OHCHR Feedback on the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence

23 May 2022

The Office of the UN High Commissioner for Human Rights (OHCHR) welcomes the European Commission's commitment to advancing the protection of human rights and the environment through due diligence,[1] as well as the opportunity to submit feedback on the proposed directive on Corporate Sustainability Due Diligence ("proposed directive").

OHCHR is the UN agency responsible for leading the business and human rights agenda within the UN system and is the institutional focal point for providing uniform guidance and clarification on issues relating to the interpretation of the UN Guiding Principles on Business and Human Rights (UNGPs).[2] Since the unanimous endorsement of the UNGPs by the UN Human Rights Council in 2011, OHCHR has contributed to the dissemination and implementation of the UNGPs in many different ways. This includes providing practical and interpretative advice, tools and other resources, supporting capacity building, and carrying out detailed comparative and empirical research, notably in relation to accountability and remedy.

Mandatory human rights due diligence regimes have a potentially vital role to play as part of a "smart mix" of measures to effectively foster business respect for human rights, as called for in the UNGPs.

OHCHR recognises the inherent challenges in building on the provisions on human rights due diligence set out in the UNGPs to create a binding and enforceable legal regime. As we have noted in our previous commentaries on developing EU policy and proposals, "all actors – policy-makers, legislators, businesses, trade unions, civil society organisations and other stakeholders – need to be clear about the different design options available and the trade-offs between different choices, and be prepared to analyse each of these options carefully in order to maximise the positive impact of such regulatory measures while mitigating the risks of any unwanted consequences."[3]

The proposed directive appears in a number of areas to reflect compromises made as a result of conflicting stakeholder input and expectations. It is important to keep in mind that the UNGPs were themselves the outcome of several years of consultation with States, companies and other interested stakeholders with conflicting positions, and compromises were made to obtain the broad-based support that has made the UNGPs into the authoritative international standard for business and human rights. When seeking to address the challenges of turning the UNGPs into a binding and widely applicable regulatory standard, any further compromises made through the political process should not materially alter key components of the UNGPs and related international frameworks, notably the OECD Guidelines for Multinational Enterprises.

OHCHR wishes to highlight for your attention some specific features of the proposed directive which risk undermining the regime's ability to achieve its stated aims, and which raise legitimate questions about the extent to which this proposed regime actually delivers on its stated objective of aligning with, and building upon, the UNGPs.[4]

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[1] See initial response to the release of the proposal made jointly by the principals of the International Labour Organization, the Organisation for Economic Co-operation and Development and OHCHR.

[2] See A/HRC/21/21, para. 33. This institutional role involves acting as secretariat for relevant human rights mechanisms, such as the UN Working Group on Business and Human Rights, which itself has a mandate from the UN Human Rights Council to promote the effective and comprehensive dissemination and implementation of the Guiding Principles.

[3] *UN Human Rights "Issues Paper" on legislative proposals for mandatory human rights due diligence by companies* (2020). Other OHCHR resources on mandatory human rights due diligence are available on the webpage for the fourth phase of the Accountability and Remedy Project.

[4] See e.g., proposed directive, pp. 9 and 31. We note the proposed directive is also meant to align with other relevant international standards such as the OECD Guidelines for Multinational Enterprises. OHCHR considers the relevant provisions of

In this response, we highlight five areas where we believe further attention and discussion are needed in order to improve alignment with the UNGPs, and to create an EU regulatory framework that is capable of meeting the EU's stated goals. These are:

1. Company scope;
2. Subject-matter scope;
3. Taking action (including the use of leverage to prevent and mitigate adverse human rights impacts);
4. Compliance, enforcement and remedy; and
5. Stakeholder engagement.

As per our mandate, our analysis is based on the vision for human rights due diligence laid out in the UNGPs. We also offer insights drawn from our extensive and detailed work, over many years, promoting and disseminating the UNGPs and developing tools and resources to enhance their implementation, including through our Accountability and Remedy Project.

1. Company scope: Which companies does this regime apply to and which corporate operations must their human rights due diligence cover?

Why is this an important issue?

All businesses, whether large or small, can have an impact on a range of internationally recognised human rights.

The purpose of human rights due diligence, as described in the UNGPs, is to ensure sound human rights risk management by business enterprises, whatever their size, sector, operational context, ownership and structure. It is through human rights due diligence that an enterprise:

- obtains the information it needs in order to understand its specific human rights risks at any point in time and in any operating context, and
- identifies and implements the actions needed to prevent harm, mitigate risks and to address their adverse human rights impacts.[5]

The Guiding Principles make clear that human rights due diligence "should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships."[6]

For some business enterprises, the complexity and number of value chains relevant to its business activities will make this a very challenging task. In situations such as these, the UNGPs take a pragmatic approach: business enterprises may prioritise certain areas for human rights due diligence, but *on the basis of "where the risk of adverse human rights impacts is most significant*,"[7] not on the basis of considerations such as the form or type of contractual relationships, their relative materiality to the relevant business enterprise or their longevity.

the OECD Guidelines and the UNGPs to be properly aligned. However, in this consultation response, we confine our comments to issues regarding the alignment between the proposed directive and the UNGPs.

[5] See OHCHR, *The Corporate Responsibility to respect human rights: An Interpretative Guide* (2012), p. 31.

[6] See Guiding Principle 17(a).

[7] Guiding Principle 17, Commentary.

Relevant provisions in the proposed directive

The proposed directive obliges Member States to establish regimes imposing legally enforceable obligations to conduct human rights due diligence on:

- very large EU companies;
- large companies operating in certain "high-impact" sectors; and
- certain non-EU companies doing business in the internal market.

