

Comments submitted by Shift in response to the Draft Report on Minimum Safeguards of the EU Platform on Sustainable Finance

Shift welcomes the publication by the Platform on Sustainable Finance of the Draft Report on Minimum Safeguards, and its call for feedback on the content and recommendations set out in that report. We commend the authors for grappling with the real challenges at the heart of making the minimum safeguards work.

The safeguards indicate that assessments should look at the procedures that an undertaking has in place to ensure alignment with the OECD Guidelines for Multinational Enterprises, the UN Guiding Principles on Business and Human Rights, core ILO conventions and the International Bill of Human Rights. Interpretations of the Minimum Safeguards as meaning that a company must not be involved, across its operations or value chain, with any negative human rights impacts will not work. The process of human rights due diligence required under the UNGPs and OECD Guidelines is of an on-going nature, and needs to respond to changes in a company's products, activities, operating context and value chain relationships as well as mergers, acquisitions, sales and other significant changes that affect its human rights risk profile. Moreover, companies do not control all the means that would ensure no impacts occur, as also recognized in the international standards.

This means that simplistic approaches that either on the one hand rule out companies alleged to be involved with an incident of any type, or on the other hand deem it sufficient for a company to be a signatory of the UN Global Compact or have a stated commitment to the UN Guiding Principles are both going to fail. The same goes for simplistic assumptions that being domiciled or operating in an EU country, covered by a particular sustainability due diligence law, or part of a supposed 'low-risk' sector, can be seen as themselves constituting minimum safeguards. We therefore warmly welcome that the report bypasses such inadequate approaches and grapples with the challenge at the center of this endeavor, which is how to assess the adequacy of a due diligence process and to do so at scale across a wide range of companies.

There is no single or simple answer to this, not least because – as the report makes clear – the current data in the public arena is inadequate to the task. At the same time, the report rightly notes that developments regarding EU reporting requirements of companies are set to change that reality and should increase the availability of high-value information, albeit this will still require that analysts and assurance providers have the skills to contextualize and assess that information in many cases.

We believe that the report's recommendations point in the right direction, but may require further elaboration in a couple of regards. We also recognize that a first version of the safeguards will be – and should be explicitly acknowledged as – a starting point: grounded in today's best 'art of the possible' and on which it will be important to build as the availability of relevant information on companies' social performance, and clarity on the most high-value indicators for evaluating that performance, further evolve in the years to come.

Against this backdrop, we offer the following specific reflections:

1. Controversies are a poor lens through which to assess compliance with the minimum safeguards

We would strongly endorse the analysis in the draft report with regard to problems with the use of controversies as a means of screening companies' social performance. Information about controversies can be a valuable input to companies', investors' and financiers' due diligence processes, enabling them to seek explanations of the root causes of issues, how they are being addressed and remedied and how their recurrence will be avoided. Where there is evidence that they are rooted in a business model or strategy, this can point to a deeper problem that needs addressing at top management and board level to mitigate the inherent risks to people as well as the business. However, for reasons that are well articulated in the draft report, controversies are a poor means of screening companies' social performance.

The issue is explained well on p. 23 of the report, when it states that:

“Controversy screening might still serve as an additional indicator for gaps in a company's human rights due diligence process. Controversies would then indicate that a company's processes fail to bring about the desired outcomes. However, a company should not be considered as compliant with MS only on the basis of the fact that there is no controversy because the company must also have implemented adequate HRDD. On the other hand, the company could still be compliant with MS even if there is a controversy provided that it has implemented a HRDD process, is remediating the case, and uses the controversy as an opportunity to improve its HR processes.”

The report points on p.23 to the problem that this raises for data analysts and rating agencies when it states that:

“based on available data, there are many more companies which have not implemented a human rights due diligence system aligned with UNGPs than there are companies which have controversies. If controversies were the benchmark against which MS compliance was measured, many companies would be MS compliant without implementing human right due diligence (HRDD) processes.”

