anti-slavery

Anti-Slavery International analysis of the European Commission proposal for a Directive on corporate sustainability due diligence

May 2022

Contents

1. Introduction

On 23 February 2022, the European Commission (EC) published its long-awaited proposal for a Directive on Corporate Sustainability Due Diligence (hereafter the draft Directive). The draft Directive aims to "foster sustainable and responsible corporate behaviour and to anchor human rights and environmental considerations in companies' operations and corporate governance".

Anti-Slavery International has been advocating since 2017 for such a law, to ensure that companies operating in the EU are held accountable for human rights abuses, including forced labour, and environmental harm in their value chains, and that victims of harm can access justice.

There is an urgent need for such a law. Decades of voluntary corporate efforts have failed to drive meaningful action to prevent forced labour. Currently the International Labour Organization (ILO) estimates that 16 million people are in forced labour in the private sector at any given time. This includes people involved in the production, manufacturing, processing and transport of products exported to the EU, as well as products produced in the EU.

Many of the root causes of forced and child labour are systemic – linked to poverty, discrimination, social exclusion and weak rule of law. Business models and strategies, however, can act as a catalyst to the problem, by creating the demand for forced labour and enabling companies to evade responsibility for respect of human rights. This includes through irresponsible purchasing and trading practices, an extensive reliance on outsourcing, and corporate self-regulation through flawed auditing and certification schemes, coupled with ongoing restrictions to freedom of association.

As the EU is the world's largest single market, an EU-wide law has the potential to influence business practices globally, as well as in the EU, to prevent forced labour, and to strengthen access to justice for victims of corporate harm. Further, as several European countries are introducing, or considering introducing, business and human rights laws, an EU-wide Directive could set the global 'bar' on how current voluntary guidance on corporate respect for human rights can be made into binding law.

Anti-Slavery International therefore welcomes the EC's draft Directive. However, serious gaps and loopholes must be addressed for the Directive to meet its ambitions.

Crucially, the draft Directive, in its current form, significantly deviates from the standards contained in the UN Guiding Principles on Business and Human Rights (UNGPs) and OECD Due Diligence Guidance for Responsible Business Conduct (OECD Guidance). These provide the existing globally agreed set of best practice principles outlining how corporations should ensure respect for human rights. These guidelines outline how companies should carry out ongoing risk-based due diligence across their operations, subsidiaries and value chains.

In the absence of significant amendments, the draft Directive's current formulation risks creating a top-down compliance approach to addressing human rights abuses and environment harm in value chains. The draft Directive takes a box-ticking and prescriptive approach, and fails to centre the importance of stakeholders – including workers, trade unions and communities – in the due diligence process. Instead, companies should be mandated to undertake meaningful and collaborative approaches to prevent the root causes of corporate harm.

More specifically, in relation to the prevention and remedy of forced labour, the draft Directive must be amended in particular to:

- Provide for a **non-exhaustive list of human rights instruments** for the material scope of the Directive
- Include **more companies in scope**, and remove limitations on due diligence obligations for non-very large companies and for the financial sector
- Remove all **loopholes relating to value chain coverage**, obligating companies to undertake risk-based due diligence on the basis of the severity and likelihood of risk or harm
- Establish a **prevailing obligation for companies to respect human rights and a duty to prevent harm**

- **Remove the dominant role of contractual assurances, industry initiatives and third-party verification as due diligence methods, and strengthen the role of responsible purchasing practices and leverage**
- Mandate **meaningful stakeholder engagement** by companies throughout the due diligence process
- Ensure **responsible disengagement**
- Align the **complaints mechanism** provided for in the draft Directive with the UNGPs and recommendations of the Office of the United Nations High Commissioner for Human Rights (OHCHR) on non-State based grievance mechanisms, and guarantee confidentiality and non-retaliation
- Strengthen **reporting requirements**, and mandate companies to meaningfully disclose information to stakeholders and to conduct value chain mapping and disclosure
- Establish **civil liability for a failure to comply with all articles relating to the due diligence obligation** in the Directive, exclude contractual clauses, industry initiatives and third-party verification as evidence of appropriate due diligence, establish liability for auditors, place the burden of proof on defendant companies and remove other barriers to access to justice
- **Expand sanctions** to include the possibility to exclude non-compliant companies from public procurement and public support schemes, and require supervisory authorities to publish lists of non-compliant companies
- Establish measures, including through EU Delegations and Member States' embassies, to **support stakeholders in third countries** to access information, monitor implementation and understand and exercise their right to raise concerns.

The proposal's obligations and accountability measures in regard to environmental harm and climate change must also be strengthened. Connections between human rights and environmental impacts have increasingly been recognised by governments, courts, international organisations and societies. This is also demonstrated by the unique and disproportionate ways in which climate change and other forms of environmental damage affect vulnerable and marginalised groups, including increasing vulnerability to forced labour.[1] This analysis, however, does not focus on the provisions relating to the environment and climate change in the draft Directive. See commentary from climate and environmental groups[2] on the gaps in this area.

The proposal must also be designed to complement and support related policy and legislation, such as the proposed EU forced labour instrument,[3] and trade and development policy.

Anti-Slavery International is committed to supporting the strengthening of this proposal working with civil society and trade unions allies, the European Parliament, the European Council and supportive businesses to do so.

1 See Anti-Slavery International and IIED, Climate-Induced Migration and Modern Slavery, A Toolkit for Policy-Makers, 2021 https://pubs.iied.org/sites/default/files/pdfs/2021-09/20441G.pdf

2 See Global Witness, Can the EU hold companies to account?, 2022 https://www.globalwitness.org/en/campaigns/holding-corporates-account/can-eu-hold-companies-account/ and ClientEarth, New EU corporate sustainability rules: A patchy starting point with need for improvement, 2022 https://www.clientearth.org/latest/press-office/press/new-eu-corporate-sustainability-rules-a-patchy-starting-point-with-need-for-improvement/

3 In February 2022 the European Commission announced it is preparing a new legislative instrument to effectively ban products made by forced labour from entering the EU market. This instrument will cover goods produced inside and outside the EU, combining a ban with a robust enforcement framework. See the Communication on Decent Work Worldwide https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1187

2. Remove any limitations on the coverage of international human rights standards

The material scope of the draft Directive is outlined in the accompanying Annex. This contains a list of rights in international human rights agreements and a list of international conventions, including the majority of UN and International Labour Organization (ILO) standards on slavery and forced labour, and a catch-all clause of human rights agreements. The Annex also recognises the human rights implications of environmental degradation.

Broadly, the draft Directive includes the key rights and standards relating to slavery and forced labour, including the core UN human rights treaties, the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children Supplementing the UN Convention against Organised Crime (the Palermo Protocol) and the ILO Fundamental Conventions. Notably, it explicitly includes the 2014 Protocol to the Forced Labour Convention, 1930 (No. 29), which updates and strengthens the Forced Labour Convention, including by adding important obligations on ratifying states which, if fully implemented, should reduce the incidence of slavery.

There are certain gaps, however, in the list of rights and conventions, for example reference to the UN's 1926 Slavery Convention and the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery.

Furthermore, relating to forced labour and its prevention, several interrelated rights and instruments are missing, including, but not limited to:

- ILO Violence and Harassment Convention, 2019 (No. 190) and relevant ILO instruments on occupational safety and health;[4]
- ILO Governance (Priority) Conventions;
- Article 7 on equality before the law of the Universal Declaration of Human Rights;
- Articles 1 and 2 of the UN Convention on the Elimination of all Forms of Discrimination against Women and Article 3 of the International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights, which both guarantee the enjoyment of the rights covered in the Covenants without discrimination between men and women;
- The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, the ILO Migration for Employment Convention 1949 (No.97), and the ILO Migrant Workers (Supplementary Provisions) Convention 1975 (No.143). Their exclusion is despite the clear risks and structural inequalities faced by many migrant workers in global value chains;
- Inclusion of rights relevant to living incomes, such as codified in Article 23 and 25 of the Universal Declaration of Human Rights and Article 7 and 11 of the International Covenant on Economic, Social and Cultural Rights;[5] and
- The UN Convention on the Protection of All Persons from Enforced Disappearances and the UN Declaration on Human Rights Defenders 1998.

