Position note on the

CORPORATE SUSTAINABILITY DUE DILIGENCE (CSDD) DIRECTIVE

May 2022

Working Group Corporate Accountability (WGCA)

The WGCA is a coalition of Belgian NGOs and trade unions. Member organisations of the WGCA that support this analysis are: 11.11.11, ABVV-EGTB, achACT, ACLVB/CGSLB, ACV-CSC, Avocats Sans Frontières, Broederlijk Delen, CETRI, CNCD-11.11.11, Commission Justice & Paix, Fairtrade Belgium, FIAN Belgium, IPIS, Oxfam-in-Belgium, Solsoc, Viva Salud, Vredesactie, and WSM.
About this note

This note lists the WGCA concerns and recommendations regarding the CSDD proposal for a directive. It is based strongly on the ECCJ analysis that we have completed or adapted in order to come to reflect the various accents & priorities present in our diverse coalition. These alterations are indicated in *cursive* throughout the document.

Contents

- Company scope (articles 2 and 3) 3
- Material scope (article 3 and annex) 4
- Value chain scope (article 3) 5
- Due diligence obligations (articles 4 to 8 and 10) 6
- Stakeholder consultation (articles 6 to 8) 8
- Complaints procedures (articles 9 and 23) 9
- Climate obligations (article 15) 10
- Public enforcement (articles 16 to 21 and 24) 10
- Civil liability and access to justice (article 22) 11
COMPANY SCOPE
(ARTICLES 2 AND 3)

The proposal rightfully targets both EU and non-EU companies operating in the EU, which would help level the playing field. However, it still only applies to very large companies. Even in the clearly insufficient list of sectors recognised by the Commission as high-impact, it is only large companies that would bear due diligence obligations.

• This narrow scope falls short of UN and OECD standards, which apply – proportionally to all companies. It is even narrower than that of the proposal for a directive on Corporate Sustainability Reporting, which covers all large companies and listed SMEs. The proposal thus fails to recognise that all companies can harm human rights and the environment. While the text risks having the burden of compliance shifted, in practice, to smaller companies, it exempts them from any responsibilities.

• The exclusion of SMEs from the scope of application and the very high thresholds for other companies (not to mention the exclusion of the public sector and other limitations such as certain definitions) severely restrict the scope and effectiveness of the due diligence mechanism.

• The proposal ignores many harmful business operations, as staff size and annual turnover are not reliable indicators of a company’s impacts and influence over its value chain. In any case, these should be alternative (not cumulative) thresholds – otherwise, corporations with a high turnover and, therefore, enough capacity to address impacts, may fall outside the scope simply because their business is not labour-intensive (e.g., commodity trading), or they rely on outsourced personnel.

• For the purpose of calculating the number of employees of EU companies, the proposal should also clarify that employees worldwide – meaning employees of the parent company and of its subsidiaries – should be taken into account, as foreseen in the French due diligence law. This approach would reflect the size and power of transnational corporations more accurately than the number of staff in their home country.

• These rigid thresholds also risk creating perverse incentives for large companies, which could be tempted to adapt their business structures to avoid falling within the scope of the directive.

• The Commission claims that the definition of high-impact sectors has been limited to sectors for which OECD guidance exists. This decision leaves out extremely high-risk businesses, including, for instance, construction, infrastructures, energy, transport, logistics, electronics or auditing. It even fails to cover the financial sector, for which an OECD sectoral guidance does exist. The narrow list proposed is based on a restrictive understanding of high impacts, which not only stem from specific economic sectors, but also from specific activities, products or services, as well as specific areas (e.g. conflict- and post-conflict areas, weak governance zones, repressive regimes). The proposal should therefore abandon high-risk sectors in favour of a generally risk-based approach or significantly extend the list to more high-risk sectors such as financial services, construction, transport, shipping, energy, logistics, electronics, auditing and certification.
MATERIAL SCOPE
(ARTICLE 3 AND ANNEX)

The proposal defines human rights impacts by reference to an Annex, which covers an incomplete list of violations but includes a catch-all clause that refers to relevant UN and ILO instruments. More worrying is the limited definition of environmental impacts, which is narrowed down to a noticeably insufficient list of environmental norm violations.

- The combination of a list of violations of specific articles of international instruments with a catch-all clause creates ambiguities and risks promoting a selective application of standards. This approach is at odds with the principles of indivisibility and interdependence of human rights. A non-limitative list of human rights instruments would be more suitable.