It further rightly notes the dilemma that this poses for providers of data analysis, given that an emphasis on effective human rights due diligence processes limits them to a much smaller set of companies that would be compliant with the minimum safeguards than if they look at companies that are not on record as being associated with a controversy. Yet we agree strongly with the conclusion of the report that this cannot and must not deter the field from looking for better means of assessing companies' social performance, and their compliance with the minimum safeguards, than controversies.

Reducing the range and number of companies that meet the requirements of the taxonomy is not necessarily a problem, since a key purpose of the taxonomy must be to drive standards of conduct towards real sustainability. That said, if necessary to enable a sufficient investable universe in the initial couple of years, it may be possible to find ways to phase in measures of due diligence conduct in order to retain a credible set of safeguards and the incentive for much-needed improvement, while allowing time for companies that otherwise meet the taxonomy's environmental requirements to fully meet the safeguards as well.

2. It is the quality of companies' processes and practices for addressing negative human rights impacts that should be front and center.

The draft report rightly recognizes that effective implementation of the responsibility to respect human rights under the UN Guiding Principles

"implies an iterative process which involves potentially affected stakeholders. It does not concentrate on punishing companies for singular incidents but encourages them to improve. If taken seriously, this iterative process has the potential to reduce human rights abuses by companies. It is therefore rightly at the centre of MS requirements."

On p.32, the report notes that,

"The due diligence process is meaningful only insofar as the undertaking can effectively demonstrate respect for human rights. This does not mean that compliance with Article 18 means an undertaking can have no negative impact. It is recognised that there will be instances where – despite their best and prudent efforts at prevention – undertakings might have a negative impact. However, it is important that a company can demonstrate progress towards avoiding and addressing any negative impact."

We endorse this view and its emphasis on what amounts to the quality of a company's human rights due diligence. The report rightly recognizes the challenges in evaluating the quality of such processes and practices, as against merely the fact that a policy, process or committee exists. Yet the reality that it is harder to evaluate their quality cannot be a rationale for defaulting to information that is without insight and value. Rather, the task must be to find better ways to evaluate the quality and adequacy of due diligence in workable and scalable

ways, recognizing that some of this may rely on new and expanded skills of data analysts where such information requires informed, expert judgment.

3. Neither the existence of due diligence laws, nor the absence of convictions under them, is adequate to assess implementation of due diligence and meeting the minimum safeguards

The report is right to recognize that the existence of due diligence laws that apply to companies in certain jurisdictions should not be taken as any guarantee of companies' social performance. It further notes that where such laws exist, their scope is often not as extensive as the due diligence requirements of international standards, and that at present the EU draft Corporate Sustainability Due Diligence Directive also falls short in this regard.¹

The report reasonably posits that where companies comply with the requirements of such laws, and to the extent that such laws align with Article 18 (and therefore the scope of the international standards on respect for human rights), such compliance could be a proxy for meeting the minimum safeguards. We would, however, disagree with the assertion on p.35 that,

“The CSDDD may later serve as a guarantee that EU companies covered by the CSDDD will be considered as MS compliant on the basis of this law, unless they are convicted for breaches. The condition for this is that the CSDDD is, as it is proposed now, aligned with the UNGPs and OECD MNE guidelines.”

This implies that merely being covered by the law and having no convictions equates to compliance, which assumes extensive enforcement and oversight on the part of states and that all problems with implementation will be carried forward in the form of lawsuits. (We would note that the term ‘convictions’ is tied to criminal law alone; however even if this category were expanded to other negative legal determinations, the significant legal and practical barriers that are likely to remain for such litigation – even if civil liability is successfully included in the CSDDD – make such legal findings far too narrow a basis for determining ‘compliance’.)