Recommendation:

Use a non-limitative list of human rights instruments, to avoid the risk of promoting a selective application of standards.

4 An amendment to the ILO Declaration on Fundamental Principles and Rights at Work, to include occupational safety and health, will be discussed during the 110th session of the International Labour Conference https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_839982/lang--en/index.htm

5 See FairTrade, University of Greenwich, BHRE and Brot für die Welt, Making Human Rights Due Diligence Work for Small Farmers and Workers in Global Supply Chains, pp.29 https://fairtrade-advocacy.org/wp-content/uploads/2020/06/UoG-HRDD-Full-Report-60pp-FINAL-SECURED.pdf

3. Personal scope: company inclusion

The draft Directive currently includes 'very large' EU companies, of over 500 employees and net EUR 150 million worldwide turnover, and 'large' EU companies of over 250 employees and net EUR 40 million worldwide revenue in the 'high-risk' sectors of textiles, agriculture and the extraction of minerals, where at least 50% of net turnover has been generated in one of these sectors. The draft Directive excludes all SMEs from scope. According to the European Commission, this scope covers around 1% of EU companies. Non-EU companies within certain thresholds are also in scope.

Large companies' obligations are restricted to undertaking due diligence only on severe impacts within said high-risk sectors. This obligation also has a phased introduction, coming into force two years after the transposition of the Directive.

A. Include small and medium enterprises in scope

The UNGPs and OECD Guidance apply to all companies of all sizes through the principle of proportionality, by stipulating that the way in which companies will take steps to respect human rights will vary according to the size and severity of their impacts. The full exclusion of SMEs therefore runs counter to the UNGPs and OECD Guidance. It also harms the 'level playing field' rationale behind the Directive, which the European Commission notes is an objective of the legislation.[6] Businesses have notably raised the need for a level playing field as a key argument in support of the need for an EU-wide mandatory human rights and environmental due diligence (mHREDD) law.

Furthermore, the personal scope is not aligned with the scope in the proposal for a Corporate Sustainability Reporting Directive, which is currently being debated. In its current form it includes large listed and not-listed companies which meet two out of three of the following criteria:

- 250 employees;
- EUR 20 million turnover;
- EUR 40 million balance sheet.

Despite the exclusion of SMEs, the draft Directive nonetheless indirectly places significant obligations on SMEs, as the draft Directive instructs very large and large companies to place requirements on direct and indirect business partners (see section 6). The draft Directive therefore risks creating a situation where larger business partners will place prescriptive, and variable, requirements on SMEs, rather than SMEs being able to develop their own approaches in line with their responsibility to respect human rights.

Furthermore, by excluding the vast majority of companies under 500 employees, the draft Directive excludes a significant number of companies and industries which have severe forced labour risks in their operations, subsidiaries and value chains (see C. below). According to 2019 data from the European Apparel and Textile Confederation, 99.8% of EU textile companies have less than 250 employees.[7] Therefore, although the European Commission has recognised that companies within this sector are high risk, the current employee number restriction is entirely self-defeating, as it effectively excludes the apparel and textile industry from scope.

Generally, employee number is not a sufficient indicator of the level of risk or resources of a company. For instance, commodity traders (which can, in some cases, have a low number of employees) can indirectly affect the due diligence of the companies that they trade with, due to the monopoly they hold.

In line with international standards and guidelines, and the fact that SMEs can cause, contribute or be linked to forced labour,[8] the Directive should include SMEs within scope, based on the principles of proportionality and risk.

6 See the Explanatory Memorandum of the proposal for a Directive on corporate sustainability due diligence.

7 See Euratex, Key Figures of the European Textile and Clothing Industry, 2020, pp.10 https://euratex.eu/wp-content/uploads/EURATEX-Facts-Key-Figures-2020-LQ.pdf

8 High-risk examples include financial institutions, commodity traders, apparel and textile companies, food and drink products, among others.

B. Require large companies to undertake due diligence on all impacts

The draft Directive stipulates in Article 6(2) that 'large' companies within the named high-risk sectors must conduct due diligence on severe impacts only in the specified sectors. As discussed in section 5, a focus on severe impacts alone runs counter to the UNGPs and OECD Guidance, which expect companies to prioritise severe impacts, where necessary, but ultimately to identify and address all risks and impacts.

This is important because forced labour does not occur in isolation, but sits within a spectrum of abuses, such as lack of payment of minimum wages, restrictions to freedom of association, discrimination, and forced overtime. This restriction to severe impacts could lead to some companies failing to identify and prioritise such labour rights impacts, which must be addressed to effectively prevent or minimise forced labour risks.

For example, the ILO, in guidance on the prevention of forced labour, has noted that "the degree of exploitation is not a stationary concept, but one that can move towards the decent work pole of the continuum with the help of freedom of association and collective bargaining".

In current practice, most companies, however, do not prioritise these broader labour rights abuses, despite the link to grave human rights violations, and the fact that such abuses are often prevalent across entire supply chains.

For example, according to research conducted by Know The Chain in the apparel and footwear sector,[9] none of the 37 benchmarked companies disclosed details of their purchasing practices that would enable suppliers to ensure decent work, including living wages for workers. In the same sector, although 43% of the benchmarked companies disclosed engaging local or global trade unions on freedom of association in their supply chains, only 5% were able to point to concrete cases in which they supported improvements to freedom of association. In the ICT[10] sector, freedom of association is the only indicator on which all 49 of the world's largest benchmarked companies scored zero in 2020.[11] Similarly, less than a quarter of companies in the food and beverage sector disclose that they support freedom of association in their supply chains.[12]

By potentially excluding companies below 500 employees from addressing severe impacts, there is significant risk, therefore, that smaller companies will fail to take effective action to prevent or eradicate forced labour and the associated risk factors.[13]

C. Expand the determination of high-risk sectors

In line with the UNGPs and the OECD Guidance, ideally the Directive should not pin any company inclusion to high-risk sector methodologies. Instead, companies, of all sizes and sectors, should be required to identify their own level of risk and undertake due diligence proportionally in response, as proposed by the European Parliament's own initiative report.

However, should a high-risk sector methodology for the scope of company inclusion be retained, then the approach of the draft Directive must be amended. The draft Directive's list of 'high-sectors' has been defined based on where there is existing OECD Guidance, "in order to reflect the priority areas of international action aimed at tackling human rights and environment issues."[14] This methodology excludes a number of sectors which are internationally recognised as high-risk sectors for forced labour.

