Art. 20	Ensure that sanctions take into account the gravity and duration of the violation, any previous infringements, any sanctions adopted in other Member States, any losses avoided or financial gains derived from the violation.
Art. 19	Explicitly state the Supervisory Authorities (SAs) must communicate with claimants throughout the investigative process, and not only when it is concluded.
Art. 19	Enable Supervisory Authorities to receive complaints in a timely, secure and anonymous manner to ensure the security of claimants, in particular of human rights and environmental defenders.
Art. 19	Member States should ensure that Supervisory Authorities are transparent in the performance of their activities. In particular, it should be the SAs' responsibility to publish and maintain an easily and publicly accessible list of national companies covered under the Directive.
Art. 19	Transparency should be guaranteed with regards to the notice of remedial actions, sanctions and investigations carried out by the Supervisory Authorities. SAs should not only publish the outcome of such actions, but also the methodology used to adopt them, and any relevant milestones.

3. DUE DILIGENCE OBLIGATIONS

The CSDD proposal lays down obligations for companies under its scope (see Para. 6) to carry out mandatory human rights and environmental due diligence throughout their operations and those of their subsidiaries, and with those businesses with which the company has an *established business relationship* (see Para. 6 and 7).

In practice, companies will have to: **a) integrate due diligence into their policies (Art. 5); b) identify actual and potential adverse impacts; c) prevent and mitigate those impacts, and bring them to an end or minimise them when they happen; d) establish and maintain a complaint procedure; e) monitor the effectiveness of the due diligence process and f) publicly communicate about it.**

3.1 Ensuring Alignment with International Principles

The European Commission's choice of company scope is not aligned with the UNGPs, which clearly state **that all businesses, regardless of size, have a responsibility to respect human rights** and that States shall ensure they respect such responsibilityⁱ. On the contrary, the EC's proposal seeks to establish a procedural obligation for only a minority of companies based and operating in the European Union.

In short, the EC is abandoning established international principles for a mostly tick-box approach. While due diligence is one of the ways in which businesses can respect their obligation to protect human rights, delivering an "economy that works for the people"ⁱⁱ cannot mean that only a certain number of companies must respect human rights and the environment.

In Art. 5, the obligation to perform due diligence is articulated through three main actions companies have to take: **1) describe their due diligence approach; 2) adopt a code of conduct for their employees and subsidiaries and 3) describe the practical processes they have implemented to ensure their due diligence processes and code of conduct are effectively implemented through their subsidiaries and a sub-set of their business relationships described as established (see Para. 7).** **By reducing the obligation to prevention to a defined list of specific actions, the proposal is closing the way for companies to respond iteratively and comprehensively to the risks and impacts they might have identified.**

3.2 Addressing Adverse Impacts

When it comes to adverse impacts, the text seems to introduce legal uncertainty. What the UNGPs and the OECD guidelines speak of is **preventing, mitigating and ceasing** adverse impacts. The proposal asks companies to **neutralise** and **minimise** actual adverse impacts. Both terms are alien to the decade of practice with the UNGPs and OECD standards, and should be abandoned in the interest of legal clarity.

Adverse human rights and environmental impacts should always be prevented by businesses and be ceased when they occur. The only case in which impacts should be mitigated is when it is not in the power of the company to bring them to an end because, for instance, the impact is linked to the operations of a business partner on which the company has little leverage.

However, by introducing a closed list of measures to be taken to identify and bring to an end adverse impacts and by asking companies to choose the 'appropriate

measures’ amongst those proposed ‘where relevant’, the proposal leaves it up to the company to decide whether the appropriate measure to take is ‘contractual insurance’, a ‘preventive action plan’ or ceasing a relationship altogether. A pure reliance on contractual insurance would delegate obligations to suppliers alone. However, companies should be obliged to take other actions in order to prevent risks. For example, companies may adapt their purchasing policies, including prices, to enable their suppliers to comply with human rights standards, including living wages for their employees.

