

ENNHRI Statement in the Context of the EU Trilogue Concerning the EU Corporate Sustainability Due Diligence Directive

October 2023

Executive Summary

On 23 February 2022, the European Commission (the Commission) published its [proposal for a Corporate Sustainability Due Diligence Directive](#) (CSDD Directive), which requires large companies to identify and address negative human rights and environmental impacts. The Council of the European Union (the Council) published its [General Approach](#) on 1 December 2022, departing in some key respects from the Commission's position. The [negotiating position](#) of the European Parliament (the Parliament) was adopted on 1 June 2023 and features several amendments. The three institutions are currently conducting trilogue negotiations to achieve an agreement on the final CSDD Directive by the end of 2023.

ENNHRI, the European Network of National Human Rights Institutions, welcomes the proposal for a CSDD Directive. An EU law is imperative to safeguarding and protecting human rights in global value chains. As highlighted in the Commission's proposal, human rights and environmental impacts in the business context continue to prevail. By requiring companies to systematically identify and address the (potential) human rights and environmental impacts of their own activities and value chains, such legislation can facilitate companies taking proactive measures to prevent, mitigate and remedy human rights abuses. It further helps ensure affected rightsholders to seek redress where insufficient human rights management on the part of companies results in damages.

This statement follows previous statements of ENNHRI following the publication of the [Commission's proposal](#) and the [Council's General Approach](#). ENNHRI makes the following recommendations with a view to inform the trilogue negotiations:

1. [Substantive due diligence](#): The substantive due diligence obligations should be based on a risk-based approach to due diligence. Appropriate measures must be defined as context specific and, as proposed by the Parliament, designed to be effective in reducing human rights and environmental impacts.

2. [Extent of the due diligence obligation](#): It is vital that the scope of due diligence a company is required to undertake includes impacts which arise not only in the upstream but also in the downstream part of the value chain. Omitting downstream activities can lead to severe human rights impacts not being properly considered by a company, which necessitates a definition of scope that moves beyond the three positions proposed.
3. [Civil liability, administrative supervision and remedy](#): The CSDD Directive should provide for civil liability for all harms which occur as a result of due diligence failures and address hurdles rightsholders commonly face when seeking redress, including legal standing, access to information, evidence barriers, legal costs, the length of proceedings, and limitation periods. Supervisory authorities should have broad powers to enforce the CSDD Directive, complementary to judicial review. The Directive should emphasise the need for companies to remediate and clarify that remediation can take different forms.
4. [Financial institutions](#): In line with international standards, financial institutions should undertake due diligence throughout their economic activities, including in respect to the provision of financial services and investment activities. To account for the particularities of investor-investee relationships, the EU legislator may specify what measures are appropriate in this specific context, as proposed by the Parliament.
5. [Stakeholder engagement](#): Meaningful engagement with stakeholders and particularly with rightsholders should be embedded throughout the due diligence process along the lines of the Parliament's position requiring not only engagement to properly identify impacts and determine appropriate measures, but also proactive communication and the provision of relevant information.
6. [Material scope](#): Companies can impact the full spectrum of human rights and for that reason, they should identify adverse impacts against all recognised human rights and environmental instruments in line with the approach of the UNGPs.
7. [Corporate governance, strategy and business model](#): The CSDD Directive should require companies to take human rights considerations into account when making decisions, also at the highest management level, as put forward in the positions of the Commission and the Parliament.
8. [Personal scope](#): The scope of application of the Corporate Sustainability Reporting Directive and the CSDD Directive should match to ensure alignment between the substantive due diligence obligations and the complementary reporting requirements.

1. Substantive due diligence

The key provisions of the CSDD Directive are those defining due diligence obligations for companies. Forming the core of the planned Directive, it is essential that they are designed in a way that encourages a risk-based approach and meaningful engagement to identify and address adverse human rights and environmental impacts. To that end, the provisions on due diligence should require companies to take appropriate measures that are both context specific and effective to prevent, mitigate and remediate negative impacts on human rights and the environment. It is crucial to forestall due diligence obligations that encourage checkbox compliance. Therefore, we recommend:

- incorporating effectiveness criteria in the definition of appropriate measures and, where possible, in definitions of the measures themselves;
- defining a non-exhaustive list of appropriate measures that a company should take in response to adverse impacts to promote effective risk-based due diligence without stifling innovation;
- ensuring that companies consider not only impacts which they cause, but also impacts to which they contribute or are directly linked to, when determining what appropriate measures to take; and
- demanding meaningful engagement with stakeholders throughout the due diligence process, including when designing appropriate measures.