- The proposal defines human rights impacts as those resulting from the ‘violation’ of human rights, as opposed to international standards, which define impacts as those which remove or reduce the ability of individuals to enjoy their human rights. By requiring the actual or potential existence of a ‘violation’, the proposal risks limiting the notion of ‘impact’ and thus the scope of the due diligence obligations and of the associated liability regime.

- A number of key human rights instruments are missing from the list in the Annex, including the ILO Convention 190 on violence and harassment in the world of work, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, the International Convention for the Protection of All Persons from Enforced Disappearance, the ILO Convention 169 on indigenous and tribal peoples, and the UN Declaration on Human Rights Defenders.

- Trade union rights, workers’ rights and social rights are not explicitly recognised in the fundamental provisions and the list is far too limited (many ILO conventions, recommendations, resolutions and declarations are missing).

- While the Annex rightfully includes the violation of the right to a safe and healthy working conditions, there is no explicit reference to the relevant ILO instruments on occupational safety and health (C138, C155, C161, C187, …). Their inclusion is advisable, as they are expected to be recognised, in 2022, as part of the ILO’s framework of fundamental principles and rights at work.

- Likewise, while the Annex rightfully includes the violation of the right to a fair wage as a human right impact, it does not explicitly mention the right to a living income. While the former applies in the context of hired workers, the latter is relevant in the context of any other income earner, such as smallholder, self-employed farmers. Moreover, as hired workers in the agricultural context often are dependent on the farmer’s income, the payment of a living wage and living income are inextricably connected.

- Environmental impacts are defined by reference to environmental conventions, which raises a major problem: the current fragmented patchwork of international environmental conventions does not provide for sufficient coverage of impacts. This regulatory gap needs to be filled by targeting environmental damage in general, as the French due diligence law does, and not specific violations of international standards.

- In any case, the list in the Annex is far from comprehensive. Key environmental conventions are missing, including the Paris Agreement, the Ramsar Convention on Wetlands of International Importance Especially as Waterfowl Habitat, the International Convention for the Prevention of Pollution from Ships, the UN Convention on the Law of the Sea, the UN Convention to Combat Desertification or the UNECE Convention on Access to Information, Public Participation in Decision making and Access to Justice in Environmental Matters (Aarhus Convention), the Basel, Stockholm and Rotterdam Conventions.

- The Annex includes a provision that rightfully expands the list of environmental impacts by covering environmental degradation with human rights implications. While the recognition of the deep connection between the environment and human rights is remarkable, this limiting approach risks having companies ignore environmental harms whose link to human rights is not evident.

- There is also no reference to general principles of environmental law, such as the prevention, precautionary, rectification-at-source and polluter-pays principles, which companies should ensure respect with.
VALUE CHAIN SCOPE
(ARTICLE 3)

The proposal requires due diligence measures that should extend throughout companies’ subsidiaries and global value chains, both upstream and downstream, but only with regard to so-called ‘established business relationships.’ Thus, business relationships that are not (or that are not expected to be) lasting, in view of their intensity or duration, would fall outside the scope. This approach risks leaving out short, unstable or informal relationships where severe impacts are actually more likely.