When a company cannot bring an adverse impact to an end, the UNGPs ask for the company to increase its leverage over the business relationship so as to contribute to mitigating an adverse impact, in the view of bringing it to an end. **Leverage** exists ‘where the enterprise has the ability to effect change in the wrongful practices of an entity that causes a harm’ⁱⁱⁱ. The concept should figure more prominently to avoid that, in conjunction with the closed lists in Art. 7 and Art. 8, the text creates a significant loophole for companies to continue engaging in harmful business relationship.

3.3 Remediation and Complaint Mechanisms

It is positive that the EC has introduced an obligation for companies to remedy harm they might have caused or contributed to. However, the proposal limits this to financial compensation and fails to recognise, as per the UNGPs, a company’s responsibility to provide effective remedy. Often, remedy goes beyond financial compensation and may include reparation or restoration, for example in case of environmental damage.

It is positive that the EC has foreseen the obligation for companies covered by the proposal to institute complaint mechanisms. Yet, as experts have remarked^{iv}, they are not integrated with the strategies to address adverse impacts in Art. 8.

RECOMMENDATIONS TO IMPROVE THE TEXT	
Art. 1	In line with the UNGPs, establish a duty for all companies to respect human rights and the environment.
Art. 4	In line with the UNGPs, establish an obligation for all companies to adopt a policy commitment to human rights and the environment.
Art. 4, Art. 5	Ensure the lists of practical obligations are presented as non-exhaustive.
Art. 7, Art. 8	Explicitly include leverage as one of the strategies companies may consider when identifying and addressing actual and possible adverse impacts.

4. RISK AND IMPACTS: MISSING THE TARGET

The proposal requires companies to address specific human rights and environmental risks and impacts. Human rights and environmental impacts are detailed in two lists in Annex I. Referring to a closed list for environmental and human rights risks and impacts presents two main shortcomings. First, as the international framework for human and international rights adapts to a changing global context, a closed list will fail to capture, in a timely manner, new and emerging rights. Second, companies act in different sectors and contexts and benefit from an open, indicative but non-exhaustive list^v. Finally, provisions addressing climate change are not integrated into the larger due diligence obligations in the proposal.

4.1 Environmental Impacts

Environmental impacts are too narrowly defined in the proposal. Art. 3 only recognises adverse impacts as the result of the violation of a prohibition among those listed in Annex I. However, negative environmental impacts can also take place without violating specific dispositions. Moreover, the list introduced by the EC in Annex I lacks a number of international conventions, excluding specific impacts like, for instance, water, air, soil and sea pollution.

4.2 Human Rights Impacts

Negative impacts on human rights are not only narrowly defined but also presented in a closed list lacking significant instruments, such as the UN Convention on Human Rights Defenders, ILO Convention 169 on Indigenous and Tribal People, the International Convention of the Protection of the Rights of All Migrants and the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas.

4.3 Climate Change

The CSDD has been presented by the EC as a significant milestone for the EU Green Deal. Yet, the proposal only pays lip-service to truly addressing businesses' contribution to climate change. Confined to Art. 15, climate change obligations are detached from the general due diligence obligations and are thus not subject to the same degree of enforcement. Companies are required to adopt climate plans integrating the Paris agreement's targets, but they cannot be held liable for failing to adopt such plans, their poor quality, or lack of implementation. Moreover, climate risks and impacts are worryingly excluded from those covered by companies' due diligence obligations. **Integrating climate change obligations within the larger mandatory due diligence framework would represent a historical milestone towards a more sustainable economy.**

RECOMMENDATIONS TO IMPROVE THE TEXT	
Art. 3	Human rights impacts must be defined as any impact that keeps right-holders from enjoying their rights, not as the violation of a particular convention or right.
Art. 3	Environmental impacts must be defined in terms of concrete impact on the environment, not as violations of particular prohibitions.
Art. 3, Art. 4, Art. 5	Include an obligation for companies to assess climate change risks and impacts throughout their operations and value chains.
Annex I	Include the UN Declaration on Human Rights Defenders, ILO Convention 169 on the Rights of Indigenous and Tribal People and the International Convention on the Rights of All Migrants to the list of Human Rights instruments in Annex I. The list must be purely indicative and non-exhaustive.
Annex I	Significantly expand the list of negative environmental risks and impacts to include water, air, soil, sea pollution. The list must be purely indicative and non-exhaustive.