4. The evaluation of adequate implementation of due diligence in line with the expectations of the minimum safeguards will require new approaches

In practice, whether or not there is coverage by due diligence laws, the primary challenge remains how ‘compliance’ or ‘adequate implementation’ will be evaluated. It is somewhat

¹ For more on the gaps between the draft Corporate Sustainability Due Diligence Directive and the international standard of the UN Guiding Principles on Business and Human Rights, see our analysis at:

https://shiftproject.org/wp-content/uploads/2022/03/Shift_Analysis_EU_CSDDProposal_vMarch01.pdf

unclear from the report whether the section that speaks to so-called ‘best practices’ and posits that, *“looking for best practice examples seems to be the most sensible way forward”* (p. 29), is seen as a response to this challenge. If the aim is to show that conducting effective due diligence is well within the capabilities of companies, then we would agree and our own experience shows good practices spreading increasingly widely. At the same time, as the report recognizes, there is ample evidence that very few companies are really doing a fully adequate job across all the expectations of due diligence. And indeed conducting due diligence is an on-going process that is never complete as risks evolve with changes in companies’ operations, business relationships, products or services, operating contexts, mergers, acquisitions and sales and so forth.

Therefore any assessment of the quality of due diligence will have to focus not on perfection but on the soundness of the foundations that a company has in place and the extent to which they signal its seriousness in identifying and addressing human rights risks. Shift’s discussions with governments, trade unions, civil society organizations and business, about how regulators should [assess the quality of human rights due diligence in their role of enforcing a new EU due diligence law](#), speak to this question. We have additional, forthcoming outputs that consider the same issue from an investor-facing ‘S’ in ESG perspective.

For example, it is relatively simple to state, in line with the international standards, that a company’s process for prioritizing impacts should be driven by the severity of risk posed to the rights of stakeholders. But in practice, the features that distinguish a robust prioritization process include that a) the process is demonstrably not based on the company’s control or influence over the impact, and b) the process includes risks arising from the company’s own activities (such as purchasing practices) and not just from the activities of business partners or others ‘out there’ in the value chain. These are features of a due diligence process that any company of any size is capable of applying, and they should give investors, regulators and civil society stakeholders alike greater confidence in the soundness of a company’s approach.

While Shift’s outputs on these ‘signals of seriousness’ and related ‘S in ESG indicators’ remain a work in progress as part of a range of consultative processes, we hope they may provide some ideas for how this kind of approach could work also in the context of the minimum safeguards.

We also note that the non-alignment examples that begin on page 39 are all about assessing and naming risks and not about addressing them, which would seem to be a missed opportunity in terms of providing illustrations that address all aspects of human rights due diligence.

5. The role of auditors

The report suggests that on page 35 that, “For EU companies, the external verification of MS compliance should rest with the auditor.” It continues:

“It is important that this audit will provide assurance that the six steps of the HRDD process have been adequately implemented. For this to take place, the auditors should have relevant expertise in the social/human rights field, the audit should cover, among other things, the commitment of senior management and board, the adequacy of risk identification and assessment, adequate assignation of responsibilities within the company and allocation of resources, the functioning of the complaint mechanism, the adequate involvement of affected stakeholders, and the correctness of external communication on HRDD.”

It is unclear to us whether this is referring to the auditors who will be assuring the reporting of EU companies covered by the CSRD. If so, there is a risk of a misapprehension here, since that assurance process will be necessarily focused on whether the reporting provides a fair and balanced representation of the actual situation of the company. It will not be assessing companies’ performance against the international standards. Internal auditors at companies will indeed need to be engaging with the issues of human rights due diligence under the proposed Corporate Sustainability Due Diligence Directive, but they will not be providing public opinions.

This said, the fact of assurance of companies’ reporting can indeed provide confidence in the information provided, and a solid basis for analysts themselves to then review the extent to which the information disclosed provides confidence in the adequacy of the human rights due diligence process being implemented by the company. However, that intermediation by the analyst will be essential. As the report says, auditors will require relevant expertise in the social/human rights field well beyond areas of health and safety and diversity and inclusion that have tended to be the focus to date. In 2018, Shift and Mazars published [guidance for assurance providers \(and internal auditors\) addressing human rights reporting and performance](#), following an extensive consultation process with professionals and other stakeholders, which speaks to the specific issues raised by this subject matter, over and above the professional guidance that governs their work. As well as auditors, analysts will similarly require capacity-building with regard to the interpretation of this type of information, which current practice and conclusions suggests is widely wanting.