- The concept of ‘established business relationships’ is poorly defined in the proposal. It is unclear how “lasting” a business relationship should be in order to be considered as ‘established.’ Recital 20 positively clarifies that if a direct relationship is established, all linked indirect relationships should also be considered as such. However, the relevant article is ambiguous and leaves room for divergent interpretations.
- This lack of clarity as regards the limitation of the value chain scope risks leaving out short, unstable or informal relationships, where, however, severe impacts exist. Companies may decide to focus exclusively on impacts among their established business partners, and ignore recurrent, severe impacts in other parts of the value chain that the company has the ability to influence.
- It is crucial that the value chain scope clearly covers less stable layers of activities, including semi-formal and informal working schemes as well as unofficial subcontracting and home-based work. For instance, it is essential that activities such as home-based workers in artisanal embroidery or self-employed workers in farming, fall within the scope of the due diligence of a garment or a cocoa corporation, respectively, even when the individual relationships with each of them may not be long and intense enough.
- The proposal risks creating perverse incentives: as short-term relationships would not be covered, companies could be tempted to switch suppliers regularly in order to avoid due diligence obligations and their associated liability. This clearly runs against the spirit of the UN Guiding Principles, which aim to foster longer lasting and cooperative business relationships. The directive should turn back to UN and OECD standards, adopt a risk-based approach, and use severity and likelihood as the central concepts of due diligence, without discriminating between different types of business relationships, which would, as opposed to the current proposal, create an incentive for maintaining long-term business relationships.
- The definition of value chain scope also explicitly excludes relationships that “represent a negligible or merely ancillary part of the value chain.” This is problematic, as activities and business relationships that may be considered ‘negligible or merely ancillary’ can also carry serious adverse impacts, such as a private security firm working for a mining company or a toxic waste disposal contractor hired by an electronics enterprise.
- Further limitations apply to the scope of due diligence obligations in the financial sector. Financial institutions would only have to conduct due diligence with regard to the activities of their clients and other companies belonging to the same group. Moreover, they would not have to observe due diligence requirements when the client is an SME. This adds to the overall watering down of financial institutions’ obligations throughout the proposal.
DUE DILIGENCE OBLIGATIONS
(ARTICLES 4 TO 8 AND 10)

The proposal stipulates general obligations to prevent or mitigate potential abuses, and to end or minimise actual ones, and lays down a list of specific measures to fulfill those obligations. The prominence given to ‘contractual assurances’ by business partners and third-party verification of compliance with such assurances, raises major concerns. Both are widely known to be insufficient for prevention and mitigation purposes.

- The proposal for a directive only puts forward obligations of means (establishment of plans, codes of good conduct) but does not contain an obligation of result. Moreover, companies remain largely judge and jury of their practices.
- The proposal is rarely construed as a framework focusing on the role of companies to ensure the sustainability dimension of their operations, but pays no serious attention to the human rights dimension nor to the position of affected people and victims. The general duty to prevent or mitigate, and to end or minimise harm should be strengthened and more clearly prevail over any of the specific measures listed in the proposal – such measures should always be assessed against said general duty. The role of contractual assurances and third-party verifications should be minimised and subject to strict quality requirements, already in the directive, in order to ensure their effectiveness.

Under the proposal, auditors are required to be “accountable for the quality and reliability of the audit,” which should be clarified as legally liable to third parties harmed as a result of faulty audits. This responsibilisation of auditors might have the counterproductive effect of nudging certifiers to avoid complex situations and cut ties with those not equipped to engage with audit processes. This process might instigate a shift from independent small farmers and their organisations, to large plantations and aggregation and contract growing arrangements. Flanking measures are thus necessary.

- Companies are expected to take “appropriate measures” to identify, prevent and mitigate impacts. The term “appropriate measures” is defined by reference to a series of circumstances, including the company’s influence over the specific business relationship. However, it is not only the company’s influence (i.e., actual leverage but also its ability to influence the behaviour of a third party (i.e., potential leverage) that must be taken into consideration. Such clarification would better align with international standards, under which companies must not only exercise leverage to address impacts, but also seek to increase their leverage when they lack it.
- There is no reference to purchasing and pricing practices in the articles of the proposal. Only the recitals mention that companies should identify and assess the impact thereof, and that codes of conduct should apply thereto. It is crucial that the text explicitly requires companies to make sure that the price they pay to their suppliers enables them to produce with respect for human rights and the environment as proposed by the European Parliament. Next to pricing practices, companies should also identify and cease, prevent and mitigate potentially exploitative purchasing practices in the supply chain such as short lead times, unilateral changes to contracts, late payments, returning of unsold goods or the unduly transfer of risk and costs to suppliers. The Commission should develop guidance to what constitutes harmful purchasing practices.

With regards to living incomes and living wages, companies should be required to develop and publish a target- and time-bound plan to close the gap between actual incomes and wages and living incomes and living wages for the regions they source from. The methodology used for establishing the level of living income and living wage should be credible and disclosed to the public. The Commission should develop guidance in this regard, taking into account ILO Conventions 87, 95, 98, 100, 131, 132, 154 and 173.

A heavy reliance on contractual assurances risks watering down the general obligations by limiting them to a mere box-ticking exercise, and shifting responsibility from the lead company onto its business partners. It neglects often indispensable changes to the lead company’s own practices, such as purchasing and pricing practices. It also neglects the myriad of active, not passive, means companies may need to employ to influence direct and indirect partners, for example, by training, communicating or collaborating with suppliers or by cooperating with local governments on the enforcement of protective laws.