The CSDD Directive turns the responsibilities of companies to undertake due diligence under international soft law, including the UNGPs and the OECD Guidelines, into hard law obligations and is based on States' obligation to respect, protect and fulfil human rights. This process bears the risk that the flexible and risk-based approach to the management of human rights impacts envisaged by these international frameworks is replaced with a formalistic approach that encourages "tick-box" compliance. To mitigate this risk, the EU legislators should pay close attention to several design features in the due diligence obligations.

The positions of the three EU institutions share the same key elements and general approach to due diligence (Article 4). They all require that companies: put in place a policy framework (Article 5); identify the impacts they (may) have on human rights and the environment (Article 6); take appropriate measures to prevent and mitigate an impact or bring it to an end

(Articles 7 and 8); operate a complaints mechanism (Article 9); monitor the effectiveness of due diligence (Article 10); and communicate on their due diligence (Article 11).

The CSDD Directive should set out clearly what standard companies are required to meet when fulfilling their due diligence obligations. Further, Supervisory Authorities enforcing the Directive, civil society organisations (CSOs) and other stakeholders must be put in the position to effectively monitor corporate due diligence efforts. Unambiguous due diligence requirements are also key for the accountability and remedy mechanisms foreseen in the CSDD Directive, including the civil liability provision (Article 22), the submission of substantiated concerns to a Supervisory Authority (Article 19), or complaints raised under a company grievance mechanism (Article 9).

Yet, the due diligence provisions should not be so prescriptive as to encourage a compliance-based approach that narrowly focuses on the letter but not the objective of the law. Thus, the appropriate measures that companies must take should still be context specific and capable of preventing, mitigating and remediating a company's identified impacts effectively.

The CSDD Directive should strike a balance between legal certainty and flexibility by clearly defining "appropriate measures" and the factors determining the choice of measures, accompanied by a non-exhaustive list of actions a company may take. The positions of the Council and the Parliament differ in several respects on this point. While both positions define "appropriate measures" to be "measures which are capable of achieving the objectives of due diligence", **the Parliament adds that the measure must also be capable of addressing the impact "effectively"**. **This is an important amendment** as it requires the design of measures that are capable of successfully preventing, mitigating or remediating an adverse impact in the specific context, rather than actions primarily aimed at legal compliance.

A similar effectiveness criterion can be found in the [German Supply Chain Act](#) (see Section 4(2) *Lieferkettengesetz*), which has proven important in avoiding a narrowly compliance focused approach. The supervisory authority in Germany recently issued a guideline, drawing on the effectiveness criterion, to clarify that contractual clauses vis-à-vis suppliers should focus on prioritised risks and take account of capacities of suppliers to ensure that contractual provisions improve human rights and environmental outcomes, rather than shifting the obligation or cost burden on to counterparties. Such an effectiveness criteria is also foreseen in the French Duty of Vigilance Law.

The different positions of the EU institutions on a CSDD Directive all include a list of appropriate measures that a company may take to address potential or actual impacts (see Articles 7(2) and 8(3)). These actions range from developing prevention or corrective action

plans, providing support to entities with whom the company has a business relationship, using contractual cascading and verification, to making investments or other modifications to management or production processes. **The Parliament position further requires consideration of the implications that a company's business model, strategy and purchasing practices can have on human rights. These are important amendments.** Take the example of purchasing practices, such as pricing pressure or last-minute cancellations and order changes, which can contribute to adverse human rights impacts. Further, the Parliament demands close engagement with business partners involving not only the provision of financial and administrative support, but also guidance, capacity-building and enabling participation in multi-stakeholder initiatives.

To ensure that companies take effective measures to address their adverse human rights impacts, the due diligence requirements must provide businesses with a broad selection of context specific actions. Therefore, **the list of appropriate measures in Articles 7(2) and 8(3) should be non-exhaustive.** An exhaustive list poses the risk of stifling innovation and encouraging a compliance rather than a risk-based approach to due diligence. An open list, by contrast, accounts for innovation and anticipates that companies advance existing approaches and explore new tools to effectively address their impacts. After all, a company will not be shielded from criticism if it undertakes all specified measures on a closed list where these actions are insufficient to effectively address its human rights impacts.

