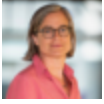


# Human Rights under the EU Corporate Sustainability Due Diligence Directive

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This article belongs to the debate » [Unboxing the New EU Corporate Sustainability Due Diligence Directive](#)

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## Dividing the Indivisible

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Human rights are meant to be indivisible and, according to the soft law [UN Guiding Principles on Business & Human Rights](#), companies are meant to respect all human rights. Unfortunately, under the EU's Corporate Sustainability Due Diligence Directive (CSDDD), that is not the case. The EU directive mandates that certain large companies situated in or trading with the EU will soon be legally required to undertake human rights and environmental due diligence in relation to their operations and business relationships. The question how to determine the directive's normative scope, both in relation to human rights and environmental standards, was highly contested among the three co-legislators, the European Commission, the European Parliament and the Council of the European Union. In the case of the human rights scope, which will be the focus of this blog post, the EU has opted for a restricted list approach adorned with a convoluted set of conditions. This is in deviation from international standards which require that business respect *all* human rights, given their indivisibility and interdependence, by means of human rights due diligence.

## A limited coverage of human rights and complex conditions to obligations

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The CSDDD establishes due diligence obligations for companies regarding certain actual and potential human rights adverse impacts with respect to their own operations, the operations of their subsidiaries and the operations carried out by their business partners. Article 3(c) and Annex I Part I determine (a) the scope of rights that the directive covers and (b) whether and to what extent due diligence obligations in relation to these rights arise for an individual company.

## **The directive's coverage of rights**

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Annex I Part I Section 2 lists human rights and fundamental freedom instruments. The list determines which human rights are covered by the directive. These are the international Covenant on Civil and Political Rights; the International Covenant on Economic Social and Cultural Rights; the Convention on the Rights of the Child; the ILO Core Fundamental Conventions (Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); the Right to Organise and Collective Bargaining Convention, 1949 (No. 98); the Forced Labour Convention, 1930 (no. 29) and its 2014 Protocol; the Abolition of Forced Labour Convention, 1957 (No. 105); the Minimum Age Convention, 1973 (No. 138); the Worst Forms of Child Labour Convention, 1999 (No. 182); the Equal Remuneration Convention, 151 (No. 100); and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111)).

The list contains many of the key and fundamental international human rights instruments, yet there are serious lamentable absences, including the UN Declaration on the Rights of Indigenous Peoples; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the UN Declaration on Human Rights Defenders, the Convention on the Elimination of all Forms of Discrimination Against Women, as well as a reference to International Humanitarian law.

The European Commission has the power via Article 3(2) CSDDD to amend this list of instruments by means of a delegated act, which is an act of executive law-making by the Commission supplementing or amending certain non-essential elements of the underlying law, in this case the CSDDD. Recital 25 specifies that once ratified by all Member States, the Commission shall add the ILO Occupational and Health Convention, 1981 (no. 155) and the ILO Promotional Framework for Occupational Safety and Health, 2006 (No 187) to the list of instruments.

## **A company's due diligence obligations within the directive's coverage of human rights**

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To determine whether a company has due diligence obligations in relation to the rights covered by the directive, Annex I Part I first lists in Section I a number of selected rights for which all companies carry due diligence obligations. As a second step, it introduces conditions under which due diligence obligations arise for the other rights within the directive's human rights coverage under Article 3 c (ii). Consequently, it depends on the context in which companies operate whether they must carry out due diligence or not.

In 19 bullets, Section I outlines rights derived from the aforementioned human rights instruments, around half of which are construed as prohibitions, for example the prohibition of arbitrary or unlawful interference with a person's privacy (no. 5) or the prohibition of unequal treatment in employment (no.16). Several of the listed rights are organised in

clusters, for example the right to freedom of association and assembly and the rights to organise and collective bargaining (no. 15), which is specified to include the right to join or form a union; for joining or forming a union not to be used as the basis for discrimination or retaliation; the right of the union to freely operate without interference; and the right to strike. Similarly, bullet no. 9 on the list covers five distinct rights for the protection of children's health, access to education and wellbeing.

A particularly noteworthy inclusion is the right to enjoy just and favourable conditions of work, including a fair wage and an adequate living wage for employed workers and an adequate living income for self-employed workers and smallholder farmers; decent living, safe and healthy working conditions and reasonable working hours (no. 7), a much-advocated-for right that, together with the obligation to take appropriate measures to alter purchasing practices in Article 7 & 8, holds real economic redistributive potential not only for business suppliers in global value chains but specifically for (self-employed) workers.

