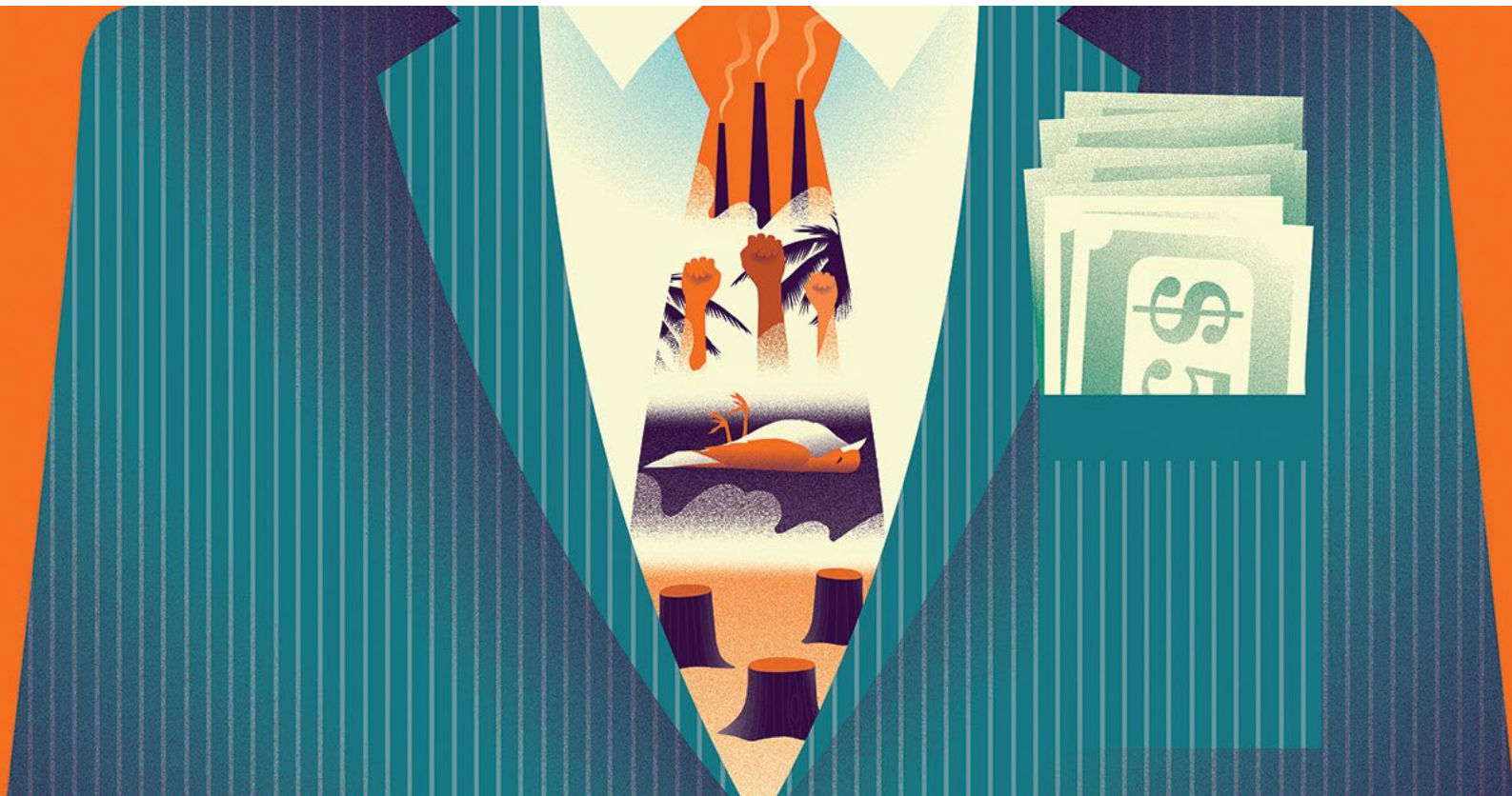
global witness

# A CHANCE AT A SUSTAINABLE FUTURE
# STRENGTHENING THE EU'S NEW LAW

4 April 2022



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# INTRODUCTION

As enthusiasm for a European Green Deal swept across EU institutions in 2019, the European Commission made a clear promise to change the rules of engagement for business.

In April 2020, the European Commissioner for Justice, Didier Reynders, publicly committed to tabling a legislative proposal on sustainable corporate governance[1] and helping reset the power imbalance between corporations, people and planet by regulating the supply chains that feed into Europe’s single market.

This was based on an emerging agreement across Europe’s political spectrum that **voluntary measures have failed** to reign in corporate human rights and environmental abuses. With a growing consensus among civil society,[2] the private sector[3] and the wider public[4] on the need for corporate accountability legislation, **the European Union (EU) has a clear mandate to introduce a strong, enforceable law to protect both people and the planet.**

On 23 February 2022, the European Commission released the long-awaited proposal on Corporate Sustainability Due Diligence. The draft Directive aims to “foster [companies’] respect of human rights and the environment in their own operations and throughout their value chains”[5] by mandating them to identify, prevent, mitigate and account for their impacts. This presents an unprecedented opportunity to help protect people and the environment. The Directive could be the first regional framework compelling companies to act sustainably, and to sanction and hold them liable in court if they fail to do so.

Despite its groundbreaking potential, the European Council and Parliament must strengthen and reassess several components of the Commission's proposal to meet its stated objective. At a minimum, the Directive must be aligned with well-established international standards on human rights, environmental protection and responsible business conduct. In the absence of necessary amendments to further strengthen the obligations imposed on companies, the Directive risks becoming a bureaucratic tick-box exercise failing to meaningfully prevent human rights abuses and environmental degradation in supply chains.

**"This proposal is a real game-changer in the way companies operate their business activities throughout their global supply chain. With these rules, we want to stand up for human rights and lead the green transition"**

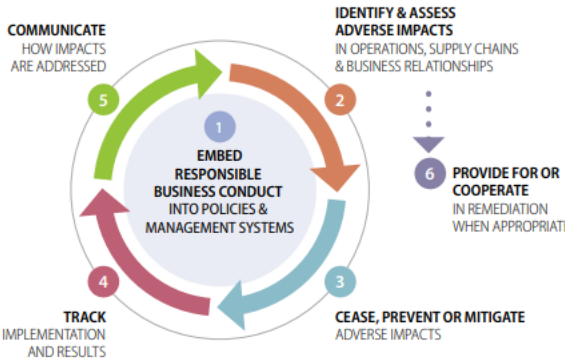
European Commissioner for Justice, Didier Reynders[6]

## No "box-ticking" due diligence

Due diligence was first introduced by the United Nations Guiding Principles on Business and Human Rights (UNGPs)[7] and the OECD Guidelines[8].These international standards outline how companies must carry out ongoing due diligence to identify and assess their actual and potential adverse impacts, take action to prevent or mitigate them, monitor the implementation and effectiveness of the steps taken and then publicly account for the process. Related to this, companies have a responsibility to ensure that victims have access to effective remedies when there is an adverse impact. The Commission's proposal currently falls short of aligning with existing international best practices and risks becoming a box-ticking exercise.