Moreover, the positions of the Council and the Parliament require a company to determine what appropriate measures to take in view of its involvement in an impact, thus, whether it (may) causes, contributes or is directly linked to an impact. These categories of business involvement derive from the UNGPs, although the positions vary in the level of detail and alignment with this involvement framework. **The substantive due diligence requirements should make clear that when choosing what appropriate measures to take, a company is required to consider not only impacts which it causes, but also those to which it contributes, whether by causing an impact jointly with other actors, or facilitating or incentivising another entity to cause an impact through, for example, its purchasing practices. Further, it should be clarified that a company must consider its leverage, when determining what appropriate measures are needed to affect change in entities causing or contributing to an impact to which the company is directly linked.**

Finally, the substantive due diligence articles must recognise the crucial role stakeholders play in the process of determining appropriate measures in a specific context. It is essential that companies consult stakeholders, especially rightsholders who might be affected, throughout the due diligence process. In this way, companies can more effectively identify their impacts

on human rights and design appropriate measures to adequately address them. Section 5 below discusses the different approaches of the positions of the EU institutions on stakeholder engagement.

2. Extent of the due diligence obligation

Severe human rights impacts can also emerge in the downstream activities of a company. Indeed, there are entire sectors where the downstream value chain carries more risk of severe human rights impacts than the upstream supply chain. It is therefore vital that the due diligence obligations cover impacts arising not only in the upstream but also in the downstream part of a company's value chain.

The use of a company's products or services is a critical component to be considered in order for a company to properly identify and address the impacts that their products and services may have after they leave the company. The requirement to consider the impacts which may arise from the sale, composition, design or commercialisation of a product or service is one means by which these use considerations can be incorporated into a company's due diligence and should be included in the final CSDD Directive.

Adverse impacts on human rights arise not only in the context of a business' own operations or in its supply chain, but also after a product or service has left the company. These subsequent activities are also described as the "downstream" part of the value chain and involve the provision of goods and services to end-users and consumers, how these goods and services are used by other companies or governments, as well as conditions for workers in distribution and logistics or impacts associated with end-of-life disposal of products. [A recent publication by OHCHR](#) notes that omitting the downstream part of the value chain can lead to severe human rights impacts not being properly considered by a company. For some industries, downstream activities carry more severe human rights risks than the upstream supply chain. A prime example are impacts on the enjoyment of human rights resulting from the use of technology. [Case studies of corporate practice](#) reveal that many companies already manage human rights impacts in their downstream value chains, showcasing that effective due diligence processes can be adapted and are not confined to the upstream supply chain or a company's own operations. **Including the downstream part of the value chain is therefore not only necessary but already being done by companies.**

The Commission proposal recognises this reality and requires companies to undertake due diligence across the full value chain, meaning that companies must consider not only impacts

that arise in the context of their own operations and supply chain, but also in the downstream part of the value chain (at least in relation to “established business relationships”). The Council and the Parliament, by contrast, limit the due diligence requirements on the downstream value chain to specific activities, including distribution, transport, storage and disposal as well as waste management in an effort to exclude the use of products or services.

However, the Parliament notably adds “sale” in the definition of the downstream value chain and further proposes requirements in Articles 7(2a) and 8(3a) for companies to consider the composition, design and commercialisation when selling or distributing a product or service.

ENNHRI supports these amendments as companies should be obliged, as part of the due diligence conducted on their own operations, to identify and address actual and potential impacts resulting from the way a product or service is composed, designed and brought to market.

3. Civil liability, administrative supervision and remedy

The CSDD Directive should provide for corporate liability where a failure to undertake adequate due diligence results in harm. Rightsholders shall thereby have an effective access to remedy. This requires a liability regime that addresses persisting obstacles to access to justice [identified by the European Union Agency for Fundamental Rights](#) and in OHCHR’s [Accountability and Remedy Project](#), including legal standing, access to information, evidence barriers, legal costs, the length of proceedings, and limitation periods.

Supervisory Authorities should have a range of competences to effectively enforce the CSDD Directive, alongside the possibility of judicial review. They should also bear obligations of transparency, publishing the names of companies that fall under the Directive and reporting annually about their own work, to empower other stakeholders to monitor both corporate compliance and public enforcement efforts.

Effective remediation is a core component of any due diligence process. The Directive should emphasise the need for companies to remediate and clarify that remediation can take different forms.

The prospects of the CSDD Directive to effectively address impacts on human rights hinge to a large extent on a solid enforcement regime. All three positions suggest combining civil liability and public supervision and enforcement through national Supervisory Authorities.

Under both mechanisms, businesses that are not in compliance with their due diligence obligations can be held to account. Companies are also required to facilitate access to remedy themselves by operating non-judicial grievance mechanisms (Article 9).

