



# THE EU CORPORATE SUSTAINABILITY DUE DILIGENCE DIRECTIVE:

MAXIMISING IMPACT THROUGH TRANSPOSITION AND IMPLEMENTATION

**THE EU CORPORATE SUSTAINABILITY DUE DILIGENCE DIRECTIVE**  
MAXIMISING IMPACT THROUGH TRANSPOSITION AND IMPLEMENTATION

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# EXECUTIVE SUMMARY

With the adoption of the long-awaited Corporate Sustainability Due Diligence Directive (CSDDD) on 24 April 2024 by the European Parliament, we will now have an EU level mandatory corporate due diligence law which will be transposed and implemented across the EU Member States in the coming years. The CSDDD creates an obligation for large companies to undertake risk-based due diligence to identify, assess, address and remedy potential and actual adverse impacts on human rights and the environment in connection with a company's activities and broader business operations. It is hoped that this development will catalyse action from business needed to address key human rights and environmental challenges we face globally and serve as an international benchmark for responsible business conduct. However, this will only succeed if: companies engage meaningfully with the process of due diligence, in line with the expectations of the [UN Guiding Principles on Business and Human Rights](#) (UNGPs); and it is situated within a wider policy environment which creates enabling conditions for its effectiveness.

The final text of the CSDDD is the result of a lengthy process and political compromise, especially around issues that are key to ensure that the Directive has its intended effect of 'fostering sustainable and responsible corporate behaviour throughout global value chains'.<sup>1</sup> The Danish Institute for Human Rights (the Institute) has previously published an [analysis of the Commission's initial proposal](#) as well as [a comparison of the different negotiating mandates](#) of the European Council and European Parliament during the trilogue negotiations. This publication analyses the final text of the CSDDD, reiterating calls and recommendations for alignment with international human rights standards set out in the UNGPs and other authoritative guidance, as well as best practice on responsible business conduct during transposition and implementation of the Directive. It goes on to consider what is needed for effective transposition and implementation of the CSDDD, both in the EU and in third countries.

The key elements of the CSDDD are outlined in this paper as follows:

- **Personal scope:** The final compromise has a much narrower scope than what was initially proposed, with a five-year phase-in approach that will have the CSDDD eventually cover companies of 1,000 employees and a turnover of 450 million EUR.
- **Material scope:** Departing from the UNGPs' approach, the CSDDD refers to "abuses" of rights contained in an annexed list, provided that the right can be abused by a company, that the abuse directly impairs a legal interest protected in the listed human rights instrument, and that the company could have reasonably foreseen the risk that such human rights may be affected. The Annex listing human rights instruments contains significant gaps, including the absence of any reference to key European human rights instruments, and by only including instruments which have been ratified by all Member States. The use of the term "abuse" to define adverse impacts may potentially restrict the scope of human rights under consideration while adding complexity to a



company's evaluation of its own adverse impacts.

- **Substantive due diligence:** The CSDDD creates an obligation on companies to adopt a human rights due diligence process generally in line with the steps outlined in the UNGPs and other authoritative responsible business conduct standards. Companies are required to take appropriate measures to effectively address the identified adverse impacts. The text lists some measures a company may take, encouraging a flexible approach with opportunities for companies to go beyond the listed measures.
- **Scope of due diligence and “chain of activities”:** The CSDDD introduces the new concept of “chain of activities”, which expands the scope of a company's due diligence from its own operations and the operations of its subsidiaries, to those of its upstream business partners that relate to the products and services of the company in question and specific activities of downstream business partners, including the distribution, transport and storage of products, provided that these activities are carried out for the company or on its behalf. This approach departs from the UNGPs and other standards which prescribe that companies should take a full value chain approach to due diligence.
- **Stakeholder engagement:** The CSDDD does require meaningful engagement with affected stakeholders, but limits stakeholder engagement to specified stages of the due diligence process, instead of throughout the whole process.
- **Enforcement and civil liability:** Member States will be required to designate one or more Supervisory Authorities to monitor compliance with the transposition laws. The Supervisory Authorities will be empowered to request information from companies and investigate compliance as well as request companies to follow certain orders to comply and order sanctions and interim measures. The Supervisory Authorities will be able to act on their own initiative or respond to reported “substantiated concerns”. In addition, the CSDDD creates a civil liability mechanism whereby companies can be held liable for damages caused by the failure to meet due diligence requirements. The inclusion of the civil liability mechanism is a very welcome feature, however it contains certain limitations which may constrain claimants ability to use it to litigate certain claims, including those for environmental damage or collective rights. Lastly, companies will be obliged to establish complaint mechanisms accessible to a broad range of stakeholders. While incorporating a range of enforcement mechanisms is welcome, they will only provide a partial solution to the remedy gap frequently encountered by rightsholders. Accordingly there is a need to continue to develop complementary access to justice mechanisms outside alongside implementation of the CSDDD.
- **Financial institutions:** The final compromise includes financial institutions in a limited way. These will be required to conduct due diligence on their own operations and in their supply chains, but not on their investments, loans, insurance or other financial services (their “downstream” activities), which are the areas where the most risk on human rights and the environment lies.
- **Corporate governance:** The final text of the CSDDD omits corporate governance elements initially included in the Commission's proposal, which included: a directors' duty of care; assigning responsibility to put in place and oversee the due diligence policy and process; and creating requirements on directors to report to the board on due diligence and adapt the corporate

strategy based on the identified impacts. This is an unfortunate omission, and other means are needed to ensure that companies are encouraged to put in place adequate governance structures and assign responsibility for oversight of due diligence required under the CSDDD.

To be effectively implemented, the CSDDD will need to be accompanied by a range of measures to ensure that a good enabling environment is created around the due diligence laws, in the EU and in third countries. This includes considering how to empower rightsholders and civil society to tackle obstacles to accessing justice in cases of adverse impacts; providing guidance to companies, including smaller companies in the chains of activities of in-scope companies; adequately resourcing Supervisory Authorities and other actors who could take on some form of monitoring of effectiveness of the law, such as national human rights institutions, among a range of other accompanying measures. This should be accompanied by other measures to support state institutions in third countries to step up efforts to realise the UNGPs alongside efforts to support implementation of the CSDDD.