The human rights and environmental due diligence (HREDD) framework in the OECD Due Diligence Guidance for Responsible Business Conduct[9] outlines specific due diligence steps, ensuring minimum common standards of behaviour for all companies. These requirements minimise the risk of fragmented and uneven standards across Member States, while nonetheless avoiding overly detailed and prescriptive provisions that can lead to formalistic due diligence. In the description of the HREDD steps and measures, the Directive should use open formulations that allow for and encourage development of new best practices, proactive behaviour by companies and substantive implementation.

### OECD Due Diligence process




## This cannot wait

For decades, businesses have profited from human rights abuses and destructive practices that have polluted the environment, wrecked the planet and destroyed the lives and livelihoods of those who have tried to stop them. Global Witness reported that in 2018, 167 land and environmental defenders were murdered for standing up to harmful corporate projects - with many more facing reprisals in the form of criminalisation, intimidation and surveillance. The number of killings rose to 227 in 2020, with the worst violence linked to the mining and agri-business sectors.[10]

The EU's proposed legislative intervention is long overdue and urgently needed. Ten years after the introduction of the UNGPs and the revision of the OECD guidelines, voluntary due diligence

measures have neither changed companies' behaviour nor held them accountable for their actions. Global Witness has demonstrated how, in pursuit of profit, corporate actions have led to significant and often **irreversible harms** to both people and the planet.

A 2022 study[11] of 1,000 companies across 60 countries shows that **only 1% are meeting the basics of socially responsible business conduct**. A failure to implement robust legislative frameworks now will not only constitute a foregone opportunity but will also cause permanent environmental damage as well as ongoing suffering for affected populations worldwide.

## Briefing objective

This briefing aims to inform ongoing EU legislative debates by outlining Global Witness' key proposals for a robust due diligence and liability framework. It seeks to help strengthen the current proposal where it falls short of protecting communities and the environment from corporate abuse. In particular, the text must be revised and amended to:

- Establish a clear corporate duty to prevent human rights, environmental, and climate harms throughout the entire value chain
- Ensure that due diligence is an outcome-oriented duty where results matter
- Incorporate safe and meaningful stakeholder engagement as an essential and mandatory component of the due diligence process, while recognizing the safety concerns specific to Human Rights Defenders (HRDs) and Land and Environmental Defenders (LEDs)
- Address the barriers to justice that prevent victims of corporate abuse from accessing effective remedy
- Ensure that companies cannot exclusively rely on contractual assurances and third-party verification processes to seek and establish compliance with their due diligence obligations and to rebut liability
- Ensure that financial institutions are held to the same ongoing due diligence requirements as other companies, and do not provide financial services where these might cause or contribute to harm
- Introduce robust transparency and disclosure requirements

This briefing divides our analysis into five sections, namely the due diligence process, civil liability, risks, enforcement and scope.

## Key terms and abbreviations

**HREDD:** Human Rights and Environmental Due Diligence
**SCDD:** Sustainable Corporate Due Diligence directive
**MS:** Member State
**EC:** European Commission
**EP:** European Parliament
**OECD:** Organisation for Economic Cooperation and Development
**HRDs:** Human Rights Defenders
**LEDs**: Land and Environmental Defenders
**RBC:** Responsible Business Conduct
**UNGPs:** United Nations Guiding Principles on Business and Human Rights
**OECD Guidelines:** OECD Guidelines for Multinational Enterprises

## Key documents

> United Nations Guiding Principles on Business and Human Rights
> OECD Guidelines for Multinational Enterprises
> OECD Due Diligence Guidance for Responsible Business Conduct
> European Commission Proposal for a Directive on Corporate Sustainability Due Diligence and Annex
> European Parliament Resolution of 10 March 2021 with Recommendations to the Commission on Corporate Due Diligence and Corporate Accountability
> European Council Conclusions on Human Rights and Decent Work in Global Supply Chains
> NGO Coalition Paper on Principal Elements of EU Due Diligence Legislation

# 1. ENSURING A ROBUST DUE DILIGENCE PROCESS

The Commission's proposal outlines due diligence as a process whereby companies are required to identify actual or potential adverse impacts, prevent and mitigate potential adverse impacts, as well as bring actual adverse impacts to an end or minimise their extent. It states that they must also integrate due diligence into corporate policies as well as develop a due diligence-specific policy, establish a complaints procedure, monitor the effectiveness of their due diligence steps and publicly communicate on due diligence.

While many of the components of due diligence outlined by the Commission are positive, the existing proposal nonetheless fails to reflect the nature, scope and contents of due diligence in line with international standards. It falls short of defining due diligence as a continuous process that requires ongoing stakeholder engagement as well as thorough, timely and transparent disclosure practices to be effective. It also does not specify that companies should publicly account for all steps of the HREDD process, nor does it outline an explicit requirement for companies to remediate or cooperate in the remediation of adverse impacts. Lastly, the proposal exempts financial institutions from comprehensive HREDD by unjustifiably limiting the scope of their duties and disengagement obligations.

## HOW TO STRENGTHEN THE COMMISSION'S PROPOSAL

### A. Define HREDD in line with international standards

As clearly established by the UNGPs and the OECD Guidelines, HREDD helps companies fulfil their duty to respect human rights and the environment. While HREDD may be considered an "obligation of means" (i.e. an obligation to undertake HREDD steps, regardless of their result or effectiveness), it is also by its definition an outcome-oriented process, whereby the extent to which a company prevents harm matters.

The Directive should therefore clarify that HREDD is an outcome-oriented process, and that its main objective is to help companies identify and prevent risks to, and adverse impacts on, human rights and the environment. It should also specify that HREDD involves risks to people and to the environment, in contrast to standard corporate due diligence which is concerned with risks to the company.

**HREDD must be a continuous process**

The proposal appears to suggest a relatively static HREDD process, whereby companies assess their risks and impacts, put the required mitigation or preventative measure in place, and

are only required to review their measures yearly, except where significant new risks emerge.