The three positions of the EU institutions on the CSDD Directive all include a civil liability clause (Article 22) that provides for liability for damages resulting from the failure of a company to comply with the due diligence obligations. However, the approaches vary when it comes to the specific conditions of liability and to measures facilitating access to justice. The Council adds a number of restrictions, proposing to establish liability only where a company violates its due diligence obligations with intent or negligence and where the damage concerns a protected interest under national law. The Commission and the Parliament, by contrast, do not include these restrictions.

The liability provision of the CSDD Directive should be clear and concise but not create unnecessary legal restrictions on liability and facilitate a range of remedies including injunctive relief. Any civil liability mechanism should provide for liability for damages which result from a failure to conduct due diligence in accordance with the Directive, rather than being limited to failures to comply with certain articles. **ENNHRI supports the position of the Parliament in extending the basis for liability to the whole of the Directive, rather than a failure to comply with Articles 7 and 8, a restriction found in the Commission and Council versions.**

In addition, the regime should further address persisting obstacles for prospective claimants. The [Fundamental Rights Agency](#) and many other organisations including OHCHR's [Accountability and Remedy Project](#) have highlighted the considerable barriers rightsholders currently face when seeking remedy in European courts. These include "legal standing, evidence barriers, high legal costs (combined with restrictive rules on legal aid) and the length of proceedings", as well as limitation periods. As regards measures facilitating access to justice, the Parliament's text stands out by proposing reasonable costs for claimants, minimum limitation periods, the possibility of legal representation of victims by trade unions or civil society organisations (CSOs), and easier access to evidence held by a defendant (Article 22(2a)).

The Parliament's amendments to mitigate some of these issues are therefore an important step to ensure that rightsholders have access to justice if they have been harmed due to a due diligence failure. ENNHRI therefore supports the amendments as a crucial tool for access to justice for rightsholders. The need to remove unnecessary obstacles to remedy also requires that adverse human rights impacts are not defined by reference to a violation of one of the rights or prohibitions in the annexes. This could create the unwarranted result that a

court would be required to make a determination that there has been a violation of international law in order for a claimant to succeed. **In this regard, ENNHRI supports the position of the Parliament which defines an adverse human rights impact as “any action which removes or reduces the ability of an individual or group to enjoy the rights or be protected by the prohibitions enshrined in international conventions and instruments listed in the Annex”.**

There is agreement among the three legislative institutions to assign the task of public supervision and enforcement to Supervisory Authorities in the Member States (MS). Supervisory Authorities can investigate cases of non-compliance and mandate companies to meet their due diligence obligation, impose sanctions, and take interim measures (Articles 17, 18 and 20). Natural and legal persons can submit “substantiated concerns” to a Supervisory Authority if they have reasons to believe that a company fails to comply with its due diligence obligations (Article 19). The three positions also envisage a European Network of Supervisory Authorities to facilitate coordination among the national institutions (Article 21(1)). When it comes to the scope of competences assigned to Supervisory Authorities, the different positions vary. The Parliament suggests additional responsibilities, including the power to assess the validity of corporate prioritisation strategies (Article 18(5)(ca)). It introduces additional considerations determining whether and how a Supervisory Authority should impose sanctions (Article 20(2)) and expands the spectrum of available sanctions (Article 20(2a)).

The Parliament’s position also obliges Supervisory Authorities to disclose the companies under their jurisdiction that are subject to the Directive (Article 18(7a)), to keep records on investigations and remedial actions (Article 18(7b)), and to release annual reports (Article 17(8a)). These are necessary amendments because they put CSOs, national human rights institutions and other stakeholders in the position to monitor the enforcement measures of Supervisory Authorities and encourage companies to learn from this published information. **ENNHRI welcomes strong administrative supervision and supports the additional requirements from the Parliament requiring transparency and reporting from Supervisory Authorities.**

Under all versions, companies must engage in some form of remediation where an impact has occurred. While the Commission only requires financial compensation (Article 8(3)(a)), the Council addresses remediation in the provision on the management of actual impacts (Article 8(3)(g)), and the Parliament proposes a new article (Article 8c) on the subject. The latter underlines that remediation shall restore affected rightsholders to a situation equivalent or as close as possible to their situation prior to the impact. Remediation can comprise

restitution, rehabilitation, public apologies, reinstatement, a contribution to investigations, and prevention of further harm. **The CSDD Directive should recognise that remediation is a key component of due diligence, which can take different forms depending on the specific context.**

4. Financial institutions

The financial industry plays a significant role in the economy and holds significant leverage to drive change in corporate human rights management. Financial institutions should therefore be included in the scope of the CSDD Directive. Following international standards, financial institutions should undertake due diligence throughout their economic activities, covering both the provision of financial services and investments.