In general, alignment with the UNGPs, the [OCED Guidelines on Responsible Business Conduct for Multinational Enterprises](#) (OECD Guidelines) and other responsible business conduct standards, including existing best practice examples, is needed to ensure that the CSDDD creates better outcomes for people and the planet throughout global value chains during implementation. The review of the effectiveness of the CSDDD by the Commission, set to take place six years after the Directive enters into force, will therefore need to consider the gaps identified in the text and seize the opportunity for better alignment and for the integration of recommendations based on international human rights standards and best practice, as outlined in this publication.

The CSDDD is part of an [ecosystem of measures adopted at the EU](#) level to regulate business conduct which regulate business impacts on human rights, and contain an expectation on companies and financial institutions to undertake sustainability due diligence. The implementation of the CSDDD must be done in a manner which is coherent with and mutually reinforcing of with the rest of the regulatory environment.

## A. INTRODUCTION

On 24 April 2024, the European Parliament adopted the long-awaited Corporate Sustainability Due Diligence Directive (CSDDD). The Directive is due to be voted on by the European Council of Ministers in May 2024, following which it will enter into force 20 days after publication in the Official Journal. The CSDDD will require companies to undertake risk-based due diligence to address potential and actual negative impacts on human rights and the environment that are connected with companies' broader business operations. This process broadly aligns with the process of due diligence outlined in the UN Guiding Principles on Business and Human Rights (UNGPs), with some departures. Further, the CSDDD provides new pathways for affected people to access justice and remediation for harms that result from the failure of a company to meet its due diligence obligations. Companies are also required to adopt and put into effect a transition plan for climate change mitigation with a view to align their business model and strategy with the objectives of the green transition.

The final text of the CSDDD is a political compromise that concludes a lengthy legislative process. The European Commission published its [proposal](#) in February 2022. The Council of the European Union (Council) and the European Parliament subsequently adopted their own positions in [December 2022](#) and [June 2023](#) respectively. Trilogue negotiations commenced on 6 June 2023, and a political agreement was reached on [14 December 2023](#) (the December Agreement). However, following indications that Germany would abstain from confirming the December Agreement in a Coreper meeting initially scheduled for 9 February 2024, a number of other Member States also indicated that they may also abstain or vote against the deal. This led to a reopening of negotiations among the Member States to try to secure a qualified majority enabling the CSDDD to proceed through the remaining stages of the legislative process. On 15 March 2024 a new proposal was confirmed by the European Council in a Coreper meeting held on that date and later confirmed by the European Parliament Committee on Legal Affairs on 19 March 2024 (the March Agreement). The March Agreement departs from the December Agreement in a number of key respects. Most significantly, it has a substantially reduced personal scope, meaning that the CSDDD will apply to only the very largest companies. The March Agreement was adopted in a plenary session of the European Parliament on 24 April 2024.

Member States will have two years to transpose the CSDDD into national law from the date of entry into force, with obligations to be phased in over a number of years.

A law which requires large companies to conduct human rights and environmental due diligence throughout their operations and value chains is a key initiative capable of harnessing the transformative potential of the UNGPs. However, the final text contains a number of shortcomings which risk jeopardising the objectives of the law. These include a reduced personal scope, carveouts for the financial sector, a reduced scope of due diligence on the downstream part of the value chain, and the absence of corporate governance elements.

In spite of these shortcomings, the deal reached on the CSDDD has huge potential to have a significant positive impact, but only if companies are encouraged to engage with it in a meaningful way. This requires not only the development of the law itself but a whole policy environment which creates enabling conditions for its effectiveness.

Everyone must play their part. Member States need to make sure that national laws putting in place the requirements of the CSDDD are ambitious, and that compliance is overseen by supervisory authorities with adequate resources and human rights and environmental expertise. The European Commission and the Member States need to ensure that proper guidance is issued and that other accompanying measures are put in place to ensure that companies can effectively meet the requirements of the law and that civil society organisations (CSOs), trade unions and others are supported to monitor its effectiveness. The EU must also consider how to support efforts in countries outside the EU through trade policy and development cooperation to ensure that the law encourages an elevation of human rights and an environmental standards throughout global value chains. Lastly, businesses everywhere, whether they are in scope of the law or not, need to take meaningful steps to effectively avoid and address the impacts they have on people and planet.

In Section B, this publication summarises the key elements of the CSDDD:

1. Personal scope
2. Material scope
3. Substantive due diligence
4. Scope of due diligence
5. Stakeholder engagement
6. Civil liability and enforcement
7. Financial institutions
8. Corporate governance

In Section C, this publication considers what is needed to ensure effective transposition and implementation of the CSDDD.

Section D concludes and offers final recommendations for what is needed to create a coherent policy and regulatory environment in line with the expectations of the UNGPs.



## B. KEY ELEMENTS OF THE CSDDD AND ALIGNMENT WITH BHR STANDARDS

### 1. Personal scope

In what is probably the most significant departure from the Commission's initial proposal and the political agreement reached in December 2023, the personal scope of the CSDDD has been significantly reduced by elevation of the employee and turnover thresholds. Under the agreement reached in December the Directive would have applied to EU and non-EU companies of 500 employees and a turnover thresholds of 150million Euro and medium sized companies of 250 employees and 40million turnover in "high impact" sectors, textile, agriculture, extractives and construction. This was estimated to apply to around 16,000 companies, around 1% of companies in the EU.<sup>2</sup>

Under the final text adopted in April 2024, however, the Directive only applies to very EU large companies of 1000 employees and a turnover of 450million Euro (Art 2(1)(a)) and non.EU companies with a net turnover of 450million in the EU (Art 2(2)(a)). It will also apply to companies which do not meet these thresholds, but is the ultimate parent company of a group which reaches these thresholds (Art 2(1)(b) and 2(2)(b)), as well as companies that have entered into franchising or licensing agreements in the EU in return for royalties amounting to more than EUR 22.5million in the EU, and a net turnover of more than EUR 80million (Art 2(1)(c) and 2(2)(c)). This represents around 5,000 companies. Or 0.05% of companies in the EU.<sup>3</sup> There will be a phase in plan pursuant to Article 37 as follows:

- 2 years: Member States required to transpose requirements of the Directive
- 3 years: Transposition laws would apply to companies of 5,000 employees and a turnover of 1.5billion EUR
- 4 years: Transposition laws would apply to companies of 3,000 employees and a turnover of 900million EUR
- 5 years: Transposition laws would apply to companies of 1,000 employees and a turnover of 450million EUR

While this is a significantly reduced scope and much longer timeline for application, the final text has retained the general approach of the CSDDD, whereby stricter obligations are imposed on larger companies who are perceived to have sufficient resources to comply, with the expectation that they will bring other smaller companies along through their business relationships. The proposal therefore requires companies captured to provide support to business partners<sup>4</sup> who are SMEs "where necessary in light of the resources, knowledge and constraints of the SME, including by providing or enabling access to capacity-building, training or upgrading management systems" (Art 10(2)(e)). In addition, where compliance with the requirements of a code of conduct or prevention action plan would jeopardise the viability of the SME, provide "targeted and proportionate financial support", however, it is unclear on what this means in practice and therefore what the threshold for the provision of assistance may be.

