

The EU Commission's Proposal for a Corporate Sustainability Due Diligence Directive

Full analysis available at: shiftproject.org/eu-csdd-proposal-analysis

Shift welcomes the EU stepping into a leadership position on the need for mandatory measures to increase the breadth and depth of **human rights and environmental due diligence**, given the urgency of the sustainable development challenges facing us all. The Commission's initiative is an **opportunity with few parallels** in terms of its potential to drive sustainability into the heart of how business gets done.

With the right framing, a **Directive could advance better outcomes for people and planet** by **scaling** quality due diligence processes that focus on the most severe human rights and environmental risks, **encouraging** creative forms of individual and collaborative leverage to tackle risks across their value chains, **enhancing** internal governance and accountability on sustainability risks, and **expanding** pathways to remedy for those harmed by business activity.

However, for these significant opportunities to be realized and for the Directive to meet its stated ambition to ensure that companies in the single market contribute to sustainable development by preventing and addressing adverse impacts, it is critical that the Directive is **firmly grounded in the key international standards** on sustainability due diligence adopted by the UN and the OECD.

In analyzing the Commission's proposal, we compare central elements of the draft Directive against the soft law standards contained in **the UN Guiding Principles on Business and Human Rights** (UNGPs) and **OECD Guidelines for Multinational Enterprises** (OECD Guidelines). We focus on those areas where we believe that a lack of alignment with the international standards will hinder the Directive's ability to meet its stated objectives and we provide our initial thoughts on how they could best be addressed. In brief, our five key reflections are as follows:

1. The Scope of the Due Diligence Duty

The draft Directive proposes **the same scope of civil liability as for the responsibility to do due diligence itself**. In so doing, the Directive deploys the novel and untested concept of **'established business relationships'** to limit the scope of due diligence, based on the ease for business of identifying risks and using leverage in these more proximate or strategic relationships. Yet **this runs counter to the international standards**, under which companies' responsibilities flow from the connection between negative impacts at any point in the value chain and companies' operations, products and services, and not from the ease with which impacts can be identified and addressed.

The last decade of practice shows that the concept of **prioritization based on severity** is the key factor in making due diligence manageable for business, as well as ensuring it tackles the most salient risks to people, yet it does not drive the logic of the due diligence duty proposed in the draft. Limiting civil liability to **'established business relationships'**, but aligning the scope of the duty to do due diligence with the international standard, could help address these challenges.

2. Demonstrating Compliance with the Duty

The draft Directive understandably and necessarily reflects the need for companies to be able to demonstrate, and for judicial and administrative bodies to be able to assess, compliance with the duty to do due diligence. However, the draft appears to fall into the trap of trying to achieve this through **a heavy reliance on contractual assurances and audit/verification processes**, which have been proven to be of limited efficacy in delivering improved outcomes for people, while generating significant costs to companies and often shifting responsibility from lead companies onto their business partners without attention to the role of their own practices in generating risks to people. There are better ways to demonstrate and assess compliance that properly reflect the range of approaches to managing sustainability risks expected under the UNGPs and OECD Guidelines, including **greater attention to the role of the Board**.

3. The Central Role of Affected Stakeholders in Due Diligence

The draft Directive contains important references to engaging with affected stakeholders and their legitimate representatives, but does not give their perspectives the role and weight that the international standards do. **Meaningful engagement with affected stakeholders** is central to making human rights due diligence under the UNGPs and OECD Guidelines effective in practice; it may also be the most challenging aspect to translate into a legally binding duty. However, there are clear opportunities to strengthen the draft's provisions on engagement with affected stakeholders, on complaints procedures and on ensuring remedy where harm has occurred to both **better align with the international standards** and advance the Directive's aims of enhancing corporate accountability for impacts and access to remedy.

4. The Scope of Companies Covered by the Duty

The draft Directive defines the scope of companies covered by the duty to do due diligence to include all 'very large' companies as well as 'large' companies in only three sectors (textiles, agriculture and extraction of minerals). **No SMEs are covered**. This risks limiting the Directive's potential to create a truly level playing field – a central factor motivating many companies that support regulation at EU level. While recognizing that there may be good reasons to stagger the imposition and/or implementation of new legal duties across different types of companies over time, the current draft **does not provide consistent risk-based rationales for why certain companies are in and others are out of the initial scope**.

5. Due Diligence in the Financial Sector

The draft Directive creates several exceptions for the financial sector which do not align with the UNGPs or OECD Guidelines and are also out of step with existing practice in the sector. For example, by **restricting due diligence by financial sector companies** to the pre-contractual phase of relationships and to the activities of large corporate clients, the draft ignores the fact that such companies are already showing the feasibility and benefits of directing their due diligence efforts towards the most severe sustainability risks – based on their clients' sectors, operating contexts and value chains – and using leverage to tackle them throughout the duration of the relationship. The Directive should avoid undermining the important **role and responsibility of the financial sector** in addressing human rights risks based on the international standards, and the catalytic effect this can have for other sectors, as we have seen in the case of climate risks.

We provide these reflections as an input into the legislative debate as it now moves forward at the level of the European Parliament and the Council, and we welcome further dialogue on them.

This is the executive summary of Shift's analysis of the EU Commission's Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence. Shift is the leading center of expertise on the UN Guiding Principles on Business and Human Rights. To read our analysis in full, visit shiftproject.org/eu-csdd-proposal-analysis