For example, according to the ILO's Global Estimates of Modern Slavery, 18% of victims of forced labour exploitation are in the construction sector, 15% are in manufacturing (which includes not only garments, but also electronics and personal protection equipment, for example), 10% are in accommodation and food service activities, and 9% are in wholesale and trade. Further, the Global Slavery Index documents that the top five products at risk of modern slavery imported into the G20 are electronics (laptops, computers and mobile phones), garments, fish, cocoa and sugarcane. The level of risk in other sectors beyond those covered by the OECD Guidance is also demonstrated by the number of international initiatives which exist or are under way to develop guidance or shared approaches to address risks in these sectors. This includes:

9 See KnowTheChain, Apparel and Footwear, Benchmark Report, 2021 https://knowthechain.org/wp-content/uploads/2021-KTC-AF-Benchmark-Report.pdf

10 Information and communications technology

11 See KnowTheChain, Information and Communications Technology, Benchmark Findings Report, 2020 https://knowthechain.org/wp-content/uploads/2020-KTC-ICT-Benchmark-Report.pdf

12 See KnowTheChain, Food & Beverage, Benchmark Findings Report, 2020 https://knowthechain.org/wp-content/uploads/2020-KTC-FB-Benchmark-Report.pdf

13 Trade union representatives have expressed concern that the restriction to severe impacts could allow companies below the 500-employee threshold to ignore potential and actual violations of freedom of association. See OpinioJuris, A Missed Opportunity to Improve Workers' Rights in Global Supply chains, 2022 http://opiniojuris.org/2022/03/18/a-missed-opportunity-to-improve-workers-rights-in-global-supply-chains/

14 See Recital 22 of the proposal for a Directive on corporate sustainability due diligence https://ec.europa.eu/info/publications/proposal-directive-corporate-sustainable-due-diligence-and-annex_en

- The European Commission's own commissioned sectoral guidance, for example for the ICT industry;
- International initiatives focused on electronics, such as the Responsible Business Alliance and Electronics Watch;
- A UN Global Compact, UN Human Rights Office, ILO and the International Maritime Organization initiative, supported by trade unions and companies, on shipping, as well as other shipping initiatives; and
- An industry-led international initiative on hospitality.

Although the examples of initiatives given here vary in effectiveness and credibility, they nonetheless show the need for specific attention to be paid to operations in these high-risk sectors and the vast amount of information available to companies in these sectors which can be used to develop due diligence processes.

Furthermore, the high-risk sector approach fails to recognise that risk levels are defined not only by sectors, but also, for example, by the geographical context in which companies operate. Notably, in line with the UNGPs, companies should conduct enhanced due diligence when operating in conflict-affected areas.

Recommendations:

- **Expand the scope of company inclusion to include at least small and medium organisations, excluding only micro-enterprises, based on the principles of proportionality, in line with the European Parliament's own initiative report.**
- **Remove the derogation of Article 6(2), so that large companies are required to undertake due diligence on all impacts, not only severe impacts.**
- **If a high-risk sector approach is retained to determine any scope of company inclusion, the determination of high-risk sectors must not be pinned only to existing OECD guidance. The high-risk sectors outlined in Article 2(1b) must be expanded to include other high-risk sectors for forced labour, including, but not limited to, ICT, construction and hospitality. The EU should refer to the upcoming new ILO and Global Slavery Index estimates of forced labour (expected to be published summer 2022) and the US Department of Labour List of Goods Produced by Child Labor or Forced Labor as a reference, among other examples of international evidence.**

4. Remove exemptions to the financial sector's obligations

The draft Directive includes a limited obligation on 'very large' financial institutions, for example, investors, insurance, ('large' financial institutions are excluded altogether) to undertake only pre-investment due diligence on the activities of large clients, excluding risks arising in clients' value chains (Article 3). Financial institutions are not required to terminate credit, loan or other contracts when this can be reasonably expected to cause substantial prejudice to the client (Articles 7(6), 8(7).

The exclusion of large financial institutions is despite existing OECD guidance for the sector, the industry's risk-profile, and the industry's leverage to drive respect for human rights and the environment. In addition, the financial industry, including SMEs, arguably has significant administrative and financial resources to implement due diligence – conflicting with the Commission's arguments for the exclusion of smaller companies.

Rather than a partial and one-off process, financial institutions must be compelled to conduct ongoing client due diligence, exerting leverage to engage with clients on the ongoing identification, prevention, mitigation and remedy of forced labour and other impacts. Forced labour is not a static situation, and an investment that may initially be low risk for forced labour can become high risk during the course of the investment, due to, for example, conflict, climate change impacts, health emergencies, such as the Covid-19 pandemic, a change in political power, etc. – as well as changes to business models and strategies. The financial sector must also be required to suspend or stop providing services to a company under the same responsibilities as outlined for other companies by the draft Directive.

In line with the OECD Guidance on the financial sector, the financial sector must also be compelled to address risks in clients' value chains, where forced labour is most likely to occur. This would also align with current good practice in the financial sector, where a number of examples of financial institutions are using their leverage to address forced labour risks across value chains, including at lower tiers.[15] As said by Shift, the Directive must "avoid incentivizing these companies to focus their resources on large lower-risk clients at the expense of smaller clients in higher-risk sectors or operating contexts, or discouraging them from innovative uses of their leverage that try to address more severe harms further up the value chains."

Recommendations:

Remove all exemptions on the financial sectors' due diligence obligations from Articles 6(3), 7(6) and 8(7).

15 For example, relating to Uyghur forced labour in solar panel production. See Eventide, Eradicating Forced Labor from Solar Supply Chains: Eventide's Approach, 2022 https://www.eventideinvestments.com/wp-content/uploads/2022/01/Eventide-SpecialReport-Uyghur-AdvisorV2-02-Single-1.pdf

5. Require risk-based due diligence on impacts across entire value chains

The draft Directive obliges companies to undertake due diligence with respect to their own operations, the operations of their subsidiaries and the value chain operations carried out by entities with which the company has an "established business relationship". This is defined as "a business relationship, whether direct or indirect, which is, or which is expected to be lasting, in view of its intensity or duration and which does not represent a negligible or merely ancillary part of the value chain". This also leads to liability being limited to established business relationships.

Although the definition of "established business relationships" in the draft Directive is unclear and questions remain, this restriction of value chain due diligence to "established business relationships" could significantly limit the potential of the draft Directive to drive meaningful corporate action to prevent forced labour.

Notably, the "established business relationship" approach contradicts the UNGPs and the OECD Guidance. These international standards focus on severity of risk – wherever it occurs in the value chain – as the basis of companies' decisions as to where to prioritise due diligence steps to prevent risks and mitigate impacts, instead of different types of business relationships.

In contrast with the UNGPs and OECD Guidance, the focus on "established business relationships" creates the risk that companies will prioritise identifying and addressing risks in the most visible or directly linked parts of their supply chain, rather than the most salient risks in more remote tiers or services of a value chain. This could incentivise companies to ignore forced labour risks in lower tiers of supply chains, where forced labour is most prevalent, for example, in raw materials and material processing. It could also allow companies to ignore forced labour in the use or disposal of products, for example in shipbreaking or waste disposal. These are two industries which are extremely high risk for labour exploitation and forced labour, yet, under the definition of 'established business relationships', may be considered 'ancillary' to some companies.

Furthermore, companies may leave out short, unstable or informal relationships from their due diligence where severe impacts nevertheless commonly exist. For example, subcontracting, smallholder farmers or home-based workers could be excluded, despite collectively representing a key part of many companies' supply chains and an area of high risk for labour exploitation. Generally, for such short-term relationships, businesses tend not to conduct the same level of onboarding or apply the same level of integration into due diligence processes, even though high human rights risks are present.

In addition, the draft Directive's current scope could perversely incentivise companies to pursue short-term contracts, instead of long-term engagement with suppliers. In many industries, for example fashion, companies often 'supplier hop' or 'jurisdiction hop' to find the cheapest prices, for example, to seek out lower national minimum wages to reduce costs. Such an incentivisation also runs counter to companies' own arguments for an EU-wide mHREDD law, which called for a law which would "promote engagement and impactful actions between supply chain partners". The Directive should encourage companies to consolidate suppliers, to increase oversight and leverage, without creating perverse legal incentives which undermine this objective.

Recommendations:

- **Replace all references to "established business relationships" with "business relationships".**
- **Strengthen the notion of risk-based and ongoing due diligence throughout the draft Directive, under which companies must prioritise impacts on the basis of their severity[16] and likelihood.**

16 As per the UNGPs and OECD Guidance, this does not mean that less severe risks should not be identified and addressed at all, but that, where necessary, there should be prioritisation for those that are the most severe or where delayed response would make them irremediable, allowing therefore for sequencing of action. Principle 24 of the UNGPs particularly makes clear that companies are expected to eventually address all risks and impacts.