5. CIVIL LIABILITY

Companies can be held liable for two reasons:

1. Their non-compliance with their due diligence obligations, and;
2. The harm caused as a result of their failure to comply with their obligations.

The possibility to hold a company liable for failing to prevent and for causing harm is a welcome element of the proposal, and one which campaigning groups and civil society have been demanding for years.

Yet, the possibility to hold companies liable for harm is conditioned by the procedural, tick-box approach to due diligence adopted by the EC and the legal uncertainty related to the identification and tackling of potential and actual impacts.

5.1 Reversing the Burden of Proof

The EC does not specify on whom the burden of proving that the harm was indeed caused by a failure to comply with the CSDD’s obligations falls. This leaves it down to Member States to establish whether it is the claimant or the defendant that have to do so. In transnational cases of corporate violations of human and environmental rights, the imbalance of power and information between the parties makes it clear that the burden of proof should be reversed and always fall on the company.

5.2 Enhancing Access to Justice

A study commissioned by the European Parliament^{vi} on access to legal remedies for victims of corporate human rights abuses recognises that claimants in such cases face very high barriers to justice – including legal fees, unreasonable time limits, and language barriers. In the interest of pursuing the Directive’s objectives, the text should explicitly mandate Member States to remove monetary and non-monetary barriers to justice for victims of corporate abuse.

RECOMMENDATIONS TO IMPROVE THE TEXT	
Art. 22	The text should direct Member States to adopt the necessary measures to ensure that in cases brought under Art. 22.2 the burden of proving the failure to prevent falls on the defendants.
Art. 22	The text should direct Member States to adopt the necessary measures so that legal fees, time limits, language and representation are not an obstacle for those seeking justice for corporate abuse.

6. INCLUDING COMMUNITIES, DEFENDERS, WOMEN, CHILDREN, YOUTH AND INDIGENOUS PEOPLE

Those affected by corporate abuse, their needs and specific situations, are absent from the text. While the UNGPs and the OECD make it clear that consulting with affected stakeholders should be an integrant and meaningful part of the due diligence process, the proposal only recommends it ‘when appropriate’. Moreover, the proposal fails to address the specific impacts that corporate abuses of human rights and the environment have on women and to recognise the specific rights of indigenous people around the world.

6.1 Stakeholder Engagement

The EC proposal presents stakeholder engagement only as an optional step when performing due diligence. However, stakeholder engagement is an essential part of meaningful due diligence in international principles. Affected stakeholders are often the ones holding substantial information regarding human rights and environmental risks and impacts^{vii}. Workers in global value chains, indigenous people and communities in areas under exploration for extractive activities have been caring

for their own land for years and should be involved on an ongoing basis in the identification and mitigation of risks, the cessation of impacts and potential remedy proceedings. The lack of stakeholder engagement further risks reducing the due diligence process to a mere rubber-stamp exercise. In line with the UNGPs, **stakeholder consultation should be recognised as an integral part of the due diligence process** and should be adapted to the particular needs of affected stakeholders^{viii}. Within stakeholder consultation, the specific role of human rights defenders, women, children and indigenous people must be considered.

Moreover, Member States' Supervisory Authorities (see Para. 9) should provide **adequate channels for affected stakeholders**, including human rights defenders, **to relay substantiated concerns safely and anonymously**.