Resort to verification through industry initiatives and third-party audits is worryingly promoted by the proposal, sending the dangerous message that companies can rely on them as an adequate means of due diligence. This vision risks the continuation of prevailing and ineffective business practice, driving audit costs yet failing to make an impact. This is a major problem (a) because of the well-documented ineffectiveness of social auditors and certifiers in identifying impacts and preventing harm, (b) because focusing on such measures shifts attention away from the crucial approaches needed to effectively address root causes of corporate abuse, and (c) because it risks to instigate a shift of burden to those less-resourced to comply with due diligence requirements, i.e. small-scale family farming operations or workers, who are, in many cases, the rights-holders.
• The Commission should also develop guidance as to which opportunities companies can pursue that support the increase of smallholder incomes, in line with development priorities of host governments. This could include the diversification of income-generating opportunities, local procurement, technology transfer, improvements in local infrastructure, better access to credit and markets or payments for environmental services.

• To properly identify risks and monitor the impact of operations and measures taken later on, the obligation to identify risks and impacts must explicitly comprise gender-sensitive human rights and environmental impact assessments, including by gathering and using disaggregated data (based on sex, ethnicity, age, migration status and others). In that regard, companies should be obliged to use the HRC Guidance on Gender Dimensions of the UNGP when developing their due diligence strategy.

• Prevention and corrective action plans are only mandated "where relevant" and "where necessary due to the nature or complexity of the measures required for prevention." Whether more or less complex, action plans should always be developed and effectively implemented whenever potential or actual impacts are identified, no matter the nature of the response required.

• The proposal qualifies the corporate obligation to end impacts by clarifying that where the adverse impact cannot be brought to an end, companies should ‘minimise’ the extent of such an impact. This novel notion of ‘minimisation’ should be clarified to make sure companies are obliged to use and increase their leverage in order to bring impacts to an end, and only if that proves impossible, reduce impacts, in any case, to the greatest extent possible.

• Companies are expected to remedy impacts by the payment of damages. The proposal fails to mention other forms of remedy beyond financial compensation such as apologies, restitution, rehabilitation, guarantees of non-repetition. Due attention should be paid to overcoming the barriers that women and other marginalised groups face in accessing and securing remedy.

• Companies are requested to end a business relationship if adverse impacts are not expected to be prevented, mitigated, ended or minimised in the short term, and, in any case, if they are ‘severe.’ The proposal over-simplifies this question and opens the door to irresponsible disengagement. Companies should only consider termination provided that they lack leverage to prevent and mitigate impacts, and are unable to increase their leverage whether in the short or the longer term, or in cases where actual or potential impacts are so severe that disengagement is the only option. They should also take into account any additional human rights consequences of such termination. In any case, for as long as the abuse continues and the company remains in the relationship, it should be able to demonstrate its own ongoing efforts to end or minimise and remediate the impact, or be otherwise exposed to liability.

• Due diligence obligations are unreasonably watered down for large, as opposed to very large, companies operating in high-impact sectors. While situations of high risk demand enhanced due diligence, large companies operating in such sectors are only required to address ‘severe’ impacts – which are ambiguously defined. According to international standards, severity may play a role in prioritising prevention and mitigation action, but all impacts should be first identified, regardless of severity, for a company to be able to adequately assess which ones to tackle and how. This approach moreover ignores the cumulative impacts of many smaller ‘nonsevere’ impacts, such as underpaying across a notable number of employees thereby depriving whole communities of large sums of money, or small but consistent amounts of toxic leakage that build up over time.

• Further limitations apply to the financial sector: financial institutions are only required to conduct due diligence before granting a credit, loan or other financial services. This limitation is at odds with what UN and OECD sectoral standards dictate. Due diligence processes should extend throughout the entire duration of corporate credits, loans and the provision of other financial services.

Corporate Sustainability Due Diligence Directive
STAKEHOLDER CONSULTATION (ARTICLES 6 TO 8)

The proposal suggests that, “where relevant”, companies shall consult stakeholders when identifying impacts, and when developing prevention and corrective action plans. Stakeholders – including employees, trade unions and other individuals, groups, communities or entities potentially affected – are thus given a very limited role. Strengthening stakeholder engagement is key to ensure companies adequately identify and address impacts.