6. Moving beyond a prescriptive due diligence obligation

The draft Directive follows a due diligence process of identification, prevention and mitigation, and bringing actual adverse impacts to an end or neutralising or minimising their extent. Companies must also integrate due diligence into corporate policies, establish a complaints procedure, monitor the effectiveness of their steps, and publicly communicate on due diligence. There is ambiguity between Article 7 and 8 as to the concepts of prevention, mitigation, minimisation and neutralisation, which poses the risk of undermining the core objective of due diligence to prevent harm.

The draft places a heavy focus on companies meeting their due diligence obligation to prevent, cease or minimise impacts through a reliance on contractual assurances, whereby a company would seek contractual assurances with business partners, and corresponding contractual assurances from its partners. The draft Directive in turn states that where such contractual cascading has been used, this should be accompanied by verification through "suitable industry initiatives or independent third-party verification". For the latter, this can be understood as audits and certification schemes. Notably, the use of said contractual assurances and verification schemes may enable a company to evade liability for a failure to prevent harm per Article 22 on civil liability.

A. Remove the excessive focus on contracts, audits and industry initiatives

The strong reliance on contractual cascading, industry initiatives and verification schemes creates the risk of reinforcing failed approaches to address forced labour and encouraging a step back from existing better corporate practices. Standard contract practice to date by companies has exacerbated top-down compliance approaches. Such clauses tend to avoid any shared responsibility, allowing a lead company to push all responsibility for harm down onto a supplier, even where the company's own practices (for example, pressure relating to meeting order deadlines) have contributed to the harm.

The draft Directive can recognise the role that balanced and equitable contractual clauses can play as a foundation to support human rights and environmental due diligence. This is crucially by creating a shared human rights and environmental due diligence obligation on a lead company and supplier, including remedy provisions. Yet, any inclusion of contractual reassurances in the Directive must not be used as a dominant means by which companies can demonstrate implementation of the obligation or meaningful action to prevent harm.

Social audits and comparable verification approaches have also traditionally pushed the burden down onto suppliers, policing suppliers' practices without scrutiny of a lead company's own contribution to harm.[17] Moreover, social audits are wholly ineffective to identify forced labour. Even where better-designed and executed, an audit approach is a snapshot in time, tick-box and linear, and is often planned in advance, and so allows for the falsification of conditions. Further, forced labour is often hidden, and can be characterised by coercive control, poor recruitment practices, and recruitment fees being charged to the employees among other indicators. This obscures transparency and so exploitation and forced labour can be hard to detect without meaningful, deep and trusted engagement with workers. In addition, social audits lack transparency with their results, with little ability for scrutiny or opportunity to hold companies to account. This model prioritises protecting company reputation and does not guarantee remediation for workers.

Numerous examples and studies have exposed and documented the failure of the audit industry in relation to forced labour and other labour abuses. For example, the rubber glove manufacturer Top Glove underwent 28 social audits in the two years before an independent investigation found widespread forced labour. A leading auditing company itself has publicly stated that "social audits are not designed to capture sensitive labor and human rights violations such as forced labor and harassment".

Similarly, certification models at raw material levels have also exposed the severe deficiency of such models to identify forced labour risks, verify an absence of forced labour, or understand the root causes of forced labour. Many certification schemes are designed to focus on "sustainable" sourcing, covering a range of environmental and social issues, and thus lack the specificity and methodology to be able to identify sensitive labour rights issues, particularly forced labour. In research commissioned for Anti-Slavery International on the coffee sector in Brazil, researchers found that, although there is evidence that certification has worked and improved standards in some cases, in others, certification has failed to protect labour rights. For example, in 2018, Brazilian inspectors found that multinational companies had purchased cocoa beans from certified farms which had been using forced labour. Similarly, NGOs have reported significant labour abuses in palm

17 Many companies still require suppliers to carry the cost of audits. We welcome that the Directive states that lead companies shall bear the cost of verification for SMEs.

oil plantations in Indonesia certified by the Responsible Roundtable on Palm Oil. These are just two examples of many.

Furthermore, industry initiatives can, where effective, be a valuable platform for exchanging information, pre-competitive collaboration, and improving access to non-judicial remedy. However, they vary vastly in effectiveness, and are not adequate to reliably detect abuses or provide access to remedy. Crucially, they are not a replacement for regulation or accountability of companies, and as such must not be allowed to be used as evidence of due diligence, verification or as grounds for an exemption from liability for harm.

Overall, with its current heavy focus on contractual assurances and third-party verification, the draft Directive risks pushing burden onto suppliers, creating further commercial demand for the flawed auditing industry, and – ultimately – allowing the prevalence of forced labour in EU supply chains to continue. This requires amendments to the draft Directive to strengthen the role of responsible purchasing practices, leverage and stakeholder engagement (for the latter, see section 7).

B. Reform purchasing practices

Irresponsible purchasing practices are a key driver of labour exploitation. Insufficient lead times, prices that undercut fair labour costs, and other unreasonable demands can drive suppliers to cut corners. This can lead to pressure being put on workers through forced overtime, poverty wages and wage withholding, as examples. Suppliers may also subcontract to unauthorised third parties to meet demand.

The European Commission has recognised the need to address purchasing practices in Recital 30 of the draft Directive, which notes "When identifying adverse impacts, companies should also identify and assess the impact of a business relationship's business model and strategies, including trading, procurement and pricing practices." This obligation to reform purchasing practices would also address risks of a due diligence obligation leading to large companies solely pushing the burden of responsibility onto SMEs. However, the Recital's language is absent from the Articles, in favour of a vaguer and weaker obligation to "make necessary investments, such as into management or production processes and infrastructures" (Article 7(2c), 8(3d)).

C. Strengthen the role of leverage

The concept of leverage – how a lead company can influence the behaviour of a business partner – is core to the UNGPs and OECD Guidance. The UNGPs state that "if the business enterprise has leverage to prevent or mitigate the adverse impact, it should exercise it. And if it lacks leverage there may be ways for the enterprise to increase it. Leverage may be increased by, for example, offering capacity-building or other incentives to the related entity, or collaborating with other actors. Crucially, a positive use of leverage can also encourage longer-term business relationships.

Currently, the draft Directive only includes aspects of leverage (referenced as 'influence' in the draft) – such as the role of leverage through contracts (see above), collaborative action (Article 7(2e) and 8(3f)) and temporary suspension of a relationship (see section 8) through a contractual approach.

Leverage is particularly important with regard to how companies seek to influence indirect business partners, for example sub-suppliers. In the current draft, this is focused on companies concluding contracts with indirect business partners (Article 7(3) and 8(4)), which is then verified by independent third-party verification. Such a top-down compliance approach with indirect partners is extremely unlikely to have a meaningful effect in practice, in particular when considering a complex and sensitive situation like forced labour.

Instead, the Directive should encourage companies to explore more varied ways to exert and increase leverage – for example, through capacity-building, engagement with trade unions and civil society, and collaborative efforts with industry peers sharing the same indirect partners. Know The Chain has documented examples from the ICT sector of how companies have engaged below tier one to address forced labour risks, including capacity-building and 'train the trainer' work with sub-suppliers.