The CSDDD may have a much more limited scope than originally envisaged, but it will nonetheless have an indirect impact on a much broader range of companies both within and outside the internal market. There is a need to provide clear guidance and support also to companies beyond those directly captured by the law, see further section C2.4 below.

Lastly, the review clause (Art 36) expressly includes the personal scope of the CSDDD, including whether different corporate forms need to be considered, whether sector specific approaches are needed and whether employee or turnover thresholds need to be revised. This will be an opportunity to pursue further alignment with the UNGPs which expect all companies to undertake human rights due diligence in a manner proportionate to their size, sector, operational context, ownership and structure.<sup>5</sup>

## 2. Material scope

Companies can impact the full spectrum of human rights and for that reason the UNGPs expect that they should therefore identify adverse impacts against all internationally recognised human rights. At a minimum, companies should identify impacts by reference to the rights contained in the International Bill of Human Rights (IBHR) and the ILO Core Conventions.

The Directive defines 'adverse human rights impact' (Art 3(1)(c)) as the impact resulting from an "abuse" of:

- selected human rights listed in an annex; and
- other human rights enshrined in a list of international instruments<sup>6</sup> provided that:
  - a) the human right can be abused by a company;
  - b) the human right abuse directly impairs a legal interest protected in the human rights instrument; and
  - c) the company could have reasonably foreseen the risk that such human right may be affected.

The CSDDD approach departs from the UNGPs' expectation that companies consider impacts on "all human rights" in two main ways: first, that the human rights a company is required to consider is limited and subject to complex conditions; and second, in defining an adverse human rights impact by reference to an "abuse" of a right.

First, while the annex setting out the rights and instruments which constitute the material scope at first glance appears relatively comprehensive in its coverage, the list of rights has important gaps. The compromise text of the CSDDD takes the approach of only listing instruments which have been ratified by all Member States, which means that the material scope of the CSDDD is necessarily partial and will not include the full range of rights in relation to which company actions may remove or reduce enjoyment. Key omissions include the [Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment](#), the [Convention on the Elimination of all forms of Discrimination Against Women](#) and the [Convention on the Elimination of all forms of Racial Discrimination](#). This approach is out of step with the EU's approach to market access under the Generalised Scheme of Preferences Plus (GSP+), which provides trade incentives to countries who have implemented specified international

human rights instruments listed in the [GSP+ Regulation](#), which does include these instruments. Further, the annexes do not refer to key European human rights instruments including the European Convention on Human Rights and the EU Charter of Fundamental Rights.

Defining adverse human rights impact by reference to “human rights abuses” not expressly listed but enshrined in the listed instruments, if they meet certain conditions, could have a limiting effect on the scope of human rights under consideration and add a level of complexity to a company’s evaluation of its adverse human rights impacts. For example, a company would be required to take a view on whether a right could be abused by a company, a complex question of international law which is not yet settled. Such an approach risks company practice creating a standard which may be out of step with international law standards.

Second, notably the UNGPs do not use the term ‘abuse’ of rights, but rather frame adverse impacts as any action or omission that removes or reduces the ability of an individual to enjoy his or her human rights. Introducing the concept of ‘abuse’ carries the connotation of a breach of duty by States under international human rights law and risks inadvertently raising the threshold for when an impact would be covered by the proposal and thereby should be part of a company’s due diligence obligation.

Further, it is not clear whether, in the context of civil liability, a court would be required to make a determination that there has been an abuse in order for a claimant to succeed. Such approach could significantly reduce the scope of the due diligence obligation and civil liability mechanism. Breaches of international law are not generally recognised as a cause of actionable harm in a civil claim under domestic law. If the actionable harm in the law requires an assessment of whether there has been a breach of international human rights law or whether there has been an ‘abuse’, then this presents challenging issues for a domestic court to determine and may create an unduly high threshold for claimants to meet in order for a claim to succeed.<sup>7</sup> Guidance and judicial capacity building are essential in order to ensure that the provisions in the proposal are consistently applied and that the liability mechanism effectively facilitates access to remedy.

It remains an attention point to encourage companies to take a wider approach to consideration of their human rights impacts in line with the expectations of the UNGPs, rather than adopting a strict compliance driven approach only in respect of the rights explicitly covered by the CSDDD. Further, consideration of the material scope set out in the annexes is expressly included in the review clause (Article 36(2)(d)).

### **3. Substantive due diligence**

The obligation to conduct due diligence is at the heart of the CSDDD. Accordingly, it is critical that the due diligence requirements encourage meaningful engagement on the part of companies to identify and take steps to avoid and address adverse human rights impacts. Companies are required to: put in place a policy framework (Art 7); identify the impacts they (may) have on human rights and the environment (Art 8); take appropriate measures to prevent or bring an impact to an end (Arts 10 and 11); provide remediation in case of actual adverse impacts (Art 12); carry out meaningful engagement with

stakeholders (Art 13); maintain a notification and complaints procedure (Art 14); monitor the effectiveness of due diligence (Art 15); and communicate on their due diligence (Art 16).

Companies are entitled to prioritise impacts where it is not possible to address all identified impacts at once, based on the severity and likelihood of the impact (Art 9). This is not fully aligned with the expectations of the UNGPs, which do entitle a company to prioritise impacts, but on the principle of severity only. This means that action should be taken on the basis of whether an impact is severe in the sense of its scope and scale, and where a delayed response would make the impact irremediable, regardless of its likelihood.<sup>8</sup> The same approach has been captured by the related Corporate Sustainability Reporting Directive (CSRD) European Sustainability Reporting Standards.