6.2 Human Rights and Environmental Defenders

Human rights and environmental defenders face specific threats and hold knowledge regarding specific risks and impacts. Yet, the EC's proposal fails to address both. Crucially, the list of human rights and environmental impacts fails to include reference to the **UN Declaration on Human Rights Defenders**.

6.3 Free Prior and Informed Consent (FPIC)

FPIC is an increasingly established international principle when investments are directed to indigenous people's lands and communities. The CSDD should explicitly mention the United Nation's Declaration on the Rights of Indigenous People and clarify that stakeholder consultation does not infringe on indigenous people's right to free, prior and informed consent.

6.4 Gender-Responsive Due Diligence

Abuses of human rights and the consequences of environmental damage impact women and men differently. Measures must be integrated throughout the due diligence process outlined in the proposal to address risks and impacts in a gender-responsive manner. Companies must specifically identify "the different risks that may be faced by women and men^{ix}" by addressing the specific threats and impacts that women and girls are confronted with, in line with the UNGPs.^x

6.5 Child Due Diligence

Children are "often illegally employed in the supply chain" and are invisible. The proposed Directive failed to focus on the specific role of businesses in respecting and protecting children's rights. In the Guide on Human Rights Mechanisms at Operational Level of the German Global Compact Network^{xi}, children and young people are listed among the "potentially more vulnerable groups". Companies generally have limited awareness of the scope **and** impact of their operations, **and those of their subsidiaries and business relationships**, on children's rights, and the potentially life-changing consequences **this may have for them**.

6.6 Situations of Conflict and Occupation

The proposal fails to outline the specific requirements for businesses in situations of conflict and occupation. The specific steps businesses should take when operating in conflict-affected areas have been published both by the UN^{xii} and the OECD^{xiii}. In such cases, businesses should implement enhanced due diligence, to ensure that their operations do not aggravate or fund ongoing conflicts. Businesses operating in conflict-affected and occupied areas should be mandated to conduct enhanced due diligence, respect their international humanitarian law obligations and refer to

existing international standards and guidance, including the Geneva Convention and its additional protocols. When a company’s presence in such areas cannot be ensured without serious human rights violations, **companies should responsibly disengage**.

RECOMMENDATIONS TO IMPROVE THE TEXT	
	Meaningful engagement with affected stakeholders should be introduced in the text as an integral part of the due diligence process, to be always conducted on an ongoing basis and not only ‘when appropriate’.
	Meaningful stakeholder engagement must include human rights defenders, workers and civil society groups and pay particular attention to the situation of human rights and environmental defenders and women.
	Companies must recognise indigenous peoples’ right to Free Prior and Informed Consent (FPIC). Their inclusion in ongoing stakeholder engagement should not impact on their right to FPIC.
Art. 7, Art. 8	Introduce an obligation for companies to take into account the specific risks faced by women, men, children and minorities when assessing and addressing potential and actual risks and impacts.
Art. 19	Member States’ Supervisory Authorities should ensure affected stakeholder and civil society groups can submit concerns in a secure and anonymous manner.
Annex I	Include the UN Declaration on Human Rights Defenders and ILO convention 169 on the Rights of Indigenous and Tribal People.
	Mandate companies to perform children-specific due diligence.
	Ensure that companies operating in situations of conflict or occupation conduct enhanced due diligence as per international standards.

7. COMPANY SCOPE

The EC’s proposal applies only to large companies based or operating in the European Union. EU-based companies subject to the obligations of the Directive are those employing with an average of **500 employees** and a net **turnover** of at least **€150 million** and those who employ at least **250 people** on average and generate a turnover of at least **€40 million**, operating in three **high risk sectors: agri-food, mining and textile**.

Different criteria apply to foreign companies operating in the EU. In this case, the proposal would apply to companies which generated **€150 million in turnover** in one of the Member States and to those which generated between **€40 million and €150 million in turnover** if those figures represent at least 51 percent of their total revenues.