When conducting due diligence, financial institutions should identify and assess their adverse impacts on an ongoing basis and not only at the precontractual stage. As a minimum, assessments should take place at milestones in a business relationship or following a complaint raised through a grievance mechanism. Financial institutions can cause, contribute or be directly linked to human rights impacts. The position of the Parliament, which introduces the presumption that financial institutions are only linked to adverse impacts, should hence be adapted in this respect.

Whether to include the financial sector in the CSDD Directive remains a subject of intense debate in the trilogue negotiations. Each version defines the personal scope of the Directive in a way that covers specific financial institutions, including credit institutions and investment firms. Yet, each version adopts more restrictive due diligence requirements for financial institutions compared to the provisions applicable to real economy companies. The different versions limit, for example, the scope of due diligence financial institutions must undertake when providing financial services to the activities (and due diligence practices) of direct business partners, that is, legal entities directly receiving financial services either from the financial institution itself or from companies belonging to the same group whose activities are linked to the contract in question.

The Council takes the most restrictive approach by granting Member States discretion whether to include financial institutions during the transposition of the Directive into national law (see Article 2(8)). Leaving the decision to the Member States, however, poses the risk of fragmentation and forestalls one of the key objectives of the Directive: the creation of a level playing field. The Council further follows the proposal by the Commission according to which

financial institutions are only required to identify and assess adverse impacts in relation to their clients before providing a financial service, i.e. at the “pre-contract” stage. The Parliament, by contrast, proposes that adverse impacts must also be identified prior to subsequent financial operations or when notified by a grievance mechanism, acknowledging that financial institutions can have impacts and leverage to drive change in the operations of their business partners throughout a business relationship.

Moreover, the positions of the Council and the Parliament vary in the way they regulate the investment activities of financial institutions. Whereas the Council excludes investor-investee relationships from the scope of the Directive, the Parliament includes investments and proposes a new Article 8a, which stipulates that institutional investors and asset managers should engage and exercise voting rights with a view to inducing their investee companies to address actual impacts. Yet, institutional investors and asset managers should also be required to take appropriate measures to induce their investee companies to prevent potential impacts they may cause, in particular by ensuring that they have effective due diligence processes in place.

The positions of the EU institutions also differ in their approach on how financial institutions can be involved in an adverse impact, i.e. whether they (may) cause, contribute or are directly linked to it (UNGP’s involvement framework). [It has been argued](#) that financial institutions can only be directly linked to impacts through their business relationships. This position, however, has been refuted on several accounts, most prominently by [John Ruggie](#). Today, authoritative guidance on human rights due diligence in the financial sector consistently affirms that financial institutions may cause, contribute or be directly linked to adverse impacts given that the involvement framework exists on a continuum.ⁱ The positions of the Commission and the Council do not address the question of involvement. The Parliament’s position, however, presumes that financial institutions can only be directly linked to adverse impacts in their value chain. This presumption does not align with international guidance on due diligence in the financial sector and further risks stalling the development of emerging practices by financial institutions (consider, for example, [the work conducted](#) under the Dutch Banking Sector Agreement).

5. Stakeholder engagement

Meaningful engagement with rightsholders and other stakeholders should be required at all stages of the due diligence process. The input of stakeholders is particularly important when monitoring the effectiveness of measures taken and in the context of remediation. The CSDD Directive should therefore include a clear obligation to engage with stakeholders, to identify and prioritise rightsholders, to provide adequate and timely information, to ensure safety, security and confidentiality, and to proactively remove barriers to engagement, specifically for marginalised and vulnerable groups.

Meaningful engagement with stakeholders and particularly with rightsholders is essential to ensure that the measures companies take to address human rights impacts are effective and match the needs of affected individuals and communities.

The extent to which companies are expected to meaningfully engage with stakeholders at the different stages of the due diligence process varies among the different positions of the EU institutions.