Companies are required to take “appropriate measures to identify and address their impacts, defined as “measures that are capable of achieving the objectives of due diligence, and *effectively* addressing the adverse impact identified” (Art 3(1)(o)). As noted further in section 2.1, this “effectiveness” requirement is an important feature which could potentially mitigate the risk of companies adopting a compliance focused approach to due diligence.

When designing the right measure in a given context, companies should consider how they are involved in an impact – meaning whether the company causes an impact alone or jointly with a subsidiary or business partner, or whether the impact is caused only by a business partner in the company’s chain of activities (Arts 10(1)(a) and 11(1)(a)). Additionally, companies should consider whether the impact occurs at the level of a subsidiary or business partner, and the company’s ability to influence the actor causing the adverse impact (Arts 10(1)(b-c) and 11(1)(b-c)). While this is a departure from the precise terminology of the UNGPs involvement framework (cause, contribute direct linkage), the recitals to the CSDDD refer to the UNGPs and explain how the concepts used in the CSDDD relate to the involvement framework (recital 53). How a company may be involved in an impact is an important consideration which can help to determine what appropriate measures will be necessary in a given case, as the UNGPs recognize.<sup>9</sup> However, while the UNGPs outlined the three categories of involvement as a means of encouraging companies to consider the impacts they may have in a broader sense, they also specified responsibilities with regard to remediation which flowed from each category: where a company caused or contributed to an impact, they should enable remediation, where a company was linked to an impact, they should exercise leverage. Since their adoption, we have observed some examples of company practice which have undertaken a sometimes reductive assessment that a company was in the “directly linked” category rather than the “contribution” category, while failing to see that these categories sit on a spectrum. This has often been driven by a desire to limit responsibilities to remediate.<sup>10</sup> The CSDDD could represent a positive advancement if it is accompanied by appropriate guidance, encouraging companies to consider how they could be involved in an impact to inform appropriate measures without creating incentives to artificially place a company in one involvement category or another.

The CSDDD includes a list of “appropriate measures” that a company “shall” take

in order to address impacts (Arts 10(2) and 11(3)). These range from developing prevention or corrective action plans, providing support to those with whom the company has a business relationship, using contractual cascading and verification, to making investments or other adjustments to management or production processes. In addition to the list of measures companies “shall” take, the CSDDD lists additional measures that companies “may” adopt to address an adverse impact, including engagement with business partners, capacity-building, guidance, and administrative and financial support (Art 7(2a) and Art 8(3a)).

The CSDDD also outlines steps that a company shall take in the event that an impact cannot be prevented, mitigated or brought to an end, including developing enhanced prevention or corrective action plans and increasing leverage through suspension of the business relationship (Arts 10(6)(a) and 11(7(a))), and terminating the business relationship if there are no expectations that those efforts would succeed (Arts 10(6)(b) and 11(7(b))) emphasising that these are to be considered a “last resort”.

As we have [argued previously](#), a closed list of measures has the potential to stifle innovation and to encourage a compliance rather than a risk-based approach to due diligence. By listing mandatory measures companies “shall” take, supplemented by voluntary measures they “may” take, the CSDDD attempts to strike a balance between: on the one hand, providing legal certainty to enable companies to understand their obligations and to enable other stakeholders to be able to monitor their efforts; and on the other hand, encouraging a flexible approach. Whether this approach, supplemented by the effectiveness requirement and obligations to consult with stakeholders, is sufficient to guard against the risk of checkbox compliance remains to be seen. There is a need for clear authoritative guidance for companies to ensure that they engage with the risk-based approach to due diligence set out in the CSDDD in line with the expectations of the UNGPs. Without it there is a risk that the law will not achieve its aims. Similarly, a company will not be insulated from criticism if it only undertakes all specified actions on a closed list if these actions are not sufficient to effectively address its human rights impacts.

#### **4. Scope of due diligence**

The CSDDD prescribes due diligence processes that cover not only a company’s own operations and the operations of its subsidiaries, but also business partners in its so-called “chains of activities”. This new concept was proposed by the Council and entails, first, the activities of upstream business partners that relate to the products and services of the company in question and, second, specific activities of downstream business partners, including the distribution, transport and storage of products, provided that these activities are carried out for the company or on its behalf (Art 3(g)).

The UNGPs and OECD Guidelines expect due diligence to be conducted across the full value chain, including the downstream, i.e., what happens after a product or service leaves the company. Unfortunately, the CSDDD take a more limited approach which includes some aspects of the downstream, but is limited to distribution, transport and storage of the product. It does not expressly include consideration of, for example, the design, sale, marketing, composition, commercialisation or use of products or services or their disposal.



As we have outlined in our recent report, [Due diligence in the downstream value chain: case studies of current company practice](#), many companies are already doing due diligence in this part of the value chain, including by adapting existing processes to consider impacts of the design, sale, marketing, use and disposal of products. It is arguable that requirements to do due diligence on a company's own operations should include due diligence on, for example, its design, sales and marketing practices which would necessarily involve consideration of how products or services are used and disposed of. Nonetheless, it is important to ensure that the CSDDD does not perversely encourage a step back from emerging good practices. This remains an attention point, particularly given that the definition of "chain of activities" is a point that is explicitly included for consideration in the review clause (Art 36(2)(c)) and a definition that deviates from the full value chain scope of the CSRD.

## 5. Stakeholder engagement

Stakeholder engagement with affected people and groups as well as their representatives is one of the most critical means of ensuring that effective approaches to due diligence are adopted. By consulting with affected stakeholders throughout the due diligence process, companies can more effectively identify the impacts they may have on human rights and design appropriate measures to adequately address them.

"Stakeholder" is defined broadly to mean employees of the company and its subsidiaries, trade unions and workers' representatives, consumers and other individuals, groups, communities or entities whose rights or interests are or could be affected by the products, services and operations of the company, its subsidiaries and its business partners (Art 3(1)(n)). The definition includes NHRI and environmental institutions and CSOs whose purpose includes the protection of the environment, and the legitimate representatives of those individuals, groups, communities or entities.