Recommendations:

- **Clarify that companies have an obligation to respect human rights and the environment and a duty to prevent harm, as the prevailing duty over any of the specific due diligence measures listed in the proposal.**
- **Minimise the dominant role of contractual assurances, industry initiatives, and third-party verification in the Directive, including by removing their function to validate the appropriate implementation of due diligence as outlined in Article 22(2).**
- **Establish civil liability for auditors for failing, either through negligence or intent, to raise in their auditing reports where a company has not complied with the law, and/or has expressly or tacitly endorsed corporate policies, decisions and actions which conflict with it.**
- **Indicate that contractual assurances should create a shared human rights and environmental due diligence obligation on the buyer and supplier, including joint commitments to remedy provisions.**
- **Amend Articles 7 and 8 to oblige companies to, where applicable, reform business models and strategies, including trading, procurement and pricing practices as part of the due diligence obligation.**
- **Amend Articles 3(q), 7 and 8 to strengthen the obligation for companies to exert and increase leverage, including with indirect business partners. This must enable companies to explore varied and non-prescriptive ways to exert and increase leverage, and to develop new best practices.**

7. Meaningful stakeholder engagement

The draft Directive only states that stakeholder consultation is compulsory in the design of a prevention plan (Article 7(2a)) and in Article 26 where it states that "Directors shall adapt the corporate strategy accordingly with due consideration for relevant input from stakeholders and CSOs."

In risk identification and minimisation, stakeholder engagement is only required "where relevant" (Articles 6(4), 8(3b)), leaving all discretion to the company to engage with stakeholders or not. Crucially, the role of stakeholder engagement is not mentioned in the provision of remedy, the design of complaints procedures (Article 9, see section 9), monitoring (Article 10) or communication (Article 11).

A. Mandate stakeholder engagement in all due diligence stages

Both the UNGPs and OECD Guidance refer to effective engagement with stakeholders as being central to the objective and processes of human rights due diligence. In recent commentary on the draft Directive, the ILO, OECD and OHCHR insist that due diligence should be "based on proactive and meaningful stakeholder consultation and dialogue, particularly with workers and all others potentially impacted by business activities".

Given the often-hidden nature of forced labour, where workers face intimidation and fear to speak candidly, or the fact that forced labour indicators may not be immediately visible (such as debt bondage), meaningful stakeholder consultation and engagement is a fundamental part of due diligence to identify the factors that indicate risks of exploitation or the root causes of exploitation. Tick-box, one-off engagements with workers (as often conducted through social audits, see section 6) will fail to build this trust and thus fail to identify where forced labour, or risks of forced labour, are present.

Where on-the-ground engagement is credibly unfeasible, for example due to severe limitations on freedoms and security risks, companies should ensure that the views of local stakeholders are meaningfully captured through credible representatives and consultations with experts. This is extremely pertinent for state-imposed forced labour.

Stakeholder engagement must therefore not only be "where relevant", as a select activity based on the interests of the company. Meaningful stakeholder engagement must be understood as a fundamental part of due diligence, and be made mandatory throughout the entire due diligence process.

The monitoring obligations (Article 10) in the draft Directive also exclude the role of stakeholder engagement. This means those evaluating the impact, relevance and efficiency of measures might only be limited to those who have initiated and implemented them. The absence of workers, trade unions, civil society and other stakeholders at the monitoring stage will lead to a lack of objectivity, a failure to identify unintended consequences, and thus prevent the identification of relevant improvements to be brought to the established processes. The Directive must strengthen the requirements to consult with stakeholders when undertaking assessments.

B. More consideration for groups in vulnerable situations

Overall, the draft Directive fails to recognise that business and human rights abuses have differentiated impacts on individuals and groups in marginalised situations, including on women and girls. The definition of stakeholders (Article 3(n), and related articles on stakeholder engagement (Articles 6(4), 7(2.a), 8 (3.b) and 26), fail to drive specific attention towards the needs and interests of groups in heightened situations of vulnerability. For forced labour, this can include migrant workers; casual, temporary and seasonal workers; homeworkers; workers from marginalised groups, such as indigenous peoples, people of lower-castes or ethnic minorities; illiterate workers; and women and children.

Companies should be required to make sure due diligence processes are designed to take heightened vulnerability into account and are gender-responsive. This must be part of the identification process and integrated into all stages of due diligence. Stakeholder engagement processes should particularly aim to understand how existing contexts and/or vulnerabilities may create disproportionate impacts for certain groups. Therefore, the definition of meaningful stakeholder engagement must also be further elaborated on in the Directive. Although a prescriptive approach should be avoided, given that stakeholder engagement is context and scenario specific, the Directive must speak to the proactive, two-way communication and good-faith nature of stakeholder engagement, including relating to the disclosure of information, and safety for

stakeholders. This obligation must also meet (and go beyond) existing international consultation standards, related to the rights to collective bargaining and free, prior and informed consent.

This must also include the design of stakeholder engagement processes themselves. Targeted meetings and engagement with specific groups of workers may be appropriate to ensure meaningful engagement with those who are differently or disproportionately affected, or who may face barriers to involvement in other processes. These barriers must be identified in the due diligence process. For example, workers' representatives and trade unions may not always be willing to address caste-based discrimination if mostly managed and dominated by "upper-caste" representatives, and targeted engagement with representatives of "lower-caste" workers would then be required.

Recommendations:

- **Mandate stakeholder engagement at all due diligence stages, including the complaints mechanisms and remedy provisions, monitoring and communication. A failure to meaningfully engage stakeholders should constitute a failure to conduct appropriate human rights and environmental due diligence.**
- **Include references to:**
  - **the need for proactive, two-way, ongoing, safe and inclusive stakeholder engagement, including relating to the disclosure of information.**
  - **the need to identify and incorporate specific considerations for people in situations of heightened vulnerability in all provisions where stakeholder engagement is relevant or should be included.**
- **Strengthen the role of trade unions and their right to negotiate the due diligence process with the company. Where workers are or may be impacted, stakeholder engagement must ensure respect of the right to freedom of association and collective bargaining, and not interfere with these rights.**

8. Ensure that disengagement is responsible

The draft Directive requires companies to terminate relationships where they have failed to prevent, mitigate, cease or minimise harms. Two approaches are envisaged in Article 7(5) and 8(6):

1. **Temporarily suspending commercial relations, "if there is reasonable expectation that these efforts will succeed in the short term".**
2. **Terminate the business relationship if the potential/actual impact is severe.**

However, the company is not required to do either of these if the law governing their relationship with the established business relationship does not permit it. Member States are thus encouraged to introduce laws that allow for termination of relationships (see also Recital 36).

This wording currently creates a high risk that companies will 'cut and run' from forced labour situations and fails to align with international standards on responsible disengagement.

Both the UNGPs and OECD Guidance recognise that companies will have to disengage from business relationships, when efforts to improve a situation have failed, or if there is no credible prospect for change in the future. The OECD Guidance describes disengagement as a 'last resort'. However, the UNGPs and the OECD Guidance note the need for companies to consider the potential adverse human rights impacts of exiting relationships. The OECD Guidance further unpacks the concept of responsible disengagement, including the need to engage with trade unions on the decision to disengage.

Crucially, disengagement does not absolve a company from its remediation responsibilities. Remediation must be owed in situations where, despite efforts to prevent the harm, the harm nevertheless occurs. The UNGPs and OECD Guidelines both state that if a company contributes to an adverse impact, it is responsible for remediating the impact to the extent of its contribution. Companies should therefore engage with suppliers and affected stakeholders to contribute to the remediation of all previous adverse impacts to which they contributed, and to make sure that potential negative consequences of disengagement are prevented. Yet, currently, the draft Directive provides no remedy provisions in Article 7.

With regards to forced labour, where and how disengagement is necessary depends on the situation:

In some situations, businesses fail to disengage when they should, extending relationships for as long as possible, despite there being no prospect to prevent or cease forced labour.[18] This is demonstrated by examples of companies that knowingly continue to source from the Uyghur Region. Some companies in this case also previously manipulated the concept of "last resort",[19] to justify maintaining business relationships with suppliers in this situation.