This approach is completely at odds with the UNGP and OECD definitions of HREDD as an "ongoing, responsive and changing" process[12]. This is echoed in the European Parliament's (EP) position, which specified that due diligence must be ongoing.[13] The Directive must therefore also clarify that HREDD is a dynamic and continuous process. It should be adaptable and responsive to changing contextual realities, not a static or one-off exercise.

In addition, to be effective, HREDD must be integrated into a company's operating, business and decision-making processes. This will range from the company's buying practices and supplier relationships to its decisions to expand an existing project or enter a new operating context.

**HREDD must emphasise prevention**

Parts of the proposal muddle the concepts of prevention, mitigation, minimization and neutralisation, making room for companies to pursue harmful activities when their outcome could have been prevented. The examples below highlight this ambiguity and illustrate its potential to exacerbate harm:

> Article 8.1 requires companies to bring actual adverse impacts to an end. Article 8.2 deals, in turn, with adverse impacts that "cannot be brought to an end". In referring to the impossibility of bringing a harmful activity to an end, it is not clear whether this was concluded after all genuine efforts to stop the harm have been pursued, or as an *a priori* decision or conclusion that a company can take or reach ahead of the activity (the latter being clearly unacceptable)

> Similarly, it is not clear whether the duty to "neutralise the adverse impact" in article 8.2(a) is intended as an alternative to prevention or as remedial action when, despite all efforts to prevent, harm nevertheless still occurred

The lack of clarity in these concepts can lead to situations in which companies weigh in the financial and commercial pros and cons of prevention vs. mitigation or minimization of harm and decide that, on balance, it is more convenient to proceed with a harmful project or activity and compensate the victims than to invest time, resources and effort in preventing harm.

Therefore, the Directive should clarify that:

> Mitigation, minimisation or neutralisation of adverse impacts is not an acceptable substitute for prevention where the risk of impact is foreseeable. Mitigation of adverse impacts is acceptable (and should be mandated) as a means of reducing the severity or scale of harm in situations in which, despite all efforts to prevent it, harm nevertheless still occurs

> Remediation is not an acceptable substitute for prevention where the risk or impact is foreseeable. Remediation is owed (and should be mandated) in situations where despite all efforts to prevent harm, harm nevertheless still occurs. It is also without prejudice to nor a substitute for taking action to cease the activity or business relationship that is causing or contributing to the harm

> Where adverse impacts did occur, companies must remediate them or cooperate in their remediation in line with established international standards

**Obligation to conduct adequate HREDD**

While the proposal gives companies significant latitude to tailor their due diligence approaches[1], at no point does the Directive indicate how adequate or effective due diligence process should look. As a result, there are no criteria to judge the quality, adequacy or effectiveness of due diligence measures, such as the prevention action plan indicated under article 7.2(a) or the corrective action plan under article 8.3(b).

The Directive should outline, in a non-exhaustive manner, criteria or key elements for judging the adequacy of HREDD. These should include:

> The extent to which the due diligence steps adequately identified the potential or actual harms through contextual risks assessments

> The extent to which the due diligence steps in place were tailored to the specific harm under consideration and were capable of preventing it in practice

> The extent to which the company engaged in meaningful consultation with those potentially affected, and their views had a genuine bearing on corporate decision-making

> The extent to which the company disclosed all relevant information about its activities to potentially affected stakeholders, HRDs and LEDs, and other experts to allow for a genuinely informed debate about possible risks and means of minimising them

> If labour rights are at stake, the extent to which workers, workers' representatives or trade unions were involved in the identification and assessment of risks and impacts and in the design of preventative measures

> If Indigenous peoples' territories and resources are affected, the extent to which their Free, Prior and Informed Consent was sought

> The extent to which the company chose those measures best suited to identify and prevent harm (as well as mitigate or minimize it, only in contexts where prevention was genuinely pursued)

> Whether the company ceased activities that were causing or contributing to harms that were not or could not be prevented, etc.

## Recommendations

> In Article 1, explicitly state that HREDD is an outcome-oriented process: its main objective is to help companies identify and prevent risks to, and actual adverse impacts on, human rights and the environment

> Explicitly state that the due diligence outlined in Article 4 must be an ongoing and continuous process

> Clarify and distinguish the concepts of prevention, mitigation, minimisation and neutralisation in Articles 6, 7, and 8

> Introduce clear criteria to judge the effectiveness of the HREDD processes that companies established (for example, to be able to judge the effectiveness of the prevention action plan indicated under article 7.2(a) and corrective action plan under article 8.3(b))

## B. Mandate safe and meaningful stakeholder engagement

The OECD clearly states that meaningful stakeholder engagement is important throughout the due diligence process, and that engaging with impacted and potentially impacted stakeholders is vital for companies

1 By repeatedly using phrases such as "where necessary" and "where relevant," and through the very concept of "appropriate measures," which includes considerations such as what might be "reasonably available to the company" and the "need to ensure prioritisation of action"

carrying out HREDD. Accurate identification and assessment of risks to human rights, the environment and good governance cannot be done without meaningful stakeholder consultation. Potentially impacted stakeholders themselves are best positioned to anticipate the way in which certain activities or projects are likely to affect them.

Meaningful engagement, especially with affected or potentially affected stakeholders, enables companies to identify and better understand the nature, scope and severity of risks and design the most appropriate ways of preventing or mitigating them. This is also critical for understanding and designing appropriate responses to the differentiated impacts of certain projects and activities on women and other specific stakeholder groups.

Ongoing engagement with stakeholders, including human rights defenders (HRDs), land and environmental defenders (LEDs) and relevant experts also ensures continuous learning, adjustment and improvement of HREDD processes.

**"Meaningful stakeholder engagement is characterised by two-way communication and depends on the good faith of the participants on both sides. It is also responsive and ongoing, and includes in many cases engaging with relevant stakeholders before decisions have been made."**

OECD Guidance for Responsible business conduct[14]

**Duty to Consult**

Based on the OECD's stakeholder engagement framework, this Directive must include an obligation for companies to integrate an explicit "duty to consult" and engage with stakeholders impacted and potentially impacted by a company's operations. This duty would constitute a fundamental parameter for judging the adequacy of HREDD processes. In this way, any failure to consult or to consult adequately in line with international standards would amount to a failure to conduct adequate HREDD.

Moreover, the Directive must mandate that companies develop and publish their stakeholder consultation framework, which outlines the ways in which they both gather and disseminate information. Companies should build frameworks that align with stakeholders' realities and incorporate the engagement parameters detailed below.

**Ongoing Engagement**

The Directive must require meaningful stakeholder engagement throughout the entire due diligence lifecycle, placing particular emphasis on the need to consult with people affected or likely to be affected by a company's activities or by the activities of entities in the company's value chain. Engagement must be integrated into all stages of the HREDD process, including risk and impact identification, design, implementation, monitoring, as well as tracking and evaluation of preventative and remediation measures.