7.1 Enlarging the Company Scope

In accordance with international standards, **all companies have a duty to prevent human rights violations and environmental damage (see also Para. 2)**. According to the EC’s own estimation, the Directive would apply to about 13,000 EU companies and 4,000 non-EU^{xiv} ones. The limited scope means that the proposal does not capture the activities of companies that fall below the thresholds but that have significant impacts, either through their direct operations or through their

business relationship. The EC's choice is also out of line with international standards such as the UNGPs and the OECD Guidelines.

Moreover, it is unclear how employee thresholds would operate. As the case of SIAT in Ivory Coast shows^{xv}, companies may have a relatively small number of employees in their headquarter in the EU but employ a significant number of workers in third-countries through their subsidiaries. In sectors like agriculture and mining, employees might often be employed on a seasonal, occasional or informal basis. In short, employee thresholds are not a reliable way to estimate a company's risk and impact throughout its value chain and risk failing to capture harmful business activities. Where employee thresholds are adopted, they should include workers hired internationally, including by the company's subsidiaries.

7.2 Including SMEs, Adopting a Truly Risk-Based Approach

Small and medium-sized enterprises are a vital part of the EU economy and the backbone of most Member States' economies. When taken together, their actions can have tragic impacts on human rights and the planet or could be a tremendous force for transformational change. Yet, the scope of the proposal leaves SMEs out entirely. One of the reasons for this choice given by the European Commission in its proposal is that the administrative burden would be too heavy for SMEs.

However, as per international standards, human rights and environmental **due diligence should always be conducted in a manner that is proportional to size, sector, operational context, governance and structure**. "Small and medium-sized enterprises may have less capacity as well as more informal processes and management structures than larger companies, so their respective policies and processes will take on different forms", the UNGPs clarify^{xvi}.

Adopting a more holistic and open approach to due diligence (see Para. 2) while establishing a general duty to prevent human rights violations and environmental damage would also help tailor its practical implementation to the needs of SMEs.

In short, the legislator should clarify that while the duty to respect human rights and the environment is shared by all companies, particular human rights and environmental due diligence obligations (one of the ways in which companies fulfil that duty to respect) can apply differently to different profiles of companies.

Moreover, although SMEs are excluded from the scope of the proposal, the text recognises that they will be impacted by the legislation through the value chains of the companies covered. Nevertheless, through contractual cascading (see Para. 2), the text risks effectively shifting the burden of conducting due diligence onto smaller companies, while also encouraging businesses covered by the proposal to shift their relationships to other companies in order to avoid supporting their due diligence costs. This introduces serious risks for SMEs.

The proposal should include lighter and proportional obligations for smaller businesses and recognise the proportional nature of due diligence processes.

Finally, the choice of **high-risk sectors** leaves uncovered many business activities in sectors such as finance, tech, defence or tourism. A truly risk-based approach would consider the individual risks and impacts of a company in a proportional manner, thus recognising that potential risks exist in all sectors. Nonetheless, if the co-legislators eventually decide to maintain the high-risk sector approach, the list of such sectors should be significantly extended.

RECOMMENDATIONS TO IMPROVE THE TEXT	
Art. 2	Introduce a duty to respect human rights and the environment for all companies, regardless of size and sector and of whether they fall within the scope of the due diligence obligations set out in the Directive.
Art. 2	Due diligence obligation shall always apply, and be fulfilled, in a manner proportional to a company's size, sector, risk and context operation.

8. VALUE CHAIN SCOPE

Human rights abuses and environmental damage happen throughout value chains, yet the EC's proposal limits the core of due diligence obligations to a company's subsidiary and its 'established business relationships'. This risks opening significant loopholes, and failing to address risky business relationships.