The definition of stakeholders put forward by the Commission focuses on employees and other individuals, groups, communities and entities affected. The Council expands this definition by listing also trade unions, consumers, CSOs and human rights and environmental defenders. In the position of the Parliament, in turn, a distinction is drawn between “affected stakeholders” (Article 3(1)(n)) and “vulnerable stakeholders” (Article 3(1)(na)). Affected stakeholders include individuals, groups and communities whose rights or legitimate interests may be affected (also referred to as “rightsholders” in international frameworks such as the [OECD Due Diligence Guidance](#)), their “legitimate representatives” and “credible and experienced organisations” tasked with the protection of the environment. “Vulnerable stakeholders”, by contrast, form a subcategory of individuals that are more prone to negative impacts and whose interests require special attention during stakeholder engagements (Articles 5(2b) and 8d(7)). **ENNHRI supports an approach which recognises in the definition and prioritises in the consultation obligation rightsholders and takes into account the vulnerabilities of particular groups, in particular indigenous peoples, as outlined in the Parliament’s position.**

Under the Council position, stakeholder consultations are prescribed in the development of preventive or corrective action plans (Articles 7(2)(a) and 8(3)(b)). Further, “due consideration” must be given to stakeholders when companies review their due diligence policies (Article 10(1)). Companies are also expected to engage with stakeholders to identify adverse

impacts, although this is only necessary “where relevant” (Article 6(4)) meaning that companies have a scope of discretion. The position of the Parliament, in turn, contains a dedicated clause on meaningful stakeholder engagement (Article 8(d)). It requires companies, first, to consult affected stakeholders throughout the due diligence process and, second, to provide them with relevant information. Further, affected stakeholders can formally submit a request for information in writing, which companies are expected to respond to within a “reasonable amount of time” (Article 8(d)(4)). In addition, the Parliament’s text demands companies to address obstacles that may hinder stakeholders from taking part in engagement activities, including the risk of retaliation or retribution.

As stipulated in authoritative international frameworks, human rights and environmental due diligence involves the process of identifying, prioritising and meaningfully engaging with stakeholders. Under the CSDD Directive, stakeholders and particularly rightsholders should be involved continuously and at all stages of the due diligence process. Further, corporate engagement with stakeholders is not confined to the one-sided process of gathering information, but also requires the proactive disclosure of relevant information to affected stakeholders.

ENNHRI supports the inclusion of a dedicated provision on stakeholder engagement, as proposed by the Parliament, to reflect the key role it plays in the due diligence process.

In line with the Parliament’s text, the Article should prioritise direct engagement with rightsholders, where possible. The Article should further include standards on how to consult meaningfully and, as the Parliament suggests, include an obligation to ensure participants are not subject to retribution and to provide relevant information adequately and in a timely manner.

6. Material scope

Companies can impact the full spectrum of human rights and for that reason, they should identify adverse impacts against all internationally recognised human rights instruments in line with the approach of the UNGPs, including as a minimum the instruments comprising the International Bill of Rights and all fundamental Conventions of the ILO but also other international and European human rights treaties and non-binding instruments reflecting international human rights law. The material scope should further include international and European climate and environmental law, including the Paris Agreement.

To clarify the material scope of the due diligence obligation, the three positions of the EU institutions define “human rights impact” and “environmental impact” in Art. 3(1)(b-c) by reference to the Annex. Part I of the Annex comprises a list of human rights norms and instruments that does not follow any conventional classification. Part II lists provisions from international conventions on environmental protection. While there is agreement on this general structure, each version differs in the definition of an adverse impact and in the choice of provisions and international instruments included in the Annex.

The three versions set out different human rights norms and instruments in the Annex. Favours a more limited approach, the Council text confines the list of instruments to those that are ratified by all EU Member States and legally binding under international law, thereby excluding, for example, international customary norms deriving, inter alia, from the Universal Declaration of Human Rights. These restrictions do not apply in the other versions. In contrast, the Parliament’s text extends the list of instruments by adding, for instance, several conventions by the International Labour Organization. Part II of the Annex is further supplemented with references to international and European environmental law, including the Paris Agreement on Climate Change.

ENNHRI supports broad inclusion of international human rights instruments in line with the approach of the UNGPs, including at a minimum the instruments comprising the International Bill of Rights and all fundamental Conventions of the ILO but also other international and European human rights treaties and non-binding instruments reflecting international human rights law, such as the UN Declaration on the Rights of Indigenous Peoples or the Declaration on Human Rights Defenders. The material scope should further include international and European climate and environmental law, including the Paris Agreement. Of the three positions, the Parliament adopts the most expansive approach.