**Inclusive and Informed Engagement**

Engagement must be based on full and timely disclosure of all relevant information. Engagement mechanisms must consider and address potential barriers to participation, and proactively seek the perspective of women and marginalised or vulnerable rights-holder groups.

Where workers are or may be impacted by a company's activities or the activities of entities in the company's value chain, stakeholder engagement must not interfere with but must facilitate and ensure respect for the workers' right to freedom of association and collective bargaining, in line with international labour law.

The Directive should also mandate that companies take appropriate steps to identify the range of potentially affected stakeholders. In conjunction with direct consultation, companies should seek expert advice and input to ensure meaningful consultation. Expert support can include context mapping, as well as mediation to mitigate security risks, ascertain additional risks or to improve communications with affected communities and their representatives, for example.

**Safe Engagement**

To be meaningful and effective, consultation mechanisms must minimise risks to people who will otherwise not participate or may suffer retaliation for their participation. Safeguards may need to be in place to ensure stakeholders can engage safely and confidently, without fear of retaliation, and communication methods themselves may need to be adapted to minimise safety concerns.

**Respecting Free, Prior and Informed Consent (FPIC)**

Where Indigenous peoples and local communities are or may be impacted by a company's activities or the activities of entities in the company's value chain, stakeholder engagement must not interfere with but must facilitate and ensure respect for their right to free, prior and informed consent (FPIC) and other rights established under the UNDRIP and ILO Convention 169 in line with relevant international standards.

## Recommendations

- Introduce a "duty to consult" as outlined above to ensure companies can fulfil their due diligence obligations in articles 4-8
- Introduce provisions to ensure stakeholder engagement is safe, meaningful and inclusive
- Expand the definition of Art 3(n) to include articles 10, 11, 19, 28, and 32 from the UN Declaration on the Rights of Indigenous Peoples (UNDRIP)[15]

**Complaints Procedure**

The draft directive mandates that companies establish a complaints procedure and give complainants a right to request appropriate follow-up to complaints. The text contains some important features, such as ample standing to bring complaints, a duty of the company to meet with complainants, and the obligation to deem well-founded complaints as "identified" risks or impacts.

However, the assessment of whether a complaint is well-founded will presumably rest on the company. This can be subject to abuse. Certain safeguards should apply, such as a requirement that companies fully justify and publish their assessments (redacted or anonymized where necessary to protect complainants), a clarification that the assessment cannot be based on the existence of evidence that complainants cannot realistically be expected to access, and the availability of an appeal process. Companies should have an obligation to respond to complaints in a timely manner.

Furthermore, in order to ensure these procedures' effectiveness and integrity, the Directive should further require that companies follow the UNGP's effectiveness criteria for grievance mechanisms, laid down in Principle 3. In particular, it should demand that these procedures are transparent, equitable and predictable,[16] and that time limits for decisions and responses to complaints are clearly established.

Lastly, the proposal expands the Whistleblower Directive[17] to persons who report breaches of this directive via grievance mechanisms. This is very important and a positive addition. However, the Whistleblower Directive only applies to persons acting within a "work-related context" (e.g. current or former workers) and does not cover persons that are external to the company, such as

HRDs or LEDs. The text must include additional provisions for their protection.

## Recommendations

- Further specify key elements of the complaints procedure in Article 9 to ensure full transparency and clear obligations for companies to respond to complaints in timely manner
- Include an obligation for companies to respond to any complaint submitted under the procedure in Article 9
- Amend Article 23 to ensure that companies implement effective measures within their complaint mechanisms to prevent reprisals against HRDs, LEDs and any other stakeholders who seek to use the complaints procedure

**Explicit recognition of defenders[18]**

HRDs and LEDs face heightened security risks, including violence, intimidation and harassment. Inadequate due diligence to identify and mitigate reprisal risks increases their exposure to harm, as well as the number and severity of likely attacks against defenders.

The Directive should include explicit recognition that certain groups, such as defenders, have a right to freedom of expression, including in the context of, and in relation to, corporate activities. In addition to explicitly naming defenders as a group that companies must engage, companies should evaluate the presence of and risks to HRDs and LEDs throughout their due diligence process.

To assess reprisal risks, companies need to ensure it is integrated into broader contextual risks assessments that consider risks to HRDS and LEDs at the country level and at project level. Assessments should include a rigorous system for identifying, evaluating, and classifying the severity of any potential or actual reported reprisals, and the classification should give weight to non-physical as well as physical forms of attacks (e.g. criminalisation). The prevalence of reprisals should be seen as a "red flag" indicating that companies should not initiate a project.

Crucially, reprisal risk assessments on potential or actual harms to HRDs and LEDs should be considered as an ongoing commitment to be conducted from the beginning of a project or business relationship. Companies must commit resources to regularly conducting risk assessments, both to ensure that new risks are identified and addressed and to check that mitigation measures are being implemented effectively. Key parameters set out in Principles 18-21 of the UN Guiding Principles on Business and Human Rights provide a relevant framework for this work.

In addition, The Directive should require that companies prevent retaliation against defenders across their value chains. The framework outlined around safe engagement (above) should include "communicating a zero-tolerance approach to attacks on HRDs across business relationships."

Finally, all complaints procedures must be structured to ensure safe and informed engagement for complainants. To do this they must ensure the procedures are accessible to local communities, including HRDs and LEDs, and that the procedures are robust enough to provide sufficient levels of protection. This includes confidential complaints assessments and adequate handling of data related to or provided by defenders.

## Recommendations

- The definition of Art 3(n) should specifically include HRDs/LEDS as key stakeholders
- Article 6 on the identification of actual and adverse impacts should be broadened to ensure companies undertake contextual risks assessments that cover due diligence on adverse governance impacts, including reprisal risks to HRDs/LEDs

## C. Ensure Thorough, Transparent and Timely Disclosure

The disclosure requirements covered under the proposal's existing scope are insufficient to ensure a complete and transparent understanding of a company's due diligence steps. Companies must be required to publicly demonstrate that they are conducting adequate due diligence and that their measures are yielding the desired results (i.e. public proof of action).

While the proposal for a Corporate Sustainable Reporting Directive (CSRD)[19] requires companies to publish an annual statement addressing "matters covered by this Directive," there is no indication as to the exact content of the reporting requirements. It is nonetheless clear that this reporting is standardised and static, and does not respond to the need for ongoing information to be made available.

