

***Shift***

DISCUSSION DRAFT

# “SIGNALS OF SERIOUSNESS” FOR HUMAN RIGHTS DUE DILIGENCE

HOW CAN NATIONAL REGULATORS BEST ASSESS THE  
QUALITY OF A COMPANY’S HRDD EFFORTS UNDER  
POTENTIAL EU LEGISLATION?

Following the adoption of mandatory human rights and environmental due diligence (mHREDD) at EU level, national regulators will need to assess whether companies are meeting the spirit and intent of a new legal standard of conduct, grounded in the UNGPs and OECD Guidelines. With limited resources and capacity, they will need to focus on critical “signals of seriousness” about a company’s HRDD efforts that go beyond the observable basics of policies and processes on paper and provide insight into the behaviors and mindsets that inform how HRDD is done. In this discussion draft, we propose a number of such “signals” that national regulators could rely on in order to inform current discussions about one way in which new mHREDD requirements could be enforced.

## BACKGROUND TO THIS DISCUSSION DRAFT

The European Commission is currently consulting on potential new regulation to require mandatory human rights and environmental due diligence (mHREDD). Together with many other stakeholders, **we believe that the due diligence process expectations set out in the UN Guiding Principles on Business and Human Rights (UNGPs) and in the OECD Guidelines for Multinational Enterprises (OECD GL) should form the core requirements on business in mHREDD regulation.**<sup>1</sup> Existing comprehensive guidance issued by the OHCHR and OECD in relation to each of those standards will be critical references for legislators drafting such regulation, and for companies seeking to meet new legal standards.

While these discussions are underway, we believe it is important already to think ahead to **how Member States will be expected to enforce any such new requirements at national level**, including through administrative and judicial mechanisms.<sup>2</sup> Specifically, **how will national regulators – which may be new to this area and have limited resources and capacity – assess whether a wide range of companies are meeting the spirit and intent of a new legal standard of conduct?** How can they carry out a potentially large number of assessments with appropriate speed and based on accessible

information and ensure they are getting meaningful insights into the quality of what the company is doing?

Any such administrative assessments will necessarily have to consider a sample of the whole of a company’s efforts, as time and other constraints are likely to preclude an assessment of everything the company is doing. At the moment, **assessments of corporate HRDD efforts tend to focus on the “observable basics”** of what a company has in place, such as the existence of a human rights policy, staff with responsibility for human rights, internal training, clauses in contracts with business partners or a grievance mechanism. But if we want to ensure that compliance with new regulation does not become a box-ticking exercise – which serves neither affected stakeholders nor companies well – then regulators will need to look beyond *whether* a company has these elements in place and also consider *how* a company does HRDD.

**Regulators will need to pay attention to key features of HRDD that are indicative of the seriousness of a company’s efforts. These offer important signals of whether there is an authentic and consistent intent and effort within a company to both find and reduce risks to workers, communities and other affected stakeholders.**

**This discussion draft is intended for the consideration of the European Commission and other stakeholders as the Commission develops proposals on mHREDD and considers how national regulators would implement any such legislation.**

In this discussion draft, we propose some key signals that national regulators could use in assessing the seriousness or quality of a company's HRDD, grouped into six broad areas of company practice:

1. Governance of human rights;
2. Meaningful engagement with affected stakeholders;
3. Identifying and prioritizing risks;
4. Taking action on identified risks;
5. Monitoring and evaluating progress in addressing risks;
6. Providing and enabling remedy.

Not all these features need to be present to judge HRDD to be meaningful or serious, yet where few of them are present, it is unlikely that HRDD will achieve its purpose in practice.

### WHAT THIS DOCUMENT IS

It is intended to inform a discussion about assessment by national regulators of company compliance with potential new mHREDD legislation by:

- **Highlighting critical features of HRDD that are often overlooked or done poorly in practice by companies** (such as meaningful stakeholder engagement);
- **Identifying key practices and behaviors needed for meaningful implementation of HRDD** that can help in distinguishing better from poorer quality HRDD by going beyond the “observable basics” of company practice;
- **Being relevant to companies of all sizes and sectors** by highlighting features of HRDD that could be demonstrated by any company in a variety of ways.

### WHAT THIS DOCUMENT IS NOT

It is not intended to:

- **Replace or dilute existing guidance on the process elements of HRDD;**<sup>3</sup>
- **Exclude consideration of authoritative sector-specific guidance** by regulators where that is relevant to a company being assessed;
- **Define leading practice** in carrying out HRDD.

This discussion draft was developed with an awareness of the parallel EU process to strengthen the regulatory framework and standards for non-financial reporting, including human rights reporting, through the review of the Non-Financial Reporting Directive and the potential creation of an EU standard-setter. **National regulators are**

**likely to have to rely on corporate disclosure as a key method of assessing the adequacy of their HRDD. We believe that the features highlighted here reflect aspects of company practice that can easily form part of companies' broader sustainability reporting, whether under mandated disclosures or routine narrative reporting.**

This draft has benefitted from initial input from a number of business, government, NGO and trade union representatives. We welcome further comments on it, particularly on points of similarity and/or difference with environmental due diligence. We intend to develop this draft through further consultation in Q1 of 2021.