8.1 Covering All Business Relationships

The full due diligence obligations in the EC's proposal apply to the businesses described in the previous paragraph, and to their "**established business relationship**". This category is problematic under three main aspects. First, it is not in line with international standards, neither the OECD nor the UNGPs. Second, it risks reducing a company's due diligence obligations towards its business relationships further down the value chains to mere contractual clauses. However, grave human right violations, such as child and slave labour, take place in the lower tiers of the value chains where due diligence obligation might be resumed to "contractual assurance". Especially in those cases of suspected violations of children's rights and slave labour, the Supervisory Authority should take immediate action and initiate investigative steps due to imminent danger.

Third, it is unclear how the "established business relationship category", defined as a commercial relationship that has been ongoing for at least twelve months and which is reasonable to think would continue in the future, would apply to companies providing services on a sporadic, yet regular, basis, such as financial consulting and auditing.

In short, while the aim of the EC might have been to exclude from the obligations to carry out due diligence business relationships that are only ancillary to a company's core business activities, as it stands, the provision fails to provide legal clarity and risks opening loopholes for abuses in global value chains.

8.2 Contractual Clauses, Third-party Verification and Schemes

While they might be helpful in ensuring legal clarity, contractual clauses cannot be a way for companies to dodge their responsibilities. They should be used as a tool, in conjunction with other strategies and coupled with measures to support suppliers in complying with human rights and environmental standards. The measures would include purchasing and pricing policies to provide business relationships with the necessary means to change their behaviour – for example by paying a living wage or disposing of waste appropriately.

The forms of contractual cascading in Art. 7 and Art. 8 can represent a **real risk for SMEs** to see the costs and burden of due diligence shifted onto them by larger companies. The mechanism set out in the Directive risks encouraging larger

companies to shift the burden and costs of compliance with their obligations onto SMEs with which they may have a business relationship.

Moreover, the proposal gives due diligence industry schemes and other similar sector initiatives a prominent role, together with third-party auditing, in a company's verification of compliance with their code of conduct and obligations. However, both sector initiatives and third-party auditing^{xvii} on companies' impacts on human rights and the environment has often proven unreliable and skewed. Sector initiatives^{xviii} have a poor record of monitoring their members' compliance with their own standards, while third-party certification can often deliver unprecise and biased results.

RECOMMENDATIONS TO IMPROVE THE TEXT	
Art. 2, Art. 3 and throughout the text	Abandon the use of established business relationships and refer to all relationships, excluding occasional and ancillary ones.
Art. 7, Art. 8	Refer to contractual insurance as one possible tool to identify and address risks and impacts in a company's value chain.
Art. 3, Art. 7, Art. 8	Explicitly state that third party verification audits should not be relied upon solely as a mechanism to verify compliance.
Art. 3, Art. 7, Art. 8	Explicitly recognise that membership in an industry scheme shall not indicate compliance with the obligations set out in the Directive.

9. ENFORCEMENT

The EC's proposal provides for a strong enforcement mechanism, where Member States designate Supervisory Authorities (SAs) to monitor compliance with the Directive's obligations, and to issue sanctions. It is significant that a specific place is given to substantiated concerns advanced by civil society organisations and other stakeholders, and that SAs must act on them. Yet, the overall system might benefit from greater transparency and better harmonisation of sanctions.

9.1 Ensuring Strong Enforcement and Sanctions

The proposal gives SAs the capacity to issue sanctions for failing to comply with the Directive obligations and with previous remedial action issued because of infringement. While it is positive that the text provides for pecuniary sanctions based on company's turnover, particular attention should be given to their harmonisation through Member States. Experiences implementing similar pieces of legislation has shown that an excessive degree of difference in the sanctions imposed among different Member States may result in low, and non-dissuasive, sanctions.^{xix}

Moreover, the list of non-pecuniary measures should be indicative and non-exhaustive, and include exclusion from public procurement, export credits, fiscal exemptions and other forms of state aid.

9.2 Substantiated Concerns

We welcome the introduction of a mechanism through which citizens and organisations, as well as affected individual and communities, can submit their concerns to the Supervisory Authorities. Yet, transparency through the whole

process of investigation by the SAs and communications with the claimants should be ensured throughout the process. Moreover, Supervisory Authorities should be enabled to receive complaints in a timely, secure and anonymous manner to ensure the security of claimants, and in particular of human rights and environmental defenders.