In line with the UNGPs and OECD Guidelines, meaningful engagement with rightsholders and other stakeholders should be required across the due diligence process. However, in the CSDDD, stakeholder engagement is limited to specified stages of the due diligence process (Article 13(3)), namely:

- a) to gather the necessary information on actual or potential adverse impacts, in order to identify, assess and prioritise adverse impacts pursuant to Articles 8 and 9;
- b) the development of prevention and corrective action plans pursuant to Article 10(2) and Article 11(3), and the development of enhanced prevention and corrective action plans pursuant to Article 10(6) and Article 11(7);
- c) the decision to terminate a business relationship pursuant to Article 10(6) and Article 11(7);
- d) the adoption of appropriate measures to remediate adverse impacts pursuant to Article 12.
- e) as appropriate, when developing qualitative and quantitative indicators for the monitoring pursuant to Article 15.

This excludes, for example, stakeholder consultation on: "appropriate measures" other than prevention and corrective action plans, remediation or the due diligence policy

under Article 5. Companies are also allowed to use multistakeholder initiatives (MSIs) and industry schemes to facilitate consultation with stakeholders. The CSDDD requires that their use is not a substitute for consultation with a company's own employees (Article 13(6)) but potentially allows for freer use for consultation with other affected stakeholders.

There is a need to ensure that companies adopt a broad approach to consultation with stakeholders, and see the value of including them in all stages of the due diligence process, particularly on tracking the effectiveness of measures taken to address impacts in line with the UNGPs. Further, there is a clear need for guidance on effective stakeholder engagement, particularly where such engagement is mediated through MSIs or industry associations.

## **6. Enforcement and civil liability**

The CSDDD requires that Member States designate one or more Supervisory Authorities to supervise compliance with the laws transposing the CSDDD (Art 24(1)).<sup>11</sup> It also specifies that Supervisory Authorities must have adequate powers and resources to discharge their functions (Art 25(1)). These include: to require companies to provide information and to investigate compliance; order a company to cease an infringement by taking an action or by ceasing a conduct; order a company to abstain from the repetition of a conduct; order a company to provide remediation proportionate to the infringement and necessary to bring it to an end; impose penalties; and adopt interim measures in case of imminent risk of severe and irreparable harm. Supervisory Authorities may initiate investigations on their own initiative, or respond to "substantiated concerns" reported by natural or legal persons that a company is not complying with its obligations. In addition to the administrative supervisory framework, the CSDDD includes other mechanisms including a statutory mechanism for civil liability (Art 29), and a company level complaint mechanism (Art 14).

The civil liability mechanism requires Member States to ensure that a company can be held liable for damages caused by the failure to meet due diligence requirements in Articles 10 and 11, subject to certain conditions:

- harms must be caused intentionally or negligently; and
- they must be done to a natural or legal person.

This second requirement may place restrictions on certain types of claims, for example, environmental or climate change litigation where there is no clear natural or legal person harmed or litigation based on group rights collectively exercised.

However, there is express provision that Article 29 cannot limit liability under national law. Accordingly, it will therefore not restrict jurisdictions with stricter tort regimes. The CSDDD addresses certain access to justice obstacles discussed below at section C2.3.

In addition, the CSDDD obliges companies to establish complaint mechanisms accessible to a broad range of stakeholders (Art 14). This mechanism requires companies to consider complaints, be transparent about processes for assessing whether they are well founded, and if well founded the impact the subject of the complaint is taken to have been identified for the purpose of the CSDDD, and must

therefore be dealt with in a company's due diligence process.

As discussed further in section C2.3, while incorporating a range of enforcement mechanisms is welcome, these mechanisms can only provide a partial solution to the persistent challenge that remedy remains poorly implemented in the context of business abuses of human rights.<sup>12</sup> There is a need to ensure that rightsholders within and outside the EU are supported to access the oversight and remedial mechanisms contained within the CSDDD, and that further efforts to develop access to justice mechanisms continue alongside implementation of the CSDDD.

## 7. Financial institutions

A particularly contentious issue in the negotiation of the CSDDD was the extent to which it should apply to the financial sector. Following intense lobbying, the final agreement includes the financial sector within scope of the CSDDD, but in a limited way: financial institutions are required to conduct due diligence on their own operations and their supply chain, rather than being required to consider the impacts of investments, loans, insurance or other financial services (i.e., their "downstream" activities). As these areas are both at the core of the business activities of financial institutions and where they have the most risk of negative human rights and environmental impacts, this is a critical shortcoming of the deal and a missed opportunity to include a key player in the transition to a more sustainable global economy.

This is unfortunate as financial institutions are uniquely placed to exercise leverage and improve the human rights practices of thousands of real economy companies. There are good emerging human rights and environmental due diligence practices from the sector, and [many institutions](#) have voiced their support for finance being fully included in the CSDDD. However, as a recent [DIHR benchmark](#) of the largest Danish financial institutions showed, the sector struggles to demonstrate respect for human rights.

Nonetheless, there is provision in the review clause which requires consideration of this issue (Art 36(1)), requiring the Commission to submit a report to the Council and European Parliament as soon as possible and at the latest 2 years after adoption. The report will be required to consider the necessity to lay down additional sustainability due diligence requirements tailored to regulated financial undertakings with respect to the provision of financial services and investment activities, and the options for such due diligence requirements as well as their impacts, in line with the objectives of the Directive.

## 8. Corporate governance

The Commission's proposal for the CSDDD included a number of corporate governance elements, as follows:

- a directors' duty of care which stated that directors should take into account the consequences of their decisions for sustainability matters including human rights, climate change and the environment in discharging their duty to act in the best interests of the company;<sup>13</sup>
- clarification that responsibility for putting in place and overseeing the due diligence policy and due diligence process is placed on directors with due input

- from relevant stakeholders and CSOs;<sup>14</sup> and
- requirements that directors report to the board in respect of due diligence and take steps to adapt corporate strategy to take into account the impacts identified and addressed in accordance with the due diligence process set out in the proposal.<sup>15</sup>

However, after opposition from some Member States and intense industry lobbying, these corporate governance aspects were omitted from the CSDDD.

Engagement by executive management and boards needed to ensure that the company undertakes a process of meaningful environmental and human rights due diligence which assesses the impacts that the company has on relevant rightsholders and prioritises action to address those impacts in accordance with the principle of severity, consistent with the approach set out in the UNGPs.<sup>16</sup> Board oversight further has the potential to improve corporate accountability and make environmental and human rights due diligence a matter of strategic priority.<sup>17</sup> This is often critical to enabling meaningful implementation throughout companies.<sup>18</sup> There are legal precedents for such approach, for example both the UK and Australian Modern Slavery Acts include requirements around board sign-off.