6. Strengthening Criterion 2

In light of the above, we commend the drafters of the report on the direction in which their recommendations lead.

We agree that the adequacy of a company's human rights due diligence processes, as outlined in the UNGPs and OECD Guidelines for MNEs, should be a primary consideration. As noted above, considerable care will be needed in how such adequacy is assessed, but this is feasible and should be supported by the kind of disclosures developed through the forthcoming European Sustainability Reporting Standards and – assuming it becomes more fully aligned with the international standards – the content of CSDDD.

The second criterion clearly seeks to avoid the problems set out in the report with regard to reference to general controversies, while still recognizing that clear evidence of involvement with serious human rights impacts should bring some weight to the consideration of whether due diligence is adequate. We recognize the difficulty in identifying sufficient independent and impartial sources of information on breaches and that even some such sources are better than none. We further note the emphasis, other than in the case of legal convictions or findings of non-compliance with the OECD Guidelines, on whether the company responds to allegations or engages with stakeholders concerned. As with the approach taken by the Corporate Human Rights Benchmark, this helps mitigate some of the risks of just taking the fact of complaints as sufficient.

This said, we would suggest that the second criterion could in general be strengthened by looking at two types of information, of which this reference to non-compliances or engagement with complaints would be one. The criterion might simply be framed as 'There are clear indications that the company does not adequately implement HRDD' and then follow this with two sub-elements:

- (a) as evidenced through data regarding the status of its own workforce; and
- (b) as evidenced through credible information about human rights abuses and the company's response.

In this approach, the first of the two considerations would focus on some key disclosures related to the company's own workforce, which are reflected in the draft European Sustainability Reporting Standards and already used by the investor-led Workforce Disclosure Initiative, and of which a couple appear in the Regulatory Technical Standards of the SFDR. These might include, for example, the extent of the workforce (understood to include contingent workers) covered by collective bargaining agreements; the CEO-to-median pay gap; the gender pay gap; the proportion of the workforce earning less than a fair wage; and similar. By focusing on the workforce, such considerations are of relevance to all companies. Being in quantitative form, the information can be readily compared and integrated into data systems. By looking at human rights issues that reflect how risk and value are allocated within a company, they speak to the corporate culture, which will likely influence also how well the human rights of more remote stakeholders are taken into account across the value chain.

While it could be ideal to have clear thresholds in relation to at least some of these workforce-based datapoints, based on which one could exclude clearly unsustainable social performance, we recognize that devising such thresholds could be challenging and would certainly take time. We consider that it would be sufficient at this point for the safeguard expectation to be that these data are disclosed and assured. This would reflect the fact that sustainable companies at a minimum need to be gathering these key data, measuring their performance on these issues, and enabling markets to do the same. Moreover, increasing measurement and transparency on these issues can itself lay the groundwork for businesses, investors, civil society and regulators to have informed, data-drive dialogue about whether and how to establish thresholds.

The second of the two considerations would then encompass the propositions in the current draft with regard to convictions, National Contact Point complaints and allegations received through the Business and Human Rights Resource Center. We would recommend widening the first category beyond criminal law cases, as connoted by the term 'convictions', to include other negative legal determinations.

We would further note that the current draft implies that a failure to engage with stakeholders with regard to allegations or complaints equates with a failure to engage with stakeholders at all (See criterion 2(b), p.57), which is not the case. We would also highlight that the statement on p.34 to the effect that, 'The first criterion is a positive assessment in that it requires certain processes to be in place. The second criterion is negative in that it requires certain impacts or events not to have occurred is not entirely accurate. The draft report is clear in other places that the existence of an impact alone is not necessarily an issue in and of itself (depending, of course, on its exact nature), but the response to the impact is what counts. The second criterion already reflects this point, while also recognizing that where courts or an NCP have concluded there is a breach that has led to harm, that will stand on its own terms.

