ENNHRI statement on the European Commission's Proposal on Corporate Sustainability Due Diligence

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ENNHRI, the European Network of National Human Rights Institutions, welcomes the publication of the European Commission's proposal on Corporate Sustainability Due Diligence (the Proposal).

In order to ensure that recovery after COVID-19 is just and equitable, that human rights abuses connected to unsustainable business practices are tackled, and that the urgent issues of climate change and environmental degradation are adequately addressed, there is a need to refocus on sustainable development and the principles set out in the 2030 Agenda, in which respect for human rights by business is deeply embedded.

The European Union has taken laudable steps to address these issues through the European Green Deal and the proposed Corporate Sustainability Due Diligence Directive. Each of them set an ambitious goal of transforming corporate behaviour and encouraging a sustainable future. The fundamental principles set out in the UN Guiding Principles on Business and Human Rights (UNGPs) remain a critical touchstone for the development of such regulatory solutions.

ENNHRI believes that the Proposal has a potential to have a significant positive impact for people and planet. However, this can only be realised if companies engage with it in a meaningful way. There is a danger that some features of the law will erode its effectiveness and lead to "checkbox compliance".

ENNHRI makes the following comments on the Proposal:

1. Scope of companies covered

The UNGPs are clear that the responsibility to respect human rights is shared by all businesses, regardless of size or sector. However, the personal scope of the Proposal is significantly less broad. It suggests that due diligence obligations will apply only to larger companies, while expecting them to support their smaller business partners to conduct business responsibly. Ultimately, only an estimated 13,000 EU and 4,000 non-EU companies will be required to comply, representing around 1% of EU companies. This is a departure not only from the UNGPs, but best

practice. In recent years there has been increased focus on encouraging and supporting SMEs to undertake their own due diligence in a proportionate way, rather than the "trickle down" approach set out in the law. It is not clear that the provisions in the Proposal requiring larger companies to provide support are sufficient to encourage SMEs to meaningfully engage in their own due diligence.

2. Due diligence obligations

Central to the due diligence process should be the risks to rights-holders. This means prioritising risks based on their severity to rights-holders, and meaningfully including rights-holders in due diligence steps as well as its enforcement. It should be a continuous process and cover a company's value chain. Applying to the value chain, rather than just the supply chain is an important recognition that companies can have impacts not only with respect to the production of their goods and services, but also with respect to their use, distribution and end of life disposal.

3. Scope of value chain/business relationships covered

The UNGPs and OECD Guidelines expect that companies take a risk-based approach to due diligence and focus their attention and resources to those impacts that are the most severe to those affected. The Proposal however does not require that companies prioritize actions guided by severity of risk. Rather, it requires that companies focus due diligence efforts based on closeness of the business relationship by stating that companies should exercise due diligence on their operations, subsidiaries and those with whom it has an "established commercial relationship". The concept of an "established commercial relationship" is not found in the international standards the Proposal is based on. This will likely exclude short-term business relationships from due diligence, even though short-term relationships often come with a high risk of human rights violations and should not fall out of the scope of risk assessments.

Experience in France under the *loi de vigilance* has shown that such an approach creates an easy way for companies to avoid due diligence obligations by maintaining an arms-length relationship with commercial partners. At the same time, it might create an incentive to enter into short-term contracts. Stable and long-term supplier relationships however are typically better from a human rights perspective since they enable companies to work with suppliers and ensure respect for human rights. Additionally, the definition in the Proposal is not clear, leading to uncertainty around what kinds of relationships will meet this threshold, and so how far the due diligence duty extends.

4. Civil Liability

ENNHRI welcomes the inclusion of a civil liability mechanism. The draft sets out a minimum set of circumstances in which a company should be liable for human rights or environmental harms occasioned as a result of due diligence failures. Providing a pathway to civil liability through judicial mechanisms is a critical component in providing access to remedy for rights-holders. However, under the Proposal, companies should not be liable for failing to prevent or cease harm at the level of "indirect business relationships" if it reasonably used contract clauses to secure responsible business conduct from partners and put in place processes to monitor compliance. The reliance on contract as a means to avoid liability creates dangerous loopholes which could undermine the effectiveness of the proposal.