The [overall feedback](#) to the consultation on the CSDDD indicated overwhelming support (637 overall respondents, 86,2%) for the integration of sustainability risks, impacts and opportunities into the company's strategy, decisions and oversight. Individual companies and business associations expressed the same sentiment with 70,6% (211 respondents) showing support. In the case of NGO respondents, 92,4% (159 respondents) agreed. Despite this, there is a clear shortfall in such governance practices, and in particular the allocation of responsibility for overseeing and implementing day to day due diligence. According to 2020 [analysis by the Alliance for Corporate Transparency](#) on the sustainability reports of 1000 EU companies, less than 15% integrate sustainability into core business strategy, board discussions, and performance incentives. According to the 2023 [Corporate Human Rights Benchmark](#), only 27% of companies allocate clear day to day responsibility for a company's human rights commitments or provide training, whereas all top ten companies implement both these practices.

It is therefore regrettable that the CSDDD did not ultimately clarify expectations on how executive management and boards should engage with and exercise oversight over human rights and sustainability issues. Accordingly, it remains an attention point to ensure that companies are encouraged to put in place adequate governance structures and assign responsibility for oversight of due diligence required under the CSDDD.

## C. WHAT IS NEEDED TO HAVE EFFECTIVE TRANSPOSITION AND IMPLEMENTATION?

### 1. Transposition

Member States must transpose the requirements of the CSDDD within two years. Certain elements of the CSDD are subject to a “maximum harmonization” approach (Art 4), requiring Member States to transpose their requirements faithfully without “gold plating” by imposing stricter obligations. This maximum harmonisation approach is applicable to Articles 8(1) and (2), 10(1) and 11(1) which set out the general obligations to identify, prioritise and take appropriate measures to address actual or potential impacts. However, there are a number of qualifiers to this approach, meaning that Member States will have considerable discretion as to how they transpose the requirements of the directive into national law:

- Article 4(2) states that “**this Directive shall not preclude Member States from introducing, in their national law, more stringent provisions, diverging from those laid down in Articles other than Articles 8(1) and (2), 10(1) and 11(1), or provisions that are more specific in terms of the objective or the field covered, in order to achieve a different level of protection of human, employment and social rights, the environment or the climate.**”
- Further, there is language in recital 31 which states that: “**this Directive should not preclude Member States from introducing more stringent national provisions diverging from those laid down in Articles other than Articles 8(1) and (2), 10(1) and 11(1), including where such provisions may indirectly raise the level of protection of those Articles 8(1) and (2), 10(1) and 11(1), such as the provisions on the scope, on the definitions, on the appropriate measures for the remediation of actual adverse impacts, on the carrying out of meaningful engagement with stakeholders and on the civil liability; or from introducing national provisions that are more specific in terms of their objective or the field covered, such as national provisions regulating specific adverse impacts or specific sectors of activity, in order to achieve a different level of protection of human, employment and social rights, the environment or the climate”  
Emphasis added.**

This means that Member States will be able to transpose the requirements of the Directive flexibly, and potentially put in place more ambitious requirements. It will be an attention point for policymakers, CSOs, NHRIs and other key stakeholders to ensure that the national transposition laws at least meet the requirements of the CSDDD, and potentially maintain a higher level of ambition enabling better alignment with international standards where this is lacking.

### 2. Implementation

#### 2.1 Approach to compliance

With a move from the soft law responsibilities set out in the international standards towards the creation of hard law obligations on businesses including to undertake due diligence, there is a danger that the flexible, risk-based approach to the management



of human rights impacts envisaged by these frameworks is supplanted by a “checkbox compliance” approach.

Not all human rights impacts can be brought to compliance levels immediately including as they may be systemic to an industry or a particular geographical context. In such instances, effective due diligence involves more nuanced approaches to creating change and addressing systemic impacts, which should be encouraged by the implementation of the Directive.<sup>19</sup>

Companies with a more mature approach to engaging with their human rights impacts have adopted a range of strategies to address the root causes of adverse human rights impacts and work more collaboratively with their business partners, state authorities and other stakeholders. These include the use of human rights impact assessments, empowering trade unions and civil society, making investments in management or production processes and creating business models which better respect human rights, encouraging long term collaboration and capacity building with partners and working at the sectoral level. However, it is amongst the larger companies that the law captures that mature approaches to human rights due diligence beyond reliance on codes of conduct and certification are found. This could mean that the law perversely encourages a step back from best practice, for example, by creating a misapprehension that companies need only undertake the appropriate measures expressly required in Articles 10 and 11, rather than undertaking a holistic, risk-based approach to due diligence.<sup>20</sup>

As discussed above, there are a number of design features which could guard against the risk of checkbox compliance, such as the requirement that appropriate measures be “effective” and by requiring meaningful engagement with stakeholders. However, these must be supported by clear guidance and an approach to administrative supervision that emphasises the need for companies to meaningfully engage with the process of risk-based due diligence in the spirit of the UNGPs.

## **2.2 Administrative supervision**

The CSDDD covers a very broad range of issues and areas of law and these must be reflected in the capacities and competences of a Supervisory Authority including but not limited to: corporate law, trade law, private international law, human rights law, sector and industry-specific challenges. It is critical in particular that any Supervisory Authority designated must have strong human rights competencies. NHRIs, as human rights experts well versed in the national contexts, could play a role in ensuring this.<sup>21</sup>

The CSDDD provides powers and mandate the Supervisory Authority should have at a minimum, and Member States must ensure that such Supervisory Authorities are adequately equipped to monitor the CSDDD transposition law including by having sufficient expertise in human rights. As noted above, it is also critical that the Supervisory Authority adopts an approach to supervision which emphasises the need for companies to comply with the CSDDD in the spirit of the UNGPs.

### **2.3 Remediation and access to justice**

The CSDDD contains an obligation on Member States to require that companies provide remediation where a company has caused or jointly caused an adverse impact. While the CSDDD is not prescriptive as to how Member States should ensure this, Supervisory Authorities are to be equipped with powers to order remediation. The CSDDD defines “remediation” to mean restitution of the affected persons or communities to a situation as close as possible to that they would be in had the impact not occurred, proportionate to the company’s involvement (Art 3(1)(t)). It also specifies that remediation should include both financial and non-financial compensation.