The Commission and the Council describe an adverse human rights impact as a “violation” or an “abuse”, while the Parliament, drawing on the language of the [UNGPs Interpretive Guide](#), defines the term as an action which removes or reduces the ability of an individual or group to enjoy a right. The former terms carry the connotation of a breach of duty by States under international human rights law. Introducing this concept to the Directive risks raising the threshold of what qualifies as an impact to be addressed by a company’s due diligence process. This is especially the case when the definition of an adverse human rights impact is linked to the violation of specific rights and prohibitions listed in the Annex, such as in the Commission’s proposal. The Council expands the definition by including human rights “abuses” not expressly mentioned but enshrined in the listed conventions and instruments, but sets complex and restrictive conditions. According to the Council’s restriction

in Art. 3(c)(ii), the latter should only constitute an adverse human rights impact, if (1) the human right can be abused by a company or legal entity other than a Member State or a third country, (2) the human right directly impairs a legal interest protected under the instruments listed in Part I Section 2 and (3) the human rights “abuse” could have been reasonably identified within company’s own operations, those of its subsidiaries or its business partners. These conditions would have a very limiting effect on the scope of human rights under consideration and add a level of complexity to a company’s evaluation on adverse human rights impacts with regards to the three conditions proposed by the Council.

Further, as noted above, it is not clear whether, in the context of civil liability, a court would be required to determine that there has been a violation in order for a claim to succeed. **The final Directive should hence favour the terminology set out in international standards, reflected in the Parliament’s position.** As stated above, ENNHRI recommends that an adverse human rights impact is defined as any action which removes or reduces the ability of an individual or group to enjoy the rights or to be protected by the prohibitions enshrined in international conventions and instruments, rather than as a violation of such rights.

The CSDD Directive should avoid listing individual rights, as human rights are indivisible and interdependent. Approaching the enumeration of rights in this way would not provide the necessary clarity or legal certainty for businesses, rather it would represent a significant departure from the expectations of the UNGPs and other core international business and human rights standards.

The CSDD Directive should furthermore leave room for expanding the list of human and environmental rights in order to allow for the adaption to new developments in the field.

7. Corporate governance, strategy and business model

Although the proposed clarification of directors’ duties lacks ambition, it still highlights that companies must take human rights considerations into account when making decisions, also at the highest management level. The final Directive should include broad corporate governance provisions in line with the Commission’s proposal which situate responsibility for establishing and overseeing due diligence processes with upper management of the company and adapt company strategy in a manner responsive to the findings of the due diligence process.

The three positions of the EU institutions differ in the extent to which they require a company to implement corporate governance reforms, including the extent to which they impose duties on directors in relation to a company's due diligence.

Whereas the Council rejects any provision on directors' duties, the Commission and the Parliament versions both require that directors take sustainability matters into account when making decisions in the best interest of the company (Art. 25(1)). As specified in the [Commission's Impact Assessment](#), such duty would not oblige directors to take management decisions that go beyond the (long-term) interest of the company, even if they would have positive impacts on human rights or the environment. Instead, the provision merely clarifies that sustainability matters must be considered in the decision-making process.

Another corporate governance question is who should take responsibility for setting up and overseeing the design and implementation of due diligence processes. The Commission's proposal assigns responsibility to directors (Art. 26(1)), while the Council incorporates a general requirement to set up and oversee the due diligence process (Art. 5(3)) without involving directors, granting each company discretion as to how it establishes and exercises oversight. The Parliament's text does not address this question.

It is also debated whether companies must adapt their strategy and business model in view of their adverse human rights and environmental impacts. Once again, the Commission assigns this task to directors (Art 26(2)), an approach that is rejected by the other legislative institutions. As an alternative, the Parliament proposes that companies adapt their business model and strategy, including purchasing practices, as a measure that may be appropriate to address specific adverse impacts (Art. 7(2)(ca) and Art. 8(3)(da)).

Situating responsibility for due diligence at the upper management level of a company is important to set the "tone from the top" and ensure that due diligence is prioritised and embedded throughout the organisation. Using the findings from due diligence to inform strategy, business model and decision making in the interests of the company is important to ensure that a company embeds due diligence throughout its operations and uses it to effectively manage its impacts on people and planet. **ENNHRI supports the requirements to situate responsibility for overseeing the due diligence process within the upper management of the company as outlined in the Commission's proposal and the Parliament's position on business model and strategy, including purchasing practices.**

8. Personal scope

To facilitate policy coherence and encourage broader uptake of due diligence, the CSDD Directive should align with the personal scope of the Corporate Sustainability Reporting Directive (CSRD). The CSDD Directive should ensure that there are adequate provisions to encourage and support SMEs undertaking due diligence. It should further emphasise in a recital that all companies have a responsibility to respect human rights as stipulated in the UNGPs, regardless of their size, sector, operational context, ownership and structure.