To be effective and serve the purpose of demonstrating to the public the "adequacy" of an enterprise's response to "particular" impacts as called for by the UNGPs, the Commission's additional provisions will need to ensure:

**Sufficiently thorough HREDD disclosure**

The current CSRD proposal requires that companies report on their due diligence process as part of their annual company reporting. This includes only an overview of the company's actual or potential adverse impacts and due diligence plan. It is insufficient to capture the dynamic and detailed nature of HREDD processes, which will be outlined under this Directive.

The Directive should therefore expand CSRD disclosure requirements to include:

- Identified impacts and risks, as well as the methodology and criteria for identifying them, including engagement and consultations
- The measures implemented to prevent or mitigate risks, and to remediate adverse impacts, as well as their outcomes
- The plans to identify, assess, prevent, mitigate and address risks and impacts going forward
- Value chain transparency as well as disclosure of risks/ impacts and due diligence measures in the value chain, which are also critical for a full and proper understanding of a company's human rights, environmental and governance impacts

Given the ongoing and continuous nature of HREDD, these disclosure requirements should be considered as non-exhaustive. Companies must be mandated to disclose any other information necessary for a clear understanding of a company's risks and impacts on rights-holders and the environment, and action taken or planned to address them.

These public disclosure requirements differs from the disclosure that is owed to individuals and groups whose human rights have been or are at risk of being impacted by corporate activities. This information is owed to them as a matter of right. It is also indispensable for an adequate HREDD process, and a prerequisite for the effective exercise of other human rights: participation, consultation and FPIC (see section on stakeholder engagement). To ensure the right to information of rights-holders, the Directive should further demand:

- **Proactive disclosure of information to stakeholders:** In addition to public disclosure, companies must be required to keep stakeholders informed about the nature, breadth and depth of any specific risks and impacts affecting or likely to affect them and/or their environment as well as the specific actions to prevent, mitigate and address these risks and impacts by proactively making this information available to them. While much of this will overlap with their public reporting, this information will likely be more specific, targeted and detailed. It will

need to be presented in an accessible and culturally appropriate manner and be accompanied by disclosure of all relevant documentation, such as project-specific impact assessments or incident inspection reports.

> **Passive disclosure of information to rights-holders:** While companies must be required to disclose information to stakeholders proactively, a formal right for affected or potentially affected people and other interested parties to request information must complement automatic disclosure. It will ensure that stakeholders and other interested persons can request information that has not been disclosed proactively, thus guaranteeing that disclosure is not fully in the hands of companies.

**Timely Public Disclosure**

Annual reporting alone will often be insufficient to present as clear and up-to-date a picture as possible of a company's risks and impacts and how it is dealing with them. For this reason, the reporting requirements must also specify that complementary or additional reporting is due whenever justified by significant changes in operations or operating contexts (e.g. shifts in risk patterns, the occurrence of harmful events) and changes in decisions, activities, projects or business relationships which carry implications for the environment or human rights.

### Recommendations

> Article 11 must further specify due diligence disclosure requirements for companies as well as their actions to implement these policies

> Article 11 must also mandate that companies continuously disclose any key information relevant to the due diligence process in real time

> Companies must be mandated to both map and disclose their value chains

## 2. CIVIL LIABILITY

While the draft Directive explicitly states that it does not require companies to guarantee that "adverse impacts will never occur or that they will be stopped in all circumstances," it clarifies that this applies to contexts where "the company might not be in a position to arrive at such results." This framing acknowledges that companies are capable of guaranteeing results in certain circumstances. However, the proposal fails to sufficiently capture these circumstances by establishing an express duty to prevent harm.

Furthermore, while we welcome the integration of civil liability provisions in the text, these must effectively ensure that companies can be held accountable for the harm they cause throughout their value chain. The current draft includes potential loopholes that companies can leverage to devolve or shirk responsibilities; an overreliance on these would remove the Directive's potential to prevent corporate harm. These include opportunities for companies to lean on contractual clauses that can help transfer responsibility to other entities in the value chain, to rely on third-party verification systems despite their limited efficacy, and to avoid due diligence requirements across the full value chain by assessing only "established business relationships".

## HOW TO STRENGTHEN THE COMMISSION'S PROPOSAL

### A. Include a "duty to prevent"

The Directive should establish a clear duty to prevent harm, as well as to conduct HREDD to discharge that duty. To discharge their duty to prevent, companies should be required to take all reasonable steps to avoid harm. These will include the specific HREDD steps outlined in the proposal, but might need to go beyond these in certain circumstances.

In line with this, the Directive should reflect that:

> The specific HREDD steps prescribed by the Directive are not exhaustive of all steps and

measures a company may need to take to prevent harm in a given case

> The fact that a company has conducted HREDD in line with the Directive should not automatically or fully absolve the company from liability. The UNGPs clarify in the commentary to principle 17 that, "[…] business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses"). Companies should be liable unless they can demonstrate that they took all reasonable measures to avoid the specific harm in the circumstances, and, crucially, *that there was nothing else they could reasonably have done to prevent the harm.*

These changes are critical to avert the risk that due diligence under the Directive becomes a box-ticking exercise capable of exonerating companies from liability for harm, even in situations in which they could reasonably have done more to prevent it.

**A general duty of due diligence**

In addition to the above, a general duty to conduct HREDD should apply in relation to all entities in a company's value chain, in line with well-established principles under the UNGPs and OECD Guidelines.

**Causing or contributing to harm**

The Directive should clearly establish that all companies, regardless of their position in the value chain or degree of control or influence over other entities or circumstances, can be held liable for directly or indirectly causing or contributing to human rights and environmental harm, wherever this occurs in the value chain.

## B. Eliminate potential loopholes

**Replace 'established business relationships' with 'business relationships'**

A company's due diligence duties should extend throughout its entire value chain, in line with the UNGPs and OECD Guidelines, and must not be limited to certain types of relationships. This aligns with the due diligence duty outlined above, which should extend to what the Commission terms "negligible or merely ancillary part of the company's value chain."

The proposal also specifies that companies are responsible for the impact of companies with whom their relationship "expected to be lasting, in view of its intensity or duration." This does not reflect the structure of many value chains, which may rely on short-term business structures and multiple smaller suppliers.

The concept of an "established business relationship," as currently drafted in the proposal, risks:

> Creating a loophole for companies to avoid conducting due diligence for short-term or "negligible" relationships that may cause harm

> Leading to harmful behaviours such as supplier hopping, whereby companies avoid establishing longer term supplier relationships and instead change suppliers frequently to sidestep due diligence obligations

> Directing companies' efforts toward addressing harms where their business engagement is most easily identifiable, not where harms or risks of harm are the most severe

The definition of established business relationship must be removed and replaced with the commonly recognised definition of "business relationship,"[20] which refers to direct and indirect relationships that a company has with its business partners, entities in its value chain and other State or non-state actors linked to any of its operations, products or services.