The proposal creates a novel pathway to civil liability for harms occasioned as a result of due diligence failures (Art 29). While the approach of the CSDDD is generally consistent with the expectations of the UNGPs, it applies direct obligations only on the largest companies. This limited approach to personal scope, combined with limitations on the material scope may therefore undermine the effectiveness of the CSDDD as a mechanism to facilitate access to remedy for corporate human rights impacts at large. The CSDDD includes a number of measures to address access to justice barriers commonly faced by claimants litigating business and human rights disputes, including access to information, limitation periods, costs of proceedings, availability of injunctive relief and the need for representative actions (Art 29(3)). However, these are only some of the barriers faced by claimants, indeed generally by public interest litigants.<sup>22</sup> Further barriers such as lack of collective redress mechanisms and challenging burdens of proof remain unaddressed in the CSDDD.

In order for the CSDDD to be effective, there is a need to continue developing additional pathways to remedy in line with the expectations of the UNGPs. This includes through operational level grievance mechanisms, multistakeholder initiatives, as well as reducing access to justice barriers which create challenges in accessing other legal avenues to remedy, such as tort or other claims. Support must be given to rightsholders and their representatives to be able to access the range of access to justice mechanisms contemplated by the CSDDD. This includes addressing access to justice barriers common in litigation, as well as ensuring that rightsholders both in and outside the EU are aware of the mechanisms they can use and are supported to avail themselves of those mechanisms.

### **2.4 Accompanying measures**

The CSDDD obliges the Commission to develop authoritative guidance as well as model contract clauses to help companies meet their due diligence requirements, for the Member States to develop tools and resources on how companies should fulfil their legal obligations (Arts 18-20). The CSDDD also sees a role for multistakeholder initiatives and third-party verification to support companies in discharging their due diligence obligations (Art 20).

However, in order to create an enabling environment for the CSDDD to be effective, these accompanying measures should focus not only on support to European companies, but also to other actors, such as civil society, trade unions and NHRIs which each have a role to play to create an effective enabling environment. These actors should also both contribute to and be supported by this ecosystem of other policy and regulatory interventions including development cooperation at the EU and Member

State levels, trade and investment policy.<sup>23</sup> This should be accompanied by other measures to support states to step up efforts to realise the UNGPs alongside efforts to support implementation of the CSDDD, including support to processes to develop National Action Plans on Business and Human Rights.

This is particularly necessary as the CSDDD will have relevance not only within the EU but also on global value chains, where it will impact on a wide range of non-EU entities and activities as EU based entities cascade requirements onto their suppliers outside the EU. EU regulatory initiatives, included the CSDDD aims at enhancing the enjoyment of human rights by workers, communities, consumers and end-users across global value chains. However, the imposition of elevated standards on third country companies leaves open the possibility that they may inadvertently encourage divestment from challenging contexts. This would represent a departure from the expectation of the UNGPs that companies engage with their business partners through a process of continuous improvement with disengagement as a last resort. In addition to guidance, tools and resources, accompanying measures such as development cooperation and trade policy are critical tools to create the required enabling environment in third countries.

## **2.5 Policy coherence**

The CSDDD is one part of a broader EU regulatory ecosystem made up of a range of regulatory and policy initiatives on sustainability which, in different ways address the impacts that businesses and financial institutions have on the enjoyment of human rights.

These include the CSDDD as well as initiatives on Corporate Sustainability Reporting, Sustainable Finance, as well as trade rules and import/export restrictions. Each initiative aims to incentivise or ensure that businesses, financial institutions and the economic system as such develop responsibly and contribute to sustainable development. Central to advancing both these aims is fostering respect for human rights by business and financial institutions. The measures, however, vary in the degree to which they align with human rights or business and human rights standards. Further, the measures approach their shared objective from slightly different angles, each potentially forming part of a “smart mix” of measures as envisaged by the UNGPs:

- Some initiatives, such as those which create due diligence obligations like the Conflict Minerals and Timber Regulations and the CSDDD, and the Deforestation Regulation, are aimed at ensuring that companies establish policies and processes, which would enable them to identify and address the impacts that they have on people and planet;
- Some initiatives, such as the Corporate Sustainability Reporting Directive and Sustainable Finance Disclosures Regulation, aim to encourage sustainable behaviour through disclosure regimes, requiring companies to report on the impacts they have on people and the planet, as well as their governance, policies, and procedures for managing such impacts;
- Others, like the Sustainable Finance Taxonomy, provides a classification system of economic activities and their sustainability contributions with the ambition to drive sustainable investment and combat green washing; and
- Others leverage EU market access to encourage corporate actors to address

their human rights impacts, such as the Conflict Minerals and Timber Regulations, the Batteries Regulation, the Deforestation Regulation and the Forced Labour Ban, and the due diligence obligations in the proposed CSDDD by its application to certain non-EU companies.

As described in a fuller account of these initiatives, [How do the pieces fit in the puzzle? Making sense of EU regulatory initiatives related to business and human rights](#), alignment with the UNGPs varies significantly across these initiatives, adding to the complexity of the EU's developing infrastructure around business and human rights. This comes with implementation challenges to the companies directly targeted by the laws. To guide implementation, there is a need to maintain the UNGPs as a continued reference point to ensure that the CSDDD is adhered to not just in accordance with the letter of the law but also in the spirit of the UNGPs thereby enabling policy coherence across EU instruments

### 3. Review

The CSDDD includes a review clause (Art 36), which requires the Commission to make a report to the Council and European Parliament on the implementation of the Directive six years after entry into force. The first report is expressly required to address a number of elements, including:

- The impact on SMEs;
- The personal scope, including whether different corporate forms need to be considered and whether employee or turnover thresholds need to be revised;
- Whether the definition of “chain of activities” needs to be revised;
- whether the annex needs to be modified, including in light of international developments, and whether it should be extended to cover additional adverse impacts, in particular adverse impacts on good governance;
- the effectiveness of enforcement mechanisms including penalties and civil liability; and
- whether changes to the level of harmonisation are required to ensure a level-playing field for companies in the internal market.

In addition, as noted above, the Commission will be required to prepare a second report no more than two years after entry into force which specifically considers whether additional requirements are needed in respect of financial undertakings.