# “Signals of Seriousness” for Human Rights Due Diligence

## HOW CAN NATIONAL REGULATORS BEST ASSESS THE QUALITY OF A COMPANY’S HRDD EFFORTS?

### A. GOVERNANCE OF HUMAN RIGHTS

**1** The company’s most senior governing body regularly discusses progress and challenges in addressing the company’s salient human rights risks, supported by appropriate expertise, informed by the perspective of affected stakeholders and with knowledge of leading practice.

- Affected stakeholders are any individuals whose human rights are or may be affected by the company’s operations, products or services, including workers, community members, consumers and end-users.
- Salient human rights issues are the human rights at risk of the most severe negative impact through the company’s activities and business relationships. Prioritization of salient risks can be necessary for companies to know which risks to address first or with the greatest resources. It is not intended to undermine a company’s responsibility to address all the human rights risks with which it may be involved.
- For companies with co-regulatory governance models, this includes discussions by and with supervisory boards, including worker representatives.
- Where a Board is relying on external advisors or other third parties in these discussions, it needs to be able to show how that advice in turn was ‘informed by’ affected stakeholders’ perspectives.


**2** The company’s most senior governing body reviews the company’s business model

and strategy, and any proposed changes to them, to ensure any inherent human rights risks are identified and addressed.

- The company’s business model can include its purchasing practices and the way in which the company is financed.
  - This implies the allocation of appropriate financial resources to support the actions needed.
- 3** The company’s most senior governing body formally approves high-level targets for addressing salient human rights risks and evaluating the company’s progress in that regard.
- 4** The company’s most senior governing body ensures that company leadership is accountable for addressing the company’s salient human rights issues, including through performance incentives where those are used for other aspects of performance.

### B. MEANINGFUL ENGAGEMENT WITH AFFECTED STAKEHOLDERS

**1** The company identifies which stakeholders in which settings are likely to be the most vulnerable to impacts in connection with its operations and value chain and seeks insight into their perspectives.

- The company can use a variety of means to gain insight into affected stakeholders’ perspectives, including by consulting with credible proxies for 

their views (such as local NGOs) where it is not possible to consult with affected stakeholders and/or their legitimate representatives directly.

**2 The company has structures or processes to hear and respond to the perspectives of affected stakeholders and/or their legitimate representatives, including at senior levels, whose use is not limited to the company’s own needs or transactions.**

- In the case of engagement with trade unions and Indigenous peoples, these should meet international standards related to collective bargaining and free, prior and informed consent.
- With respect to workers’ perspectives, these could include existing structures such as trade unions and works councils.

**3 The company’s decisions and actions with regard to identifying, assessing and prioritizing risks, and tracking how effectively it addresses them, are informed by the perspectives of affected stakeholders and/or their legitimate representatives.**

- 4 The company engages with affected stakeholders and/or their legitimate representatives to identify whether they are aware of and trust existing structures or processes as a way to raise concerns or grievances and have them addressed.**
- These should be designed to protect stakeholders against the risk of retaliation.

**C. RISK IDENTIFICATION AND PRIORITIZATION**

**1 The company’s processes for identifying human rights risks:**

- a) Encompass its operations and business relationships throughout its value chain;
- b) Include impacts the company may cause, contribute or be linked to;

**c) Include risks inherent in its business model and strategy;**

**d) Go beyond identifying impacts that the company considers it can control or impacts that could lead to liability for harms;**

- An example of the former is risks to trade union rights in the supply chain, which are salient for many companies but may not be prioritized for attention and effort.

**e) Draw on a variety of well-informed sources to identify relevant risks;**

- This includes new risks not only those implied by existing or past impacts.
- One source will be the company’s own grievance mechanisms, including the role of trade unions in this regard.

**f) Are iterative and responsive to changes in the risk environment.**

- This includes sectoral and geographic risks.

**2 The company’s prioritization of its salient human rights risks:**

- a) Is determined by the severity of the potential impacts on people, not by risk to the business;
- b) Is not determined by where the company has leverage or what it considers easiest to address;
- c) Is updated in light of new or emerging risks.