7. Alignment with the UNGPs

We appreciate the attention in the report to alignment with the UNGPs and the expert knowledge that has clearly shaped this aspect of the report. We would just note that a couple of points could be further and better aligned.

- a) The summary of the UNGPs on page 9 would more accurately reflect:
 - In point 2, that the process is about identifying and assessing actual and potential adverse human rights impacts, rather than 'human rights risks and their impact'
 - In point 3, state more clearly that it is about taking action to cease, prevent or mitigate human rights risks and impacts

- In point 5, be clear that communicating externally is a much broader category than formal reporting, and that the minimum expectation set in the standard is of reporting formally on how severe human rights risks are addressed (see further below on this).
 - In point 6, begin with the point about providing remedy (actually providing or cooperating in the provision of remedy) where the company causes or contributes to actual negative impacts, and then add the point about establishing operational-level grievance mechanisms as one means of providing remedy. This will avoid implying that remedy only applies as provided through such mechanisms, and make clear that it is part of the responsibility to respect human rights to play a role in the provision of remedy where contributing to harm through whatever legitimate and appropriate means (including courts or other state-based processes)
 - Make clear that stakeholder engagement underpins the process of due diligence in general, and not just the identification and assessment of impacts
- b) On page 23, where the report speaks to the reporting requirements in the UNGPs specifically, it states that, *“The UNGPs provides a system which requires companies to implement actively and to report on processes,”* and continues by saying that:
“The first step to assess compliance with MS is to understand whether a company reports on its due diligence approach. If this is missing, a core element of UNGP is absent, and the company cannot be considered as being MS compliant. The lack of data on MS, therefore, is not only a sign that there is not enough data available, but that implementation of the UNGP, and herewith alignment with MS, is low.”

UNGP 20 is more circumscribed than this, given that the GPs are addressing all companies of all sizes, and actually says:

*“In order to account for how they address their human rights impacts, business enterprises should be prepared to communicate this externally, particularly when concerns are raised by or on behalf of affected stakeholders. **Business enterprises whose operations or operating contexts pose risks of severe human rights impacts should report formally on how they address them.**”*

At the same time, UNGP 3 sets out that States should *“Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts,”* which is what we see the EU and its Member States responding to through the CSRD.

The current language of the draft leans unnecessarily on UNGP 20 to suggest that all companies must report on all aspects of their human rights due diligence. The fact remains that formal reporting is the primary means through which information about the adequacy of companies’ human rights due diligence can be assessed by

investors and other stakeholders, and is essential for the kind of assessment necessary to meet the minimum safeguards.

8. Cross-references to the reporting standards being developed by EFRAG

We would recommend that the reference on page 14 to the standard-setting work of EFRAG be updated to reflect that the process has now moved on from the interim Project Task Force and is in the hands of the new Technical Expert Group and the Sustainability Reporting Board to which it reports.

We note that the table on p.34-35 predominantly references the draft cross-cutting standards developed by EFRAG and only refers to the draft social standards with regard to remedy. In practice, the social standards will be the basis of significantly more specific disclosures on the points referenced when it comes to human rights issue.

It is unclear to us why the disclosures highlighted in box 5.10 on page 38 of the draft report are seen as pertinent to the assessment of the adequacy of due diligence. These disclosures provide a general description of the business as essential context to other disclosures but do not pertain to due diligence. We are also unsure why the table on p.39 majors just on the performance metrics with regard to a company's workforce and does not consider the narrative disclosures required across the four social standards in relation to all stakeholder groups (workforce, value chain workers, affected communities and end-users/consumers) regarding action the company is taking to address any material impacts identified. (We note also that the numerical labels of the various standards is a bit confused here and elsewhere and could be corrected.)

9. Complaints mechanism

The draft report suggests that it will be important for there to be a complaint mechanism for employees, and one for external stakeholders, in the event that a company's disclosures seem to be incorrect. It is unclear how it is envisaged that such a mechanism would work, who would operate it, how its legitimacy and effectiveness would be assured, and how such mechanisms could be applied at scale. We have misgivings about the feasibility of this proposition.