• In accordance with international standards, stakeholder engagement should not be done only “where relevant,” but as a general rule. It is always relevant for companies to consult stakeholders – without them, companies cannot be sure that they have adequately identified and assessed adverse impacts and taken the appropriate measures to prevent or mitigate them.

• Stakeholder engagement should not be done only in the context of the development and implementation of prevention and corrective action plans, but as part of every step of the due diligence process. Risk prioritisation should be informed by stakeholders’ perspectives.

• The proposal fails to provide quality requirements for stakeholder consultation. It should be clarified that consultations must be carried out in good faith, and be effective, meaningful, timely, and informed. They should be adapted to the needs and rights of specific, vulnerable groups. Companies needs to ensure that due account is taken of the outcome of the consultation and that these outcomes are adequately communicated to stakeholders.

• Consultations should also ensure the safe participation of stakeholders without fear of reprisal. For this purpose, companies should be obliged to ensure that stakeholders are not put at risk due to their participation in the consultations.

• When defining stakeholders, the proposal could more explicitly recognise NGOs, human rights and environmental defenders, indigenous people and civil society organisations, including women organizations.

• The issues of workers’ rights, their representatives and trade union organisations are largely ignored. The aspects relating to information, consultation, participation and collective bargaining are reduced to a minimum in the proposed text [filing of internal complaints in case of violation]. The trade unions, with the support of the European Parliament, were asked to provide for a strong and proactive involvement of the trade unions throughout the process of identification, prevention and redress, as well as at the various stages of design, monitoring and implementation of the vigilance mechanisms adopted. Similarly, the trade union role in alternative dispute resolution procedures must be clarified and strengthened. The text is also silent on measures and tools to help victims overcome obstacles to access to justice, in particular collective redress and the representation of victims by trade unions.

• The proposal should more clearly recognize the necessary role of trade unions, as legitimate representatives of workers, and their right to negotiate the due diligence process with the company. Trade unions and workers’ representatives in the company’s subsidiaries and value chain should also be explicitly involved.

• The text undermines the central role of trade unions, especially in consultation, as this is not automatic and companies could even override trade union consultation as the definition of “stakeholder” does not refer to trade union organisations or workers’ representatives. In general, this conception of social dialogue is a serious breach of the central role of workers and trade unions in the respect of human, social and environmental rights by companies. The proposal thus risks by-passing and runs contrary to the rights which trade union and workers’ representatives have under international and European human rights instruments, as well as the EU acquis on information, consultation and participation, as well as collective bargaining and collective agreements.

• In line with the above, the proposal should recognise the role of farmers’ cooperatives as representatives of farmers, and their ability to shape the purchasing and pricing practices of agricultural commodity buyers, with the aim of redistributing value and risk throughout the supply chain more evenly.

• There is also no reference to the right to Free, Prior and Informed Consent, as enshrined in the UN Declaration on the Rights of Indigenous Peoples, which goes beyond the right to a mere consultation, granting a stronger role for indigenous peoples regarding decisions affecting their lands and natural resources.
COMPLAINTS PROCEDURES (ARTICLES 9 AND 23)

The proposal expects companies to establish ‘complaints procedures’, which certain stakeholders can access, while rightfully clarifying that recourse to these procedures should not preclude claimants from having access to judicial mechanisms. However, the text should further emphasize the prevalence of judicial procedures over complaints ones, and provide strict quality requirements, which are key to ensuring the effectiveness of the latter.

• Complaints procedures have a proven track record of failure and should in no possible way preclude access to justice. Complaints mechanisms will continue to be ineffective if affected people lack the real possibility of going to court to assert their legal right to a proper remedy. This also means victims should never be forced to turn to complaints procedures before bringing a legal case.
• In any case, as set out in the UN Guiding Principles, complaints procedures should be legitimate, accessible, predictable, safe, equitable, transparent, rights compatible and adaptable, and should ensure timely and effective responses to stakeholders. In line with setting up a continual process of engaging with stakeholders, complaints procedures should be set up in an empowering way by requiring the proactive involvement of minority groups, such as women and girls, or otherwise vulnerable individuals.
• Companies should ensure that stakeholders can draw on the complaints procedures without fear of reprisal. To this end, the proposal suggests extending the Whistleblower Protection Directive to the reporting of due diligence breaches. However, this directive would only cover employees and other persons with a professional relationship to the company, but leave other stakeholders, such as human rights and environmental defenders, unprotected. It also only applies to the reporting of breaches of Union law and to reprisals from the respective company, while not considering the risk of reprisals from other actors. Companies should therefore be obliged to ensure that stakeholders are not put at risk when submitting a complaint.
• It should also be clarified that complaints procedures must provide for the possibility to raise concerns either anonymously or confidentially.
• The directive should stress remediation expectations in the context of complaints procedures. These should also allow complainants to propose appropriate remedy, as recommended by the European Parliament.
• The proposal entitles civil society organisations to submit complaints, but only those “active in the areas related to the value chain concerned”. If interpreted restrictively, this could impede relevant NGOs from bringing complaints on the basis that they have not been active in the economic sector at issue before. Standing should thus be broadened.