The listed rights must be interpreted according to international law. For example, the right to liberty and security is to be interpreted in line with Article 9(1) of ICCPR. Consequently, companies, implementing authorities and judges will need to take international jurisprudence and recommendations of treaty bodies into account. This approach underscores the international nature of human rights due diligence as a concept stemming from the UNGPs and international human rights law.

Bullet 18 and 19 in Section 1 of the Annex build a bridge between the human rights and environmental normative scope of the directive as they cover human rights harms induced by environmental degradation.

## **Conditions for due diligence obligations**

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Article 3 (c) (ii) outlines under what conditions an individual company carries due diligence obligations for human rights that (a) fall within the directive's scope, but (b) are *not* covered by the list of selected rights in Section 1, namely that: (i) the right concerned can be abused by a company or legal entity; (ii) the abuse directly impairs a legal interest protected in the human rights instrument; and (iii) the company could have reasonably foreseen the risk that such human right may be affected, taking into account the circumstances of the specific case.

In its General Approach, the Council originally had proposed a different wording for the first condition, namely that “[t]he human right can be abused by a company or legal entity other than a Member State[...]”. This seems to be a reference to distinctive State obligations under international human rights law, such as the protection and the fulfilment of human rights. While indeed businesses are not expected to take on these State obligations, the UNGPs highlight in Principle 12 that companies can have an impact on the entire spectrum of internationally recognized human rights. This means, they also can contribute to or be linked

to human rights violations resulting from a State's failure in relation to its obligation to fulfil a human right. It is therefore to be welcomed that the wording of condition one has not followed the General Approach of the Council. Also, Recital 25 now clarifies that 'abuse' is to interpret in line with international law. According to international standards, human rights abuse relates to harm which a business caused, contributed to or is linked to.

The second condition is problematic: the phrase "directly impairs a legal interest protected in the human rights instruments" is unclear; especially how or why a "legal interest" can be differentiated from a right in any of the international human rights conventions. Regarding the requirement that the abuse *directly impairs* such a "legal interest", it must be noted that the directive establishes a clear, overarching obligation on companies to undertake due diligence across their own operations, those of their subsidiaries, and those of their business partners in order to prevent, mitigate and bring to an end adverse human rights impacts (Art1(1)(a)); and to ascertain their level of involvement (causing; or jointly causing) when doing so (Art 7.1 and 8.1). Considering this overarching obligation on companies to undertake due diligence across the chain of activity, the phrase "directly impairs a legal interest" must be taken to apply to any abuse by the company, its subsidiaries and its business partners.

The third condition generates considerable legal uncertainty for companies, as some human rights will be foreseeably affected in some contexts, for some companies, but not in others. It is therefore highly context specific. The requirement that "the company could have reasonably foreseen *the risk* that such human right *may be affected*" is a significantly lower threshold than reasonable foresight of the right *actually being abused*. Firstly, foresight of risk is far easier to satisfy than foresight of an actual right being impacted; and secondly it is only necessary to show foresight of a right being *affected* as opposed to abused. Rights can be affected in a myriad of nuanced ways, whereas abuse is far more targeted and specific. Whereas 'abuse' is specified to be interpreted in accordance with international human rights law, "affected" is not specified. The obligation on companies to undertake meaningful stakeholder consultation, as well as the right and ability of stakeholders to notify the company of risks and actual impacts to their human rights will undoubtedly play a key role in increasing companies' foresight of human rights affected and henceforth the normative human rights scope per se. In this regard, the directive once again reflects aspects of the German Lieferkettengesetz, which provides that companies only need to address risks and harms beyond the first tier if they have "substantiated knowledge" of that risk or impact, enabling rights holders to inform the company. In comparison however, "reasonable foresight of a risk of a right being impacted" is a much lower threshold than having 'substantiated knowledge'.

## Conclusion

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It is regrettable that the EU co-legislators have not followed international standards and ensured that the directive covers *all* internationally recognised human rights, or at the very least provided a clearer and more comprehensive list of pertinent rights missing as listed above. Instead, the directive's normative human rights scope is the obvious result of a political compromise. Though co-legislators were aiming to increase legal certainty for companies, the outcome is a lack of clarity and a complicated test whether due diligence obligations actually arise for individual companies in specific instances. To overcome these challenges, Member States and the Commission should improve language and ensure clarity in their transposing national laws and in the forthcoming Guidelines (under article 13) respectively. The absence of a number of important human rights instruments, notably for indigenous peoples' and migrants' rights, are serious and must be rectified at the EU level during the first review of the directive. Given the status of the law as a directive, Member States also have the freedom to add these missing instruments during national transposition and should do so in order to further honour their commitments under the UNGPs.

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