9.3 Transparency

Member States should ensure that Supervisory Authorities are transparent in the performance of their activities. In particular, it should be the SAs' responsibility to publish and maintain an easily and publicly accessible list of national companies covered under the Directive. Transparency should also be guaranteed with regards to the notice of remedial actions, sanctions and investigations carried out by the SAs. They should not only publish the outcome of such actions, but also the methodology used to adopt them, and any relevant milestones.

RECOMMENDATIONS TO IMPROVE THE TEXT	
Art. 20	Ensure harmonisations amongst Member States by explicitly stating the effective and dissuasive nature of pecuniary sanctions.
Art. 20	The list of non-pecuniary sanctions should be given as indicative and non-exhaustive, and should include ban from export credits, fiscal exemptions and other forms of state aid.
Art. 20	Ensure that sanctions also consider the gravity and duration of the violation, any previous infringements, any sanctions adopted in other Member States, any losses avoided or financial gains derived from the violation.
Art. 19	Explicitly state that SAs must communicate with claimants throughout the investigative process and not only when it is concluded.
Art. 19	Enable SAs to receive complaints in a timely, secure and anonymous manner to ensure the security of claimants, in particular of human rights and environmental defenders.
Art. 19	Mandate SAs to publish and maintain an updated and easily accessible list of national companies covered by the Directive.
Art. 19	Mandate SAs to publish and report on notice of remedial actions, sanctions and investigations carried out. This should include the methodology used for their adoption and any relevant step in the relevant processes.

ENDNOTES

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- ⁱ [United Nations Guiding Principles \(UNGPs\), General Principles.](#)
- ⁱⁱ [An economy that works for people | European Commission \(europa.eu\).](#)
- ⁱⁱⁱ See UNGPs, Pillar II.
- ^{iv} [Legislating for impact: analysis of the proposed EU corporate sustainability due diligence directive | The Danish Institute for Human Rights.](#)
- ^v See “[Putting the Environment in Human Rights and Environmental Due Diligence](#)”.
- ^{vi} [European Parliament, DROI Committee, Access to legal remedies for victims of corporate human rights abuses in third countries.](#)
- ^{vii} [OECD Due Diligence Guidelines for Responsible Business Conduct.](#)
- ^{viii} See UNGPs, Pillar II, Art. 18.
- ^{ix} [OECD Due Diligence Guidelines for Responsible Business Conduct, p.27.](#) See also [UNGPs, p.20.](#)
- ^x More details can be found in the letter co-signed by more than eighty organisations, including CIDSE, and addressed to the European Commission “[Ensuring a gender-responsive and effective Corporate Sustainability Due Diligence Legislation](#)”.
- ^{xi} [DGCN GM-guide EN 20191125 WEB.pdf \(globalcompact.de\).](#)
- ^{xii} Principle 7 of the [UNGPs](#) sets out guidelines for business operations in conflict-affected areas.
- ^{xiii} The OECD has issued [Guidelines for the responsible sourcing of minerals from conflict-affected and high-risk areas.](#)
- ^{xiv} [Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence.](#)
- ^{xv} [Quand hévéa rime avec violations de droits – CIDSE.](#)
- ^{xvi} See [UNGPs Pillar II, Art.14.](#)
- ^{xvii} Clean Clothes Campaign, [Fig leaf for fashion.](#)
- ^{xviii} Institute for Multi-Stakeholder Initiatives (MSI) Integrity, [Not Fit for Purpose: the Great Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance.](#)
- ^{xix} European Network for Central Africa, PAX International, NGO Coalition for the Conflict Minerals Regulation, [Review Paper: The EU Conflict Minerals Regulation. Implementation at the EU Member State level.](#)



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