Notably, some companies have also raised contractual obligations and Chinese laws[20] as a reason why they cannot disengage from suppliers at risk of being implicated in Uyghur forced labour. This therefore also exposes a large loophole in the draft Directive, in that it potentially allows companies to avoid disengagement if the national laws governing contracts do not permit disengagement. This loophole could also potentially encourage more producer countries to introduce such laws.

In contrast, in other examples, companies respond to public exposes of forced labour by "cutting and running" from suppliers. In such examples, companies irresponsibly disengage, which can lead to severe and non-remediated impacts for workers. Often, in such cases, the lead company places the blame for such harm on the suppliers, ignoring its own role in the harm, such as through irresponsible purchasing practices, or an undue reliance on flawed audit results.

Recital 36 recognises the need for responsible disengagement. It notes that "companies should prioritize engagement with business relationships in the value chain, instead of terminating the business relationship,

18 Exceptionally, in the context of Uyghur forced labour, companies are unable to support the direct provision of remedy to workers in the Uyghur Region. As an alternative, Anti-Slavery International recommends that companies which identify they have contributed to or profited from Uyghur forced labour engage with representatives of the global Uyghur community to support financial aid to Uyghur refugees. This has been best practice in the fashion industry. This is also comparable for state-imposed forced labour in cotton harvesting in Turkmenistan.

19 Between 2020-2022 Anti-Slavery International has conducted intensive private engagement with companies in the fashion sector and business associations on the risks of sourcing from the Uyghur Region. In 2020 and early 2021, numerous companies and business associations raised the argument of "last resort" to continue to seek to source from the Uyghur Region, despite the volumes of evidence that human rights principles could not be adhered to, the lack of any credible prospect to change this, and the calls from victims and representatives of the Uyghur Region to cease sourcing. Due to the growing awareness around the issue, and growing better practice by the industry, this argument has become less dominant.

20 I.e. see the Anti-Foreign Sanctions Law

as a last-resort action after attempting at preventing and mitigating adverse potential impact without success". Further, Recital 32 states that "to enable continuous engagement with the value chain business partner instead of termination of business relations (disengagement) and possibly exacerbating adverse impacts, this Directive should ensure that disengagement is a last-resort action, in line with the Union's policy of zero-tolerance on child labour. Terminating a business relationship in which child labour was found could expose the child to even more severe adverse human rights impacts".

Recommendations:

- **Introduce language defining responsible disengagement in Articles 7 and 8. This necessitates amendments which require companies to:**
  - **Take into account potential social and economic adverse impacts of disengagement, including through consultation with affected stakeholders.**
  - **Where a decision to disengage is taken, develop a responsible exit plan which details the actions the companies will take, as well as its expectations of its suppliers, buyers and other business relationships to prevent adverse impacts from disengagement.**
  - **Engage with business partners and affected stakeholders to contribute to the remediation of all previous adverse impacts to which they contributed. See also section 9 of this document on providing for non-financial remedy.**
- **Consider possible loopholes that may prevent disengagement where necessary, such as the risk that producer countries will introduce laws governing contract termination to prevent disengagement.**

9. Ensure meaningful grievance mechanisms and protect from retaliation

Article 9 obliges companies to "provide the possibility for person and organisations [...] to submit complaints to them where they have legitimate concerns". Member States must make sure that individual people, trade unions, workers' representatives and civil society organisations can issue complaints. Companies must establish a procedure for dealing with complaints. Member States must make sure that complainants are able to request follow-up, and to meet with company representatives to discuss severe impacts.

Where a complaint is considered well-founded, this will seemingly mandate a company to revert to the due diligence obligations of Articles 7 and 8.

A. Amend the complaints mechanism to align with the UNGPs effectiveness criteria and OHCHR recommendations

Non-judicial grievance mechanisms are an important access to remedy route for workers at risk of forced labour, as workers may face significant obstacles to access remedy through alternative routes, for example as experienced by migrant workers.[21]

Therefore, it is welcome that the draft Directive specifically requires companies to provide the possibility for people, and their representatives, to submit complaints. However, the draft Directive's current narrow formulation of a 'complaints mechanism' risks perpetuating current corporate-led top-down approaches to grievance mechanisms, as it is focused solely on the submission of complaints, rather than the provision of effective remedy.

Notably, the draft Directive fails to set out how a company can ensure an effective complaint mechanism, departing from the UNGPs, and ignores the past decade of learnings on how to implement meaningful grievance mechanisms.

First, Guiding Principle 31 of the UNGPs establishes eight 'effectiveness criteria' for the establishment of operational-level grievance mechanisms. These are focused on the principles of legitimacy, accessibility, predictability, equitability, transparency, rights-compatibility, continuous learning and stakeholder engagement and dialogue.

Further, since the establishment of the UNGPs, the OHCHR has run an "Accountability and Remedy Project" to further assess how to better improve accountability and access to remedy for victims of business-related human rights abuses. In its 2020 report on non-State-based grievance mechanisms, the OHCHR notes that few non-State-based grievance mechanisms "are fulfilling their envisaged role", and that "the remedies that may be obtained from non-State-based grievance mechanisms are usually partial at best". Crucially, the OHCHR notes that "developers and operators of non-State-based grievance mechanisms need to give much greater emphasis to the needs, expectations and perspectives of the people for whose use these mechanisms are intended, recognizing the different ways in which meaningful stakeholder engagement is fundamental to meeting each of the Guiding Principles' effectiveness criteria for such mechanisms in practice".

Research by Anti-Slavery International in 2021 on migrant workers' access to remedy also found that such corporate-led approaches to operational-level grievance mechanisms currently fail to address the power imbalance between workers and employers, and, overall, lack the oversight, independence and accountability needed to secure workers' trust and guarantee effective remedy resolutions. This research found that companies must shift away from corporate-led approaches, to instead supporting approaches where workers, or their credible representatives, are involved in the design, implementation and monitoring of access to remedy routes.

Noting the deficiencies of current practice, the OHCHR provided a series of recommendations on how to improve non-State-based grievance mechanisms. Among numerous issues, the OHCHR places significant

21 In many countries, migrant workers face structural inequalities and barriers to access justice. Further, even where judicial access to remedy routes are available, slow remedial processes can force migrants to decide between enduring abuse, behaving unlawfully or returning home worse off than when they left. This makes the role of non-state mechanisms which can provide remedy quickly crucial. However, non-state mechanisms are also often limited in their ability to be effective for migrant workers. For example, migrant workers may be excluded from trade union activities based on immigration status, caste, age, gender or employment sector. This means remedy can be out of reach altogether unless meaningful alternatives are provided which consider the heightened barriers to remedy and justice of specific groups of workers. See Anti-Slavery International, Migrant workers' access to remedy, A briefing paper for business, 2021 https://www.antislavery.org/wp-content/uploads/2022/02/ASI_AccessToRemedy_Report.pdf

emphasis on the central role that relevant rights holders and other stakeholders must play in the design and evaluation of grievance mechanisms and the provision of remedy, to meet the UNGPs effectiveness criteria. The OHCHR explicitly calls for companies, where relevant and appropriate, to engage proactively with those seeking to develop and implement worker-driven and community-driven grievance mechanisms. The OHCHR also notes the need for any grievance mechanism to be "provided with an appropriate degree of independence from the business enterprise(s)".

Instead of taking account of these learnings, the draft Directive, conversely, poses the risk of cementing the weak corporate practice of recent decades. In its current formulation, companies will act as their own arbiter in the design and execution of complaints mechanisms. Notably, companies will be able to determine themselves whether a complaint is "well founded" (Article 9(3)), and where this is determined, very weak remediation obligations are attached. Article 8(3a) includes remedy provisions, and these relate solely to the payment of damages where adverse impacts cannot be brought to an end. As well as failing to include remedy provisions relating to disengagement under Article 7, this formulation fails to include other forms of remedy beyond damages and financial compensation, in line with the bouquet of remedies outlined by Guiding Principle 25 of the UNGPs. Remedy must take into account the needs and interests of the affected party and be decided upon and designed in consultation with rightsholders or their representatives.