• The obligation to inform of complaint procedures only applies towards workers and trade unions, unreasonably excluding other relevant stakeholders and civil society organisations.
• Complainants are only entitled to meet with the company’s representatives to discuss severe impacts – a restriction based on a concept (severity) of ambiguous definition, and which again ignores the cumulative effect of many ‘non-severe’ adverse impacts that may be ongoing or widespread.
CLIMATE OBLIGATIONS
(ARTICLE 15)

The proposal fails to explicitly include greenhouse gas emissions within the definition of environmental impacts to be prevented via due diligence. Instead, it expects just a few companies to adopt a climate transition plan. This provision reads as a weak, formal requirement, limited in scope, rather than as a substantive obligation to reduce climate impacts.

- Climate impacts should be explicitly included in the Annex to the directive, among the impacts that companies must identify, prevent and mitigate through their due diligence processes. This addition is of the utmost importance, given the unique and disproportionate ways in which both climate change and the transition towards a low-carbon economy may impact human rights and the environment.
- Companies should not just be obliged to adopt, but also to effectively implement an effective transition plan in line with the Paris Agreement, including short-, medium- and long-term reduction targets. The proposal fails to provide quality requirements for climate transition plans, which are crucial to ensure their adequacy and effectiveness.
- Only very large companies are subject to the obligation to adopt climate transition plans. The proposal leaves large companies in high-impact sectors off the hook. This is an unacceptably narrow scope. To have a real impact, all companies, including but not limited to the extraction of mineral resources, should be subject to this requirement.
- The proposal seems to refer exclusively to the climate impacts of the company’s operations, which could be interpreted as excluding indirect emissions. This exclusion would run counter the overall spirit of the directive itself, as well as the objective of UN and OECD standards, which aim to address both internal and outsourced impacts. Both direct and indirect emissions should be explicitly tackled, as concluded by the recent Dutch court ruling against Royal Dutch Shell.
- Climate transition plans would have to include emission reduction objectives only if climate change is identified as a ‘principal’ risk or impact of the company. In the absence of a definition of ‘principal’ risk or impact in the text, this is a confusing and, once again, unnecessary limitation of the scope. Whether or not the company has correctly identified climate change as a ‘principal’ risk or impact needs to be reviewable by the competent authorities.
- Civil liability should apply for the failure to comply not only with human rights and environmental due diligence obligations but also with climate transition requirements. This is necessary to ensure affected stakeholders can challenge climate plans before courts, not only supervisory authorities, and request relief or redress.

PUBLIC ENFORCEMENT
(ARTICLES 16-21 & 24)

The proposal includes important provisions on public enforcement. It compels Member States to designate truly independent supervisory authorities, which may initiate investigations, either on their own motion or as a result of substantiated concerns, and issue orders, impose sanctions or adopt interim measures. This regime however raises some questions and could be improved by enhancing transparency, setting minimum pecuniary sanctions across the EU and by clarifying the interplay between administrative and civil liability.