In addition, the proposal allows companies to delegate responsibility as well as lean on third-party verification systems with no oversight or

accountability to ensure identification, prevention or removal of harms throughout their value chains (see section below).

**Ensure contracts cannot be used to outsource responsibility**

Contract clauses can be a helpful due diligence step in the context of business relationships, and a way of establishing reciprocal duties across business relationships. However, contract clauses that have the effect of shifting the responsibility for carrying out due diligence as well as upholding human rights and environmental standards onto suppliers and other actors in the value chain must be avoided.

On their own, these clauses are unlikely to ensure prevention of human rights and environmental harm, and can in fact aggravate risks by placing additional pressures on entities that often have neither the resources nor the operational infrastructure in place to bear them.

The Directive should therefore indicate that contracts must contain the following characteristics and obligations:

- A responsibility for the lead company to support its partner in meeting the HREDD commitments entrenched in such contracts, including with the necessary levels of financial and other resources
- A commitment by the buyer to engage in responsible purchasing practices that will support - not interfere with or undermine – the supplier's obligations to uphold human rights and environmental standards
- A joint commitment that, in the event of an adverse impact, the parties will prioritise victim-centred human rights remediation above conventional contract remedies (that flow from the breaching party to the non-breaching party, not to victims)

**Remove Third-Party Verification**

Ample evidence from multiple jurisdictions globally demonstrates that social auditors' and certifiers' failures have resulted in countless human rights violations, emphasising the systemic failures of many third-party verification systems. The Directive must therefore not allow for third party certification to be considered as sufficient evidence of appropriate diligence. The entire proposal would be severely undermined if a company was able to defend claims of harm solely through its use of third-party verification.

The Directive must ensure that companies cannot outsource their due diligence duty to third-party verifiers, and that they face legal accountability for human rights violations and environmental destruction. Much like for contractual assurances, the Directive should explicitly state that third-party verification does not shield companies from liability or absolve them from their duty to prevent and mitigate harm.

## Recommendations

- Clearly establish a "duty to prevent" harm alongside HREDD obligations for companies
- Clearly establish a duty to conduct due diligence along the entire value chain
- Replace references to "established business relationships" with "business relationships" as defined in the OHCHR's Corporate Responsibility to Respect Interpretive Guide
- Outline clear and mandatory contracting characteristics that companies must follow, in line with the recommendations above
- Remove references to third-party verification, and emphasize that the duty for HREDD and liability for non-compliance with the Directives lies with the company

## 3. RISKS

The scope of the human rights, environmental and climate risks captured under the due diligence process (combined with the scope of companies covered by this Directive), will have an enormous impact on the Directive's capacity to protect people as well as the environment. The current draft annex includes a list of applicable human rights conventions and a limited set of environmental standards. It also suggests that companies have a duty to address climate impacts, without explicitly including this as part of the due diligence process.

However, the draft Directive omits references to crucial human rights, environmental and governance instruments and conventions, chief among them the Paris Agreement,[21] the OECD Anti-Bribery Convention[22] and the UN Declaration on Human Rights Defenders. The latter provides for the support and protection of human rights defenders in the context of their work, articulating existing rights in a way that makes it easier to apply them to the practical role and context in which they operate.

# HOW TO STRENGTHEN THE COMMISSION'S PROPOSAL

## A. Include mandatory climate due diligence

While the proposal explicitly refers to climate in article 15, aimed at "Combating Climate Change," it does not mandate that companies undertake climate due diligence, nor does it make climate due diligence enforceable through civil or administrative liability mechanisms. Indeed, the only reference "adverse climate impacts" is in Article 29 as part of a review clause. This means that unless the text is further strengthened, companies will not need to identify the climate risks in their supply chains until after 2030. Given the urgency of corporate action on climate and the EU's ambitions under the Green Deal, this is unacceptable.

Companies have played a central role in creating the climate crisis, and though the international community acknowledges that we are now at a tipping point, action to curb harmful corporate behaviour has been slow and insufficient. The Directive must include a binding climate due diligence framework with 'Paris-aligned' objectives and strategies. This would complement elements of the Corporate Sustainability Reporting Directive ('CSRD'), which requires companies to report on their plans to ensure that their business model and strategy are compatible with the transition to a sustainable economy, and with the limiting of global heating to 1.5°C.

**Define climate-related impacts**

The Directive should outline broad definitions of environmental and climate impacts to ensure adequate GHG reduction and environmental protection targets. This should incorporate an indicative, non-exhaustive list of adverse environmental impacts, should be developed in consultation with stakeholders, and should leave room to accommodate the consolidation and development of this area of law.

**Assess climate-related impacts**

Businesses should assess actual and potential climate-related impacts based on their total GHG emissions inventory across their value chain; these should include Scope 1 (direct emissions from owned or controlled sources), Scope 2 (indirect emissions from the generation of energy that is purchased and used by the company) and Scope 3 (all other indirect emissions). Companies should then evaluate their contribution to these impacts. Their assessment and ensuing targets must be reasonable, precautionary, evidence-based, regularly updated in line with the best available science, and aligned with the Paris Agreement.

**Address climate-related impacts**

Establishing and meeting Science-based Targets will be central to addressing companies' climate-related impacts. This should be reflected in the Directive.

Companies should aim to reduce emissions related to all their business activities in line with 1.5°C pathways by setting clear, Paris-aligned targets. Much like the assessments, the targets must be regularly updated based on the best available science.

As mentioned above Paris-aligned targets, assumptions and methodologies must be reasonable, precautionary, evidence-based and regularly updated in line with the best available science. The Directive must also prioritise the near-term reduction of absolute emissions rather than the setting of net zero targets for decades ahead. This means that:

> The entity must set an objective of achieving Paris-aligned targets (Scopes 1–3) by 2050 at the latest, depending on sector, and consistent with a 1.5°C pathway

> The entity must adopt a strategy which sets short (1-2 years), medium (2-5 years) and long-term targets, including 2025 and 2030 targets (Scopes 1–3)

> The strategy and underlying assumptions must prioritise reductions in its value chain GHG emissions and not rely on unproven or uncosted negative GHG emissions, offsets, and/or technology

> The strategy must explicitly consider 'just transition' imperatives.