Further, complainants and their representatives are provided inadequate rights under the draft Directive. Although complainants are entitled to request a follow-up and to meet with company representatives, this draft Directive provides no standards on legitimacy, transparency and equitability in this process, per the UNGPs. In addition, under Article 9(4b), complainants only have the right to meet with company representatives to discuss "potential or actual *severe* adverse impacts" (own emphasis).

Furthermore, and crucially, the draft Directive fails to include the role of actual and potentially affected stakeholders in the design, implementation or governance of grievance mechanisms. This means that grievance mechanisms will likely fail to take into account the needs of workers, particularly workers at heightened risk of vulnerability, and in turn will lack the necessary trust to be meaningfully used.

B. Protection for whistleblowers and human rights defenders

Article 23 states that persons reporting breaches to the Directive shall be protected by the terms of the "Whistleblowers directive".[22] Recital 65 describes such persons as "persons who work for companies subject to due diligence obligations under this directive or who are in contact with such companies in the context of their work-related activities".

This protection is too limited. The existing EU Directive on whistleblowers 2019/1937, to which the draft Directive refers, only protects reporting persons (whistleblowers) linked to an EU company or institution by a working relation (i.e. current or former workers) and does not apply to a wider definition of human rights defenders. This would exclude any external individual or group reporting forced labour linked to a company.

The draft Directive therefore fails to ensure protection for all human rights defenders. Globally, human rights defenders are at enormous risk of retaliation when advocating in relation to corporate abuse. In 2021 alone, the Business Human Rights and Resource Centre documented 615 attacks on human rights defenders, 140 of whom were advocating for labour rights.

At a minimum, the draft Directive should ensure that all human rights defenders are protected from retaliation, whatever their relation to the company and wherever the company is based (both inside and outside the EU). This would be in line with the EU's own priorities to support human rights defenders, as outlined in Article 21[23] of the Treaty on European Union. In addition, in 2004, the Council of the EU also adopted guidelines on the protection of human rights defenders, of which the definition[24] within can be transferred to the Directive. Notably, human rights defenders are currently not explicitly mentioned in the definition of stakeholders (Article 3(n)).

22 This is an existing EU Directive, 2019/1937.

23 Article 21 of the Treaty emphasises that EU actions on the global stage should consolidate and support democracy, the rule of law, human rights and the principles of international law.

24 These guidelines define human rights defenders as "those individuals, groups and organs of society that promote and protect universally recognised human rights and fundamental freedoms. Human rights defenders seek the promotion and protection of civil and political rights as well as the promotion, protection and realisation of economic, social and cultural rights. Human rights defenders also promote and protect the rights of members of groups such as indigenous communities. The definition does not include those individuals or groups who commit or propagate violence".

Recommendations:

- **Allow for forms of remedy beyond financial compensation, in line with Guiding Principle 25 of the UNGPs.**
- **Amend Article 9 to incorporate the UNGPs effectiveness criteria and OHCHR recommendations, including by:**
  - **Instead of "complaints mechanisms", referring to the broader concept of grievance and remediation mechanisms, particularly referencing companies' obligations to provide for or cooperate in the remediation of adverse human rights impacts.**
  - **Specifying key elements relating to stakeholder engagement in the design, monitoring and enforcement of grievance mechanisms and the provision of remedies.**
  - **Providing for the possibility for companies to participate in grievance mechanism approaches implemented by others (for example, workers, communities, civil society, trade unions, suppliers, etc.).**
  - **Incorporating guarantees of non-retaliation, confidentiality and anonymity for all actual and potentially affected stakeholders.**
  - **Ensuring legitimacy and transparency in follow-up procedures, including by obligating companies to respond in writing to any complaint submitted under the procedure, including those deemed to be 'unfounded'. Further, enabling not only complainants, but also representatives of complainants to request follow-up and meet with company representatives. This should also cover all impacts, not only 'severe impacts'.**
  - **Clarifying that any non-judicial remediation efforts must be in parallel to encouraging collective bargaining and recognition of trade unions and should by no means undermine the role of legitimate trade unions in addressing labour-related disputes, nor preclude access to judicial or other forms of remediation.**
- **Amend Article 3(n) to provide for a definition of human rights defenders.**
- **Amend Article 23 to ensure that Member States introduce the measures necessary to protect all stakeholders and their representatives, including human rights and land and environmental defenders, from any reprisals or adverse impacts when seeking to exercise their rights under the Directive, and so that companies are obliged to ensure that stakeholders are not put at risk when submitting a complaint.**
- **Include provisions to hold companies liable for any retaliation action taken against whistleblowers and human rights defenders, whether this action was taken by the company or by actors it has mandated to do so.**

10. Strengthen transparency and disclosure requirements

The current proposal does not create new transparency and disclosure obligations for most companies. Article 11 states that such obligations are already covered by the EU's Corporate Sustainability Reporting Directive proposal. The draft Directive creates only an additional requirement for companies not covered by the latter to publish an annual statement.

Evidence has shown that such reporting exercises have failed to drive tangible positive systemic change.[25] Enhanced communication and value chain transparency requirements linked to the due diligence obligation are therefore necessary.

First, companies must be required to map and disclose value chains. This is particularly relevant to forced labour situations, where abuses tend to happen in the lower tiers of the supply chain. It is therefore a prerequisite that a company maps and understands its supply chain, both to prevent the highest risks of forced labour and take steps to address it where it exists. This can also promote collaboration between companies, to work together to establish collaborative due diligence approaches with suppliers and sub-suppliers, including for example joint grievance mechanism and capacity-building approaches. There are some examples of international brands, including both large companies and SMEs, which already publicly disclose lists of direct suppliers, types of products and numbers of workers. The Open Apparel Registry is another example of a collaborative approach to information sharing, which collects and enables access to publicly available lists of suppliers.

Second, in line with the UNGPs and OECD Guidance, communication must also relate to companies' disclosure of information to stakeholders, which differs from annual sustainability reporting, as transparency and access to information is required for meaningful consultation. Business enterprises must proactively disclose information on their due diligence processes, across all stages and with all information relevant to workers and other relevant stakeholders.

This facilitates information sharing and gathering a range of input and perspectives. This should be done freely and without threats of reprisals or harm. Information shared by a company should include its plans, details on how it is managing potential and actual negative impacts and reporting on the outcomes of its efforts, including the impact of complaints mechanisms, outcomes of grievance procedures and remediation. Recognising potential credible disclosure challenges, the OECD Guidance has outlined how companies can communicate potentially sensitive information to stakeholders.

As highlighted by Clean Clothes Campaign, ECCHR, Public Eye and SOMO in their policy paper, any legislation should shift the burden onto companies to actively seek ways to disclose information to the greatest extent possible, in a meaningful and user-friendly manner. Legislators should promote a change in companies' current default position from non-disclosure to disclosure.