- According to the proposed text, inspections shall be conducted with prior warning to the company, except where prior notification would hinder effective supervision. However, advance notice of inspections should be the exception and not the rule.
- The proposal expects Member States to lay down a regime of effective, proportionate and dissuasive sanctions, which should be based on the company’s turnover, but leaves the amounts to their full discretion. For the purpose of levelling the playing field and preventing a race to the bottom between Member States, the directive should also provide for detailed criteria for the determination of sanctions and a specific minimum level of fines.
- Companies applying for public support would need to provide evidence that they have not been sanctioned for due diligence breaches. However, the proposal fails to provide for the exclusion of non-compliant companies from public procurement, as stipulated in the German due diligence law and as proposed by the European Parliament.
- The directive should also foresee the explicit exclusion of non-compliant companies from public support schemes including those of Export Credit Agencies, as proposed by the European Parliament.
- The proposal rightfully provides that taking remedial action does not preclude the imposition of sanctions or the triggering of civil liability for damages. However, the interrelation between administrative and civil liability deserves some further clarification – public enforcement proceedings should in no way pre-empt judicial ones, and supervisory authorities’ decisions over due diligence breaches should by no means pre-condition or determine courts’ assessments.
- The proposal does not provide for any form of criminal liability, which is a concern given that companies may foresee paying for fines with the profits generated through lucrative business practices that breach the directive. Criminal liability ought to be provided for grave and widespread human rights violations (such as loss of lives), huge environmental harm, or repeated breaches of the directive in order for penalties to be guaranteed dissuasive.
CIVIL LIABILITY AND ACCESS TO JUSTICE (ARTICLE 22)

The proposal includes a civil liability regime, a crucial element to advance corporate accountability, allow workers and communities affected by corporate abuse to obtain judicial remedy, and incentivise compliance with due diligence obligations. However, major barriers to justice often faced by claimants in business-related human rights and environmental cases remain unaddressed.

- The proposal puts forward a fault-based liability regime, but tort law in Member States will put the burden of proof for a wide range of evidentiary parts on the claimants, including the violation of a human right or environmental standard, the harm suffered by the victim, and the causal link between them. In addition, the proposal does not regulate who should prove whether the company breached its duty or not. This is an extremely hard for victims to prove in court, especially since it requires access to information in the hands of the company (particularly considering the compliance focused approach to due diligence measures in the proposal).
- The proposal currently leaves the question of burden of proof to national law. As highlighted by the EU Fundamental Rights Agency, Member States’ rules on the burden of proof constitute a major barrier in these cases, and disclosure – the obligation to release company documents in a legal dispute – either does not exist in most European legal systems or is available in only a limited way. The directive should clarify that it should be on the defendant company to clarify its connection to the violation and the harm, and to prove that it took all appropriate measures. The text should direct Member States to adopt the necessary measures so that legal fees, time limits, language and representation are not an obstacle for those seeking justice for corporate abuse.
- Civil liability applies only for the breach of the obligations to prevent or mitigate potential impacts and to end or minimise actual impacts (articles 7 and 8). Failure to comply with other articles of the directive should also give rise to liability. For instance, injunctive relief may be more important than compensatory relief, in particular, for union busting activities, or in the event of a danger to the environment. The directive should clarify that it should be on the defendant company to clarify its connection to the violation and the harm, and to prove that it took all appropriate measures. The text should direct Member States to adopt the necessary measures so that legal fees, time limits, language and representation are not an obstacle for those seeking justice for corporate abuse.
- Companies are exonerated from liability for harms caused by indirect partners if they sought contractual assurances and verified compliance therewith. The exemption would not apply if it was unreasonable to expect that such contractual assurances would prevent the harm, which one could argue in a significant number of cases. However, it opens a potential loophole.
- It should also be reconsidered whether any due diligence defence should be available for companies when harm is caused by their subsidiaries, considering that subsidiaries are part of the corporate structure, not a business relationship.
- Other major barriers to justice routinely faced by claimants in business-related human rights and environmental cases remain unaddressed. In particular, the directive should ensure:
  - that Member States set up accompanying measures to provide support to claimants, including by regulating legal costs in light of the disparity of resources between the parties, as foreseen in the German due diligence law and
  - that Member States set up accompanying measures so that legal fees, time limits, language and representation are not an obstacle for those seeking justice for corporate abuse.
- The proposal makes liability of overriding mandatory application in cases where the law applicable to a claim is not the law of a Member State. This would ensure companies can be held liable as per the directive, no matter where the harm occurred. This provision can help overcome one common barrier to justice as seen in previous business-related human rights cases where the application of foreign law led to the case being dismissed. However, this provision only works if the liability regime set out in the directive is strong and does not fall short of legislation otherwise applicable. For this reason, ideally, the Rome II Regulation should be modified so that claimants can opt for the law that is most favorable to them, as foreseen in the German due diligence law.
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