> Established reduction targets and mitigation measures must be effectively integrated into the business, with tasks and responsibilities assigned at the right level and to the right functions

> In the event of adverse climate effects, the company discontinues activities and investments that prevent it from achieving its reduction targets

## Recommendations

Building on the current draft of Article 15, the proposal should Integrate climate risks and impacts into the HREDD process in line with OECD guidelines by:

> Introducing a definition of "adverse climate impacts" in Article 3

> Requiring companies to align targets and action with the goals of the Paris Agreement

> Including the Paris Agreement in the Annex as a key international text and standard on climate

## B. Broaden the list of human rights conventions and impacts

In addition to the listed conventions, the Directive should explicitly refer, in annex, to the following:

> The ILO Convention 190 on violence and harassment in the world of work, a key convention to improve gender responsiveness of the Directive

> CEDAW articles 1 and 2, which define what constitutes discrimination against women and State obligations in this regard

> The Convention on the Protection of the Rights of all migrant workers and members of their families

> The Convention on the Protection of All Persons from Enforced Disappearances

> UN Declaration on Human Rights Defenders

> Articles 10, 11, 19, 28, and 32 of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP)

## Recommendation

> The Directive must expand the list of human rights listed in annex to include the conventions and provisions listed above

## C. Include due diligence on adverse governance impacts

The close links between human rights abuses, environmental destruction and corruption have been well documented.[21] Corruption diverts resources, often expediting or exacerbating human rights and environmental abuses by allowing destructive projects to go ahead, dodgy concessions to be granted and communities to be displaced for profit. It increases power imbalances between those who are rich, powerful and profitable and the affected people and communities that suffer the consequences.

This Directive must therefore include strong measures to tackle corruption and require that companies address the negative risks and impacts of corruption as part of a broader HREDD obligation. This will not substitute other efforts required to strengthen the EU's fight against corruption. However, strong anti-corruption measures integrated into due diligence processes will help to catalyse business action on corruption, harmonise the legislative approach to this and remove distortions in competition in the EU's internal market. The EP supported this approach in its report calling for corporate accountability legislation.

### Recommendations

- Introduce a definition of 'adverse governance impact'
- Include an Annex to cover key governance aspects, including the United Nations Convention Against Corruption (UNAC) (2003), the OECD Anti-Bribery Convention (1997), and the Council of Europe Civil Law Convention on Corruption (1999)

# 4. ENFORCEMENT

A robust enforcement framework is crucial to guaranteeing the Directive's effectiveness, deterring harmful corporate behaviour and allowing victims of corporate abuse access to remedy in EU courts. The draft Directive includes important components of both a civil and administrative liability regime by introducing civil liability for harm caused by a failure to conduct due diligence, the overriding mandatory application of civil liability as well as the establishment of supervisory authorities with the power to request information, investigate and impose sanctions.

The proposal nonetheless fails to address existing barriers to justice for victims of corporate abuse who, based on the existing draft, will continue to struggle to access justice and obtain remediation.

## HOW TO STRENGTHEN THE COMMISSION'S PROPOSAL

The prospect of civil liability will provide a strong incentive for companies to comply with their HREDD obligations, further contributing to ensuring the law's effectiveness. In addition, civil liability provides victims of corporate-human rights and environmental harm with an avenue to claim reparations, in line with their right to remedy under international and EU human rights law.

However, victims of corporate abuse often find it extremely difficult to identify and access the information and evidence they need to substantiate a claim against a corporate defendant, to acquire the financial resources needed to bring their cases to court, in addition to facing structural barriers, such as limitation periods for legal action. If left unaddressed, these barriers to justice may make the provisions on liability futile and meaningless. Lack of effective judicial accountability and access to remedy can undermine the effectiveness of the entire

Directive, as companies will know that they are unlikely to be held accountable for due diligence failures. For these reasons, the following additional measures must be implemented:

## A. Reduce barriers to justice

### Distribution of the burden of proof

The Directive should be amended to state that upon the claimant making a prima facie case based on reasonably available preliminary evidence, the burden of proof shifts to the company, who should be required to disclose any further evidence relevant to the claimant's case. This information would help determine key aspects of the case, such as the nature of the relationship between the defendant and the harming entity, whether all reasonable measures to prevent the harm were implemented by the company, and weather no other measures could reasonably have been expected from the company.

### Injunctive Relief

While the Directive includes the power of supervisory authorities to "adopt interim measures" to help avoid severe or irreparable harm, the Directive should demand that both supervisory authorities and courts are capable of providing injunctive relief to prevent or minimise the risk of harm and allow for closer scrutiny of an evolving situation. This can be achieved by ordering companies that are not meeting the due diligence standard of conduct to:

- Immediately cease certain conduct
- Desist from a repeating certain conduct
- Take and report on interim measures
- Engage with and consult with stakeholders
- Disclose information more regularly
- Provide additional information
- Any other measure required by the circumstances to help prevent or minimise the risk of harm

### Legal Standing and Collective Redress

The draft should allow for redress and injunctive measures to be sought by anyone who suffered harm or is at risk of suffering harm, including the families of the victims and any relevant stakeholders, such as HRDs and LEDs, NGOs, trade unions and consumer protection organisations. The Directive should also provide for collective redress in cases of alleged business-related human rights abuses or environmental harm with the aim to provide victims with the broadest possible access to judicial remedy.

### Limitation Period

The Directive should remove limitation periods for redress proceedings. This will allow claimants time to gather the evidence and resources required to present their case, in addition to reducing barriers to justice for victims of long-term adverse impacts, including indigenous communities.

### Financial Obstacles

MS should review procedural rules and rules on legal aid to ensure that judicial proceedings in cases concerning alleged human rights abuses or environmental harm by companies are not prohibitively expensive for the claimant, considering the potential high costs that may be incurred in such cases and the disparity of resources between the parties.

### Confidential Information

MS should ensure that national courts have the power to order the disclosure of evidence containing confidential information that is relevant to the action for redress or to the injunctive measure, including any trade secret or alleged trade secret.

## B. Clarify and expand administrative penalties

While the draft Directive specifies that sanctions should be "effective, proportional and dissuasive," it should further outline the parameters for effective and dissuasive sanctions. Sanctions could further include, but not be limited to:

- Financial sanctions tied to a percentage of turnover
- The temporary or permanent closure of an establishment
- Withdrawal of a permit or licence to operate
- Temporary or permanent disqualification from practicing a commercial activity
- Denial, suspension or withdrawal of state aid, export credit and other public finance
- Denial, suspension or withdrawal of public procurement contracts
- Directors' disqualification
- Publication of an adverse decision
- Inclusion on a public list of non-compliant companies
- Confiscation of goods
- Dissolution

## C. Include additional measures for supervisory authorities

**Publicly available information**

Supervisory authorities should be required to publish and regularly update a list of all companies subject to the Directive and maintain a publicly available repository of all HREDD reports against this list.