There is an option for the Commission's reports to be accompanied by a legislative proposal. With a view toward feeding into the review process, CSOs, NGOs, NHRIs and other stakeholders should seek to gather evidence on implementation of the CSDDD and what additional amendments or measures are needed to address already identified shortcomings, as well as challenges that may materialise in the first years of implementation to ensure CSDDD achieves its objectives. This could be undertaken through benchmarking, gathering testimony from rightsholders, or other methodologies to assess the impact of the law.

## D. LOOKING AHEAD: MAXIMISING IMPACT THROUGH TRANSPOSITION AND IMPLEMENTATION

As we turn now toward transposition and implementation of the CSDDD, we must ensure that we maximise the chances of the Directive achieving the paradigm shift in corporate respect for human rights of which it could be capable. We have highlighted the importance of policy coherence within the EU regulatory environment, to ensure that the range of policy and regulatory initiatives which the EU has adopted in recent years which regulate business impacts on human rights and the environment are implemented in a way which is mutually reinforcing and creates the right incentives. Maintaining the UNGPs as a touchstone is one means of ensuring that each of these initiatives is developing in the right direction and contributing to the smart mix.

However, just as there is a need for a coherent legal environment, there is a corresponding need for a coherent approach to the development of accompanying measures. This is a complex ecosystem of measures implemented at the EU, Member State and Partner Country levels as well as through multi-stakeholder initiatives and industry initiatives from the private sector. Further, other actors, such as civil society, trade unions and national human rights institutions also have a role to play to create an effective enabling environment. These actors should also both contribute to and be supported by this ecosystem of accompanying measures.

In addition, international dialogue and engagement is needed to drive action at a global level. A number of countries outside the EU are in the process of developing their own mandatory due diligence laws, or other initiatives to drive business respect for human rights, such as through sustainability reporting requirements. Efforts to develop a legally binding instrument at the international level on business and human rights are ongoing and should also be considered as a key component of this developing ecosystem.

Overall, it is clear that the UNGPs have continued relevance, both in ensuring coherence at these various levels of policy and regulation, but also to ensure that they are being implemented in the spirit of the framework and consistent with its objective: to create a global standard of practice expected of states and business, enabling business to live up to their responsibility to respect human rights and to drive better outcomes for people.



## ENDNOTES

- 1 'A Just and Sustainable Economy: Commission Lays Down Rules for Companies to Respect Human Rights and Environment in Global Value Chains' [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_22\\_1145](https://ec.europa.eu/commission/presscorner/detail/en/IP_22_1145)
- 2 The Explanatory Memorandum accompanying the Commission's proposal states that it is expected that 13,000 EU and 4,000 third country companies will be captured by the proposal. [European Commission Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive \(EU\) 2019/1937](#), page 16.
- 3 This estimate is based on calculations from SOMO, with data from Eurostat and Orbis, cited in Anna Brunetti, "[Scope of EU supply chain rules cut by 70% ahead of key Friday vote](#)", Euractiv, 15 March 2024.
- 4 "business partner" means an entity (i) with which the company has a commercial agreement related to the operations, products or services of the company or to which the company provides services pursuant to point (g) ('direct business partner'); or (ii) which is not a direct business partner but which performs business operations related to the operations, products or services of the company ('indirect business partner'), Art 3(1)(f).
- 5 UNGPs, GP 14.
- 6 The Annex concerning human rights impacts is divided into two parts: Annex I, Part I Section 1, which lists rights the subject of the Directive and Annex I, Part I Section 2 which lists the international instruments from which those rights derive.
- 7 For further analysis on this point, please see Gabrielle Holly and Claire Methven O'Brien, [Human rights due diligence laws: key considerations: Briefing on Civil Liability for Due Diligence Failures](#), Danish Institute for Human Rights (2021)
- 8 See [UNGPs](#), GP 24 and commentary.
- 9 UNGPs, GP 15, 17, 19 and 22 and associated commentary.
- 10 See for example analysis from the [Thun Group of Banks](#) which advanced the view that financial institutions could only ever be directly linked to an impact, and therefore did not bear responsibilities to remediate. This analysis was disputed by John Ruggie, the Architect of the UNGPs in his [response](#).
- 11 The articles concerning the mandate and powers of the Supervisory Authority are Articles 24-28.
- 12 See for example the findings of the following: [UN Working Group on Business and Human Rights: Guiding Principles on Business and Human Rights at 10: taking stock of the first decade](#) (2021); and OHCHR, [The Accountability and Remedy Project](#) (ARP) Main reports I-IV; and World Benchmarking Alliance, [Corporate Human Rights Benchmark](#), 2023.
- 13 Article 25 of the [Commission Proposal](#)
- 14 Article 26 of the [Commission Proposal](#)
- 15 Article 26 of the [Commission Proposal](#)
- 16 On the need for clear governance, see for example, John F Sherman III [Human Rights Due Diligence and Corporate Governance](#) Harvard Kennedy School Working Paper No 79 (June 2021).
- 17 See , for example, John Morrison [Human Rights Due Diligence and Corporate Boards: Reflections on European Commission proposals relating to director duties](#)

- [and board oversight](#), Business and Human Rights Resource Centre Blog Series (9 March 2022).
- 18 See for example, John Morrison, Phil Bloomer and Camille Le Pors [Responsibility from the top down: Why human rights due diligence must be a mandated concern of corporate boards](#), Business and Human Rights Resource Centre Blog Series (3 March 2021).
  - 19 Gabrielle Holly and Signe Lysgaard [Legislating for impact: analysis of the proposed EU corporate sustainability due diligence directive | The Danish Institute for Human Rights](#), Danish Institute for Human Rights (22 March 2022), p30.
  - 20 Gabrielle Holly and [Legislating for impact: analysis of the proposed EU corporate sustainability due diligence directive | The Danish Institute for Human Rights](#), Danish Institute for Human Rights (22 March 2022), p20.
  - 21 Danish Institute for Human Rights, [Workshop report: Engaging with Supervisory Authorities under the Corporate Sustainability Due Diligence Directive](#), (6 March 2024).
  - 22 Fundamental Rights Agency, [Business and Human Rights: Access to Remedy](#) (5 October 2020)
  - 23 See European Commission and International Trade Centre, [Making Mandatory Human Rights and Environmental Due Diligence Work for All: Guidance on designing effective and inclusive accompanying support to due diligence legislation](#), (1 July 2022)