**3 Where the company focuses its initial assessment of risks on certain parts of the business, these are selected based on the severity and likelihood of the risks to people, and the company progressively expands its focus into other parts of the business. ►►**

- ④ **Where the company has a broader risk management system, the company ensures that its salient human rights risks are appropriately reflected in that system.**

## D. TAKING ACTION ON IDENTIFIED RISKS

- ① **The company's main activities to prevent or mitigate human rights risks:**

- a) **Are focused on outcomes for affected stakeholders;**
  - This includes seeking to achieve positive human rights outcomes as part of preventing and mitigating risks, not only 'doing no harm'.
- b) **Directly relate to the company's salient human rights risks and are proportionate to them;**
- c) **Directly engage those parts of the business whose actions or omissions can influence outcomes for affected stakeholders;**
- d) **Include measures to address any contribution of the company's own activities to its salient risks.**

- ② **The company takes deliberate steps to build leverage to influence others where its existing leverage is insufficient to prevent or mitigate risks, including considering the role of disengagement as a form of leverage.**

- This means going beyond the use of traditional commercial leverage to consider other forms of leverage in the direct relationship.
- The company should be able to explain how any decision to disengage relates to point 1(a) above.

- ③ **The company identifies where collective leverage with others is needed, and collaborates with relevant stakeholders, peer companies and/or experts to advance outcomes for affected stakeholders through processes that demonstrably align with**

**international human rights standards.**

- Seeking to use collective leverage is not a replacement for the company using whatever individual leverage it has.

## E. MONITORING AND EVALUATING PROGRESS IN ADDRESSING RISKS

- ① **The company sets both high-level and operational targets that are:**

- a) **Articulated in terms of the intended outcomes for affected stakeholders;**
- b) **Relevant to addressing the company's salient human rights risks as well as specific, measurable, achievable and time-bound;**
  - These align with SMART expectations of good target design with more precision about what "relevant" means in human rights terms.
- c) **Developed with input from internal or external subject-matter experts and, wherever possible, from affected stakeholders and/or their legitimate representatives.**

- ② **The company monitors and evaluates progress towards the targets based on a set of indicators that together:**

- a) **Are used to evaluate progress towards the targets;**
  - This should include evaluating the company's efforts to use leverage, individually or through collective initiatives.
- b) **Enable analysis of the reasons for progress or setbacks;**
- c) **Factor in feedback from affected stakeholders and/or their legitimate representatives. ►►**

- 3 The company discloses progress towards at least its high-level targets, including explanations of any setbacks and resulting changes in strategy.**

effectiveness of actual outcomes not only of the existence of processes.

## F. PROVIDING AND ENABLING REMEDY

(Note that these signals are about remedy that the company provides itself, distinct from any form of liability that may be imposed under new legislation.)

- 1 The company engages constructively when there are allegations of human rights-related impacts in its operations or value chain to understand the issues being raised and the perspectives of affected stakeholders.**

- This includes the company's own potential role in causing or contributing to harms.
- It also includes cooperation with legitimate processes, including judicial processes, where relevant.

- 2 When providing remedy for impacts it has caused or contributed to, the company goes beyond measures to prevent the impact recurring to consider what other forms of remedy to can best address the harms to affected stakeholders, taking into account their perspectives.**

- The purpose of remedy is to put the affected person back in the position they were in before the harm or as close to it as possible. This means considering forms of individual remedy such as apologies, rehabilitation, restitution or compensation, and not only measures to prevent future harm.

- 3 The company evaluates its actions to provide remedy for their effectiveness in delivering outcomes that are satisfactory to affected stakeholders.**

- Company evaluations of the effectiveness of remedy should include assessments of the

- 4 The company uses its leverage to support the development and implementation of effective grievance mechanisms in its value chain that are capable of providing remedy to affected stakeholders.**

- This includes the role of legitimate trade unions as effective grievance mechanisms and the importance of respect for trade union rights along the value chain in this regard.

- 5 The company draws on information from its own grievance mechanisms to inform the early identification and mitigation of risks to people and to continuously improve its due diligence processes.**

## ABOUT SHIFT

Shift is the leading center of expertise on the UN Guiding Principles on Business and Human Rights. Shift's global team of experts works across all continents and sectors to challenge assumptions, push boundaries and redefine corporate practice in order to build a world where business gets done with respect for people's dignity. We are a non-profit, mission-driven organization headquartered in New York City.

 [shiftproject.org](https://www.shiftproject.org)

 [@shiftproject](https://twitter.com/shiftproject)

---

## ENDNOTES

1 This includes the underlying substantive human rights standards that those documents refer to, ie the International Bill of Human Rights and the ILO Declaration on Fundamental Principles and Rights at Work (as elaborated in the ILO core conventions).

2 There are multiple ways in which the standard of conduct in the UNGPs and OECD GL could be integrated into legal regimes, as explained by OHCHR, “UN Human Rights ‘Issues Paper’ on Legislative Proposals for Mandatory Human Rights Due Diligence by Companies”, June 2020, available at [https://www.ohchr.org/Documents/Issues/Business/MandatoryHR\\_Due\\_Diligence\\_Issues\\_Paper.pdf](https://www.ohchr.org/Documents/Issues/Business/MandatoryHR_Due_Diligence_Issues_Paper.pdf).

3 For example, as set out in the six-step due diligence process with supporting measures in the OECD Due Diligence Guidance for Responsible Business Conduct.