In addition, they should maintain a publicly available and regularly updated record of companies that

- Have not submitted reports
- Have been requested to submit additional information or to rectify submitted information and whether they have complied with these requests
- Have been sanctioned and the reasons for this
- Are subject to third party substantiated concerns, and, where relevant, the results of any investigation triggered by these complaints
- All other information and documentation concerning companies' compliance with their HREDD requirements.

Finally, they should also publish their work plan and priorities for the year ahead, as well as their enforcement action, outcome and the nature of problems found over the past year. They should account for the methodology and criteria used for determining priorities, performing checks and applying sanctions.

**Stakeholder Engagement**

Supervisory authorities should be required to solicit rights-holders' views by way of consultations and other means to inform their work plan and prioritisation, to evaluate the impact of their interventions against the objective of preventing harm and generally to assist and inform their work and performance.

**Early Warning and Rapid Response**

They should also provide an early warning mechanism for rights-holders, local human rights and environmental defenders and other members of the public to submit urgent concerns and request an early intervention from the CA to prevent problems escalating and avoid harm. Because of their urgent nature, these submissions must trigger a quick response from supervisory authorities, which may include the adoption of interim measures such as the immediate suspension of activities.

### Third Party Submission of Information

The draft Directive establishes a "Substantiated Concerns" procedure. This is very positive and will significantly support and complement the authorities' monitoring and enforcement functions. In addition to this system of formal complaints, enforcement authorities should also have a mandate to receive information regarding alleged non-compliance with HREDD duties from any member of the public and a duty to act on this information by opening an investigation or integrating it into any ongoing investigation or regular monitoring and determination processes.

### Power to Demand Information

As part of their regular monitoring or in response to substantiated concerns or submitted information by a member of the public regarding the contents of HREDD reports, supervisory authorities must have the power to demand a rectification, clarification or the submission of additional information regarding a company's HREDD practices and outcomes (either in general or in relation to a specific case or concern).

### Additional Support for Local Communities

EU Heads of Mission/MS embassies or consular offices in third countries should assist supervisory and other authorities in the implementation of protection measures for rights-holders, their representatives or members of the public who file substantiated concerns or submit information regarding alleged non-compliance with HREDD duties.

### EU Assistance in Third Countries

EU Heads of Mission/MS embassies or consular offices in third countries should facilitate the submission of substantiated concerns or information regarding alleged non-compliance with HREDD duties by actively reaching out to rights-holders and providing information about these avenues and how to use them and by offering guidance and practical assistance. Where warranted by the circumstances, they should receive substantiated concerns and information regarding alleged non-compliance with HREDD duties themselves and coordinate action with the relevant supervisory authority.

EU Heads of Mission/MS embassies or consular offices in third countries should assist supervisory and other authorities in the implementation of protection measures for rights-holders and/or HRD and LEDs at risk of harm.

## Recommendations

> In line with the application of civil liability in article 22, the Directive should outline provisions for easing barriers to justice, including:

1. Shifting the burden of proof onto companies when claimants have provided reasonably available preliminary evidence
2. Removing limitation periods for redress proceedings
3. Outlining provisions for collective redress

> Expand Article 20 to include parameters for effective and dissuasive sanctions, in line with the recommendations outlined above

> Expand Article 18 to include a mandate for supervisory authorities to publish information, and a power to demand information

# 5. SCOPE

## HOW TO STRENGTHEN THE COMMISSION'S PROPOSAL

### A. Eliminate due diligence exemptions for financial institutions

We fully support that the proposal scope captures a broad range of financial institutions whose activities have the potential to cause human rights and environmental harm. Nonetheless, the current text unjustifiably limits the scope of financial institutions' obligations. It states that these institutions must only conduct due diligence once, prior to providing their services. Their responsibilities are also limited to direct large clients (i.e. excluding entities in these clients' own value chains and direct clients that are SMEs). Finally, unlike other entities, they are not required to terminate their relationship with a company where this termination could cause "substantial prejudice" to that company.

These limitations go against the OECD's specific guidance for financial institutions[22] and fundamentally undermine crucial HREDD principles, including the importance of ongoing due diligence throughout the entire duration of a relationship (not just once during the pre-contractual phase) and of ceasing or disengaging from activities where these cause harm.

Financial institutions must be held to the same ongoing due diligence obligations principles as other companies, particularly considering the long-term nature of investment, crediting and other financial sector activities. They must be required to suspend or stop providing a financial service to a company in the same way and under the same circumstances delineated for other companies in scope of the Directive.

Financial sector due diligence must also apply to SMEs and extend to all entities in their clients' value chains. This is particularly important considering that many mid-sized financial actors (venture capital, private equity) are extremely high-risk.

### B. Integrate revision clauses to capture all companies operating in the EU

The personal scope of the Directive is currently limited and at odds with international standards. Both the size of companies covered by this Directive as well as the sectors considered "high risk" must be reviewed, with a view to adding new companies and sectors within the Directive' scope.

The scope of the Directive should be subject to review two years after its entry into force and every two years thereafter, and aim to expand its coverage to a larger number of companies and sectors, including SMEs.

#### Recommendations

- Mandate that financial institutions conduct due diligence on the same level as every other company included in the scope of this proposal
- Remove exemptions for financial institutions under Articles 6(3), 7(6) & 8(7)

# ENDNOTES

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[3] Business & Human Rights Resource Centre, *Companies & Investors in Support of mHRDD* https://www.business-humanrights.org/en/big-issues/mandatory-due-diligence/companies-investors-in-support-of-mhrdd/

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[12] Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises 2011 http://www.oecd.org/daf/inv/mne/48004323.pdf

[13] European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)) https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.html

[14] Organisation for Economic Co-operation and Development Guidance for Responsible Business Conduct, Page 49 http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf

[15] United Nations Declaration on the Rights of Indigenous Peoples, 13 September 2017 https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html

[16] Page 33, United Nations Guiding Principles on Business and Human Rights 2011 https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf

[17] DIRECTIVE (EU) 2019/1937 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 23 October 2019 on the protection of persons who report breaches of Union law https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1937

[18] The UN Declaration on Human Rights Defenders identifies human rights defenders as individuals or groups who act to promote, protect or strive for the protection and realisation of human rights and fundamental freedoms through peaceful means. Land and environmental defenders are people who take a stand and carry out peaceful action against the unjust, discriminatory, corrupt or damaging exploitation of natural resources or the environment. Land and environmental defenders are a specific type of human rights defender – and are often the most targeted for their work.

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