25 See Anti-Slavery International, A call for a UK Business, Human Rights and Environment Act, 2022 https://www.antislavery.org/wp-content/uploads/2022/01/ASI_Report_UKBHREA_FULL.pdf

Recommendations:

- **Through amendments to Article 11, and/or other relevant Articles:**
  - **Require companies through ongoing communication to disclose key information relevant to due diligence processes to actual and potentially affected stakeholders, on a proactive basis and in a manner appropriate to their context**
  - **Mandate mapping and disclosure of value chains and value chain information.**
  - **Specify further reporting and disclosure requirements regarding human rights risks and impacts, as well as all stages of the due diligence process that are used to address them. The Directive must require that such information is regularly updated, with clear forward-looking plans and the disclosure of targets focused on impacts and not just on actions. Within this, specifically require companies to disclose:**
    - **Details of all third-party audits conducted during the relevant period – including the name of the auditor and disclosure of whether indicators of harm, including forced labour, were identified.**
    - **Indicators on the effectiveness of complaints/grievance mechanisms, for example, the number of complaints received, the nature of grievances (respecting anonymity), and details of the remedy provided.**
  - **Clarify the limits of non-disclosure agreements and provide a clear definition of the notion of "commercially sensitive" information.**
  - **Include a 'right to information' clause that would guarantee stakeholders' access to information such as contractual clauses, codes of conduct or corrective action plans, among other elements.**

11. Remove loopholes to civil liability

Article 22 (1a and 1b) establishes that EU Member States shall ensure that companies are liable for damage if they failed to take appropriate measures to prevent or minimise potential adverse impacts or end actual adverse impacts as laid down in Articles 7 and 8 and, as a result of this failure, adverse impacts occurred and led to damage.

Article 22(2) provides exclusions from this, namely that a company will not be held liable for damages caused by an adverse impact arising from an indirect partner, "unless it was unreasonable, in the circumstances of the case, to expect that the actions actually taken, including in respect of verifying compliance, would be adequate" to prevent, minimise, bring to an end or mitigate the adverse impact. In addition, Member States are to take due account, in assessing the existence and extent of liability, of the company's efforts to comply with any remedial action required of them by a supervisory authority, any investments made and targeted support provided, as well as any collaboration with other entities to address adverse impacts, per Articles 7 and 8.

Although it is extremely welcome that the draft Directive provides civil liability for damages, the current formulation poses a high risk that companies will be able to evade liability through a reliance on weak due diligence methods. This is the direct consequence of the extremely weak due diligence obligation laid out in Articles 7 and 8 which – as discussed in depth above – has an exaggerated reliance on the role of contractual clauses, and third-party verification, fails to include meaningful stakeholder engagement, and could enable irresponsible disengagement.

This risk is particularly high in relation to Article 22(2) on indirect partners. As things stand, companies will be able to evade liability through the use of third-party audits and verification, unless it can be proven that it was "unreasonable" to expect such steps would be adequate.

Crucially, both paragraphs fail to ensure that the claimant will not be held responsible for providing the evidence to prove the "reasonableness" and "appropriateness" of the measures taken by the company. Unless this is clarified, it is likely that complainants will shoulder the burden to prove the inadequacy of a company's steps to prevent, mitigate, cease or minimise an impact. The enormous barriers this poses for claimants has been documented by civil society. In terms of establishing the liability regarding indirect partners, per Article 22(2), this evidentiary burden will be even more difficult to overcome, due to the additional barrier of having to prove an "unreasonable" judgement on the adequacy of a third-party initiative.

Recommendations:

- **Through amendments to Article 7 and 8, ensure that the specifications for how companies should implement their due diligence obligations are non-exhaustive, leaving space for each company to determine what is appropriate in its specific context, as outlined in section 6. Article 22 must also be amended to give rise to liability for failure to comply with all due diligence obligations (Articles 4-11) of the Directive.**
- **Place the burden of proof on the defendant company to clarify its connection to the violation and harm and demonstrate that it took all appropriate measures.**
- **Address other major barriers to justice, which reduce time limitations for bringing claims, allow for collective redress and representative actions.[26]**
- **Remove industry initiatives, audits and third-party verification as means to assess whether appropriate due diligence was undertaken.**

26 See European Coalition for Corporate Justice, European Commission's proposal for a directive on Corporate Sustainability Due Diligence, A comprehensive analysis, 2022, pp.20-21 https://corporatejustice.org/wp-content/uploads/2022/04/ECCJ-analysis-CSDDD-proposal-2022.pdf

12. Strengthen public enforcement

The draft Directive compels Member States to designate independent supervisory authorities, which can initiate investigations, and issue orders and impose sanctions. Any natural or legal person is to be entitled to submit substantiated concerns to a supervisory authority. Article 20 requires Member States to lay down rules for the sanctions, and requires these to be "effective, proportionate and dissuasive", based on a company's turnover. The draft Directive requires companies applying for public support to provide evidence that they have not been sanctioned. Article 21 establishes a European Network of Supervisory Authorities.

The draft Directive's proposals for public enforcement are welcome, in particular the strong powers provided to supervisory authorities. However, further elaboration is necessary to allow for a wider range of sanctions which exclude non-compliant companies from public procurement and public support schemes.

In addition, the Directive should require supervisory authorities to publish and update lists of companies subject to the Directive, said companies' reports, and provide for a list of non-compliant companies. The latter is a long-standing practice of the 'Brazil Dirty List', for example, and this has led to the Brazilian Central Bank adopting regulations prohibiting financial institutions from lending to individuals or companies featured on the Dirty List. This is an example from which the EU can learn.[27]

Recommendations:

- **Expand the list of specified sanctions to allow for, for example, exclusion, suspension or withdrawal from EU and Member States' relevant mechanisms, such as public procurement and public support schemes, including export credit and state aid.**
- **Require supervisory authorities to publish lists of all companies subject to the Directive, with accompanying lists of companies that have breached the Directive, and/or are subject to substantiated concerns/investigation/information requests.**

27 See Anti-Slavery International, EU law. Global Impact. A report considering the potential impact of human rights due diligence laws on labour exploitation and forced labour, 2021, References to the Brazil Dirty List https://www.antislavery.org/wp-content/uploads/2021/11/ASI_EUlaw_GlobalImpact_Report2.pdf

13. Introduce accompanying measures to support stakeholders in third countries

Article 14 suggests that EU Member States should provide support to SMEs and companies' business partners to fulfil due diligence obligations. This includes websites, platforms and financial support, as well as a proposal to facilitate joint stakeholder initiatives in third countries.

Although this support to SMEs is welcome, the draft Directive nonetheless completely omits any support or education for local civil society organisations, trade unions and vulnerable communities in third countries to know and exercise their rights in the frame of the Directive. This is key both to meaningful stakeholder engagement in the course of any company's due diligence process and to enable stakeholders in third countries to meaningfully engage in the Substantiated Concerns procedure (Article 19) and to access justice.

Clear pathways of support must be established which enable stakeholders in third countries, including workers, trade unions, local communities, civil society and human rights and environmental defenders, to access information, monitor implementation and understand and exercise their right to raise concerns and access remedy. This also requires a dedication of resources.

Accompanying measures should also support third-country governments to establish and implement legislation which strengthens the ability of trade unions, civil society and other actors to exercise their rights. Further, Member States should support third-country governments to strengthen national/local labour rights monitoring and access to remedy procedures, as well as facilitate information sharing between EU and third countries to improve understanding and investigations into human rights violations.

Recommendations:

- **Through amendments to Article 14, reference the need for the EU and EU Member States to support workers, trade unions, civil society, communities and human and environmental defenders in third countries, including through development aid, to enable them to actively monitor implementation and exercise their rights under the Directive.**
- **Through amendments to Article 19, require EU Delegations and Member State embassies to support the submission of substantiated concerns, including by actively providing guidance, practical assistance, and supporting protection measures.**
- **Through amendments to Article 21, include the active involvement of workers, trade unions, civil society, communities and human and environmental defenders from third countries in the European Network of Supervisory Authorities.**
- **Through amendments to Article 21, reference the need for the EU Member States' supervisory authorities to actively exchange knowledge and intelligence with third-country governments, while adhering to other recommendations in this document on the protection of stakeholders.[28]**

28 See Anti-Slavery International, EU law. Global Impact. A report considering the potential impact of human rights due diligence laws on labour exploitation and forced labour, 2021, Recommendations to EU legislators https://www.antislavery.org/wp-content/uploads/2021/11/ASI_EUlaw_GlobalImpact_Report2.pdf