All three positions of the EU institutions define the personal scope of the CSDD Directive with a focus on larger companies, including non-EU companies that are conducting business in the EU on a sufficient scale. Yet, the positions vary regarding the criteria and thresholds defining the personal scope as well as the type of financial institutions included (Art. 3(1)(a)(iv)). The Council and the Parliament further agree on a phase-in approach, meaning that the Directive would apply in sequence starting with very large companies, although there is disagreement about the applicable thresholds and timeline (Art. 30(1)).

The Commission and the Council versions include only very large companies and mid-sized companies working in high-impact sectors like garment, agriculture and mining, drawing loosely on the industries covered by sector-specific OECD guidance. Taken together, there are four types of companies that would fall within scope (Art 2):

- Large EU companies (>500 employees and a net worldwide turnover >150 million Euro)
- Mid-sized EU companies (>250 employees and a net worldwide turnover >40 million Euro) working in high-impact sectors (i.e. extractives, agriculture, textiles)
- Large non-EU companies (with a net turnover in the EU >150 million Euro)
- Mid-sized non-EU companies (with a net turnover in the EU >40 million Euro) working in high-impact sectors

In comparison, the Parliament text defines the scope wider by including large and mid-sized companies regardless of their sector. Furthermore, it covers ultimate parent companies of large corporate groups that meet certain employee and net turnover thresholds on a consolidated level. Under consideration of these amendments, the Parliament position would cover the following categories of companies (Art. 2):

- Large and mid-sized EU companies (>250 employees and a net worldwide turnover >40 million Euro)
- EU parent companies of large groups (>500 employees and a net worldwide turnover >150 million Euro on a consolidated basis)
- Large non-EU companies (with a net turnover >150 million Euro worldwide and >40 million Euro in the EU)
- Non-EU parent companies of large groups (>500 employees, a net turnover >150 million Euro worldwide, and >40 million in the EU all on a consolidated basis)

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. While Articles 7 and 8 on substantive due diligence provide that a company may take steps to support SMEs, including through the provision or financial support, it is not clear that this is sufficient to encourage SMEs to meaningfully engage in their own due diligence. The CSDD Directive should provide clearer obligations on companies in scope to support SMEs to meet the expectations of the CSDD Directive and to fully participate in the value chains of companies in scope.

As the UNGPs make clear, all companies have a responsibility to respect human rights, regardless of their size or circumstances, which can be discharged in part by conducting human rights due diligence. While none of the positions of the EU institutions take such a broad approach, the Corporate Sustainability Reporting Directive, by contrast, requires not only large companies but also listed SMEs to report on sustainability matters, including due diligence processes. **To facilitate policy coherence and encourage broader uptake of due diligence, ENNHRI recommends that the CSDD Directive should align with the scope of the CSRD.**

ⁱ International Finance Corporation (2012), Policy on Environmental and Social Sustainability, available online: <https://www.ifc.org/content/dam/ifc/doc/mgrt/sp-english-2012.pdf>; OHCHR (2017), Response to Request from BankTrack for Advice Regarding the Application of the UN Guiding Principles on Business and Human Rights in the Context of the Banking Sector, available online: <http://www.ohchr.org/sites/default/files/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf>; OECD (2017), Responsible business conduct for institutional investors: Key considerations for due diligence under the OECD Guidelines for Multinational Enterprises, available online: <https://mneguidelines.oecd.org/RBC-for-Institutional-Investors.pdf>; OECD (2019), Due Diligence for Responsible Corporate Lending and Securities Underwriting: Key considerations for banks implementing the OECD Guidelines for Multinational Enterprises, available online: <https://mneguidelines.oecd.org/final-master-due-diligence-for-responsible-corporate-lending-and-securities-underwriting.pdf>;

PRI (2020), Why And How Investors Should Act on Human Rights, available online: <https://www.unpri.org/human-rights/why-and-how-investors-should-act-on-human-rights/6636.article>; UN Working Group on the issue of human rights and transnational corporations and other business enterprises (2021), Taking stock of investor implementation of the UN Guiding Principles on Business and Human Rights, UN Doc. No. A/HRC/47/39/Add.2, available online: <https://www.ohchr.org/sites/default/files/Documents/Issues/Business/UNGPs10/Stocktaking-investor-implementation.pdf>; OECD (2022), Responsible Business Conduct Due Diligence for Project and Asset Finance Transactions, available online: <https://www.oecd-ilibrary.org/docserver/952805e9-en.pdf?expires=1687953344&id=id&accname=guest&checksum=3447820E578844305D464BDFF442C5FB>.