More broadly, ENNHRI encourages the European Parliament and the ECouncil to grasp the opportunity of the drafting of this directive to better take into account the recommendations made, inter alia, by the European Union Agency for Fundamental Rights on how to overcome the numerous hurdles faced by victims when they seek redress for business-related human rights abuses.

ENNHRI welcomes the designation of the proposed Directive as being of mandatory overriding application, while being without prejudice to Union or national rules on civil liability related to human rights impacts or to adverse environmental impacts that provide for stricter liability.

5. Role of Stakeholders

Throughout the due diligence process, stakeholder, and in particular rights-holder engagement is a key element under the UNGPs and essential in improving human rights situations. Although the Proposal does include stakeholder engagement, it is mainly discretionary, such as at the crucial stage of identifying risks and adverse impacts (Art. 6(4)). Equally important is including rights-holders when designing appropriate remedy to best tailor it to the individual situation, including exploring forms of remedy other than financial. The draft does not mention any form of engagement at this step (Art. 8 (3)(a)). International guidelines also highlight stakeholder engagement at the monitoring stage so a company may best track the effects of its efforts, which the draft does not mention (Art. 10).

Further, it is positive that companies are required to establish a complaint mechanism accessible to affected persons and other stakeholders including trade unions and CSOs. This creates another avenue to extend the scope of value chain due diligence obligation beyond "established

commercial relationships". However, care must be taken to ensure that this does not unduly shift the burden on civil society and other organisations to identify a company's impacts across the value chain. These actors may not have the resources to monitor a company's full value chain impacts, or access to the same level of information about them available to the company.

6. Role of contract and responsible disengagement

Under the Proposal, companies are expected to seek contractual assurances from their business partners that they will act responsibly in accordance with a code of conduct, and put in place means to verify that their partners are living up to these requirements. However, this carries a risk that a company will "farm out" its management of human rights and environmental risks by passing responsibility to its partners through a contract clause, and then engaging a third-party certification firm to verify compliance. This approach also risks overlooking the role that the buying companies play in contributing to human rights violations through their purchasing practices, such as pricing pressure, last-minute cancelations and order changes.

Currently, the draft could lead to negative human rights impacts through companies ending a business relationship. While the Proposal makes clear that companies should prioritise engagement with their business partners it also anticipates the creation of new termination rights for companies in cases of severe impacts and obligations for a company to step away while preventative efforts are undertaken. This carries the possibility that companies will refrain from engaging with their business partners to improve human rights performance. It undermines the central logic of the proposal in applying obligations only to the largest companies in the hope that they will engage with their business partners.

Risks to rights-holders should also be central to the decision on whether a business relationship should be terminated or continued. Ending a business relationship can leave the affected people such as the workers in a more vulnerable position than continuing it. While it is positive to note that the draft considers disengagement as a last resort, it should also require that such a decision to end a business relationship be informed by the possible negative impacts of ending a relationship.

7. Administrative enforcement

ENNHRI welcomes the oversight structure which has clear rules on powers of the national supervisory authorities, including the power to investigate, inspect, order cessation of infringements, impose pecuniary sanctions and adopt measures to avoid irreparable harm. Such a range of administrative powers is necessary to account for the diversity and potential complexity of cases.

An important feature is the turnover based pecuniary sanctions, and to ensure their deterrent effect, the regulation should include a minimum percentage that member states set as the maximum fine. Human rights and environmental due diligence enforcement will be most effective if anchored in as many mechanisms as possible. It is therefore unfortunate that due diligence obligations are not linked to public procurement.

Another welcome feature is the EU-level cooperation mechanism through the European Network of Supervisory Authorities, since a seemingly arbitrary patchwork enforcement is not in the interest of companies, rights-holders, or anyone else. It is also positive to note that Member States will have to provide support to companies in their implementation. Further, it is positive to note that anyone can bring a "substantiated concern" to the supervisory authorities and have access to a court (or "other independent and impartial public body") competent to review the legality of the decisions, acts or failure to act of the supervisory authority.

About ENNHRI

ENNHRI is the European Network of National Human Rights Institutions. We bring together over 40 National Human Rights Institutions (NHRIs) to enhance the promotion and protection of human rights in Europe. Our network provides a platform for collaboration and solidarity in addressing human rights challenges and a common voice for NHRIs at the European level.

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