Provisions are included in the proposed directive that would limit the scope of mandatory human rights due diligence for regulated financial undertakings (see section 3 below).

For each company that comes within the ambit of the proposed regime, the scope of operations to be addressed through human rights due diligence is limited to:

- the company's own operations;
- the operations of its subsidiaries; and
- the operations of entities with which the company has an "established business relationship."

OHCHR comment

A regulatory regime that is fully aligned with the UNGPs would encompass all companies, rather than selecting based on size or sector. However, OHCHR recognises that some limitations in the scope of companies required to conduct human rights due diligence under the proposed regime (e.g., in terms of size, turnover, number of employees, sector), and also in the scope of operations covered by human rights due diligence activities, may be necessary in the interests of legal certainty for companies and to make the regulatory task a manageable one.

Nevertheless, the ways in which these scopes have been limited in the proposed directive diverges from the risk-based approach to human rights due diligence called for in the UNGPs.

As noted above, the UNGPs stipulate that where it may be unreasonably difficult to conduct due diligence across large value chains, companies may "identify general areas where the risk of adverse human rights impacts is most significant … and prioritize these for human rights due diligence."[8] However, under the proposed directive, risks of serious human rights impacts arising from the activities of value chain actors with which the relevant company does *not* have an "established business relationship," far from being prioritised (as called for in the UNGPs), would fall outside the scope of human rights due diligence activities altogether.

The scope of human rights due diligence for companies in "high-impact" sectors is further complicated by a derogation (see Article 6(2)) that would require such companies to focus only on adverse impacts "relevant to the … sector" they are working in. This apparent attempt to enhance legal certainty for companies instead creates a legal test that is likely to prove difficult to apply in practice in many cases, especially in relation to goods and services needed for operational purposes (i.e., not destined for incorporation in finished goods).[9]

These exclusions reduce the value of human rights due diligence (as prescribed in the proposed directive) as a risk management exercise. Not only will the analysis be less than comprehensive in terms of the business relationships covered, these exclusions also reduce the likelihood of a complete and holistic analysis of the different ways in which the company's own business model or practices (e.g., purchasing practices) may contribute to or be linked to adverse human rights impacts occurring within its value chains. Furthermore, these limitations on scope may create perverse incentives for companies responsible for carrying out human rights due diligence under the proposed directive which may actually *exacerbate*

[8] Id.
[9] This derogation is also relevant to the subject-matter scope of the proposed directive; see section 2 below.

human rights-related risks (for instance, due to increased reliance on more temporary arrangements to avoid "established business relationships").

Recommendations to improve alignment with the UNGPs

- **Remove "established business relationship" as a limiting concept for defining the scope of a company's human rights due diligence obligations.**
- **Give greater emphasis and more specific direction in the provisions of the proposed directive to prioritisation of due diligence (see Guiding Principle 17 commentary) and provide a clear mandate for supervisory bodies to issue further guidance for companies in relation to the same.**
- **Keep under review the companies which will be legally required to conduct human rights due diligence under the proposed regime. If retaining an exhaustive list of "high-impact" sectors, create a mechanism for rapid designation of further "high-impact" sectors in response to emerging risks and needs.**
- **Remove the derogation set out in Article 6(2).**
- **Regardless of the "company scope" of the regime, consider including a clear mandate for supervisory bodies to engage in educational and promotional activities relating to human rights due diligence that extends to *all* companies (including SMEs and companies not working within "high-impact" sectors).**

2. Subject-matter scope: What kinds of human rights-related risks does the directive seek to cover?

Why is this an important issue?

As the commentary to the UNGPs makes clear, "the initial step in conducting human rights due diligence is to identify and assess the nature of actual and potential adverse human rights impacts with which a business enterprise may be involved."[10] The normative framework for this assessment exercise is supplied by the collection of legal standards known as "internationally recognised human rights."

Internationally recognised human rights are defined in the UNGPs as encompassing, *at a minimum*, those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organisation's declaration on Fundamental Principles and Rights at Work.[11] The UNGPs also note that, depending on the circumstances, business enterprises may need to consider additional international standards in their due diligence processes.[12]

Business enterprises should not prejudge which human rights are likely to be most relevant to their business activities. While, in practice, some rights will be more relevant or "salient" than others in particular industries and circumstances, companies are unlikely to predict all of the human rights that may be impacted in advance, and will inevitably require specialist human rights expertise and stakeholder engagement to do so thoroughly and accurately (on stakeholder engagement see section 5 below).[13] In formulating their approach to human rights due diligence, companies need to be mindful that business activities can have an impact on *virtually the entire spectrum of internationally recognised human rights* and that their "corporate responsibility to respect," under the UNGPs, applies to all such rights.[14]

[10] Guiding Principle 18, Commentary.
[11] Guiding Principle 12. For further explanation see OHCHR, *The Corporate Responsibility to respect human rights: An Interpretative Guide*, pp. 9-10.
[12] The Commentary to Guiding Principle 12 mentions, in particular, international standards relating to the rights of indigenous peoples; women; national or ethnic, religious and linguistic minorities; children; persons with disabilities; migrant workers and their families; and standards of international humanitarian law.
[13] See Guiding Principle 18; OHCHR, *The Corporate Responsibility to respect human rights: An Interpretative Guide*, pp. 43-44.
[14] See Guiding Principle 12, Commentary.

Relevant provisions in the proposed directive

The material scope of mandatory human rights due diligence under the proposed directive is limited to identifying and preventing "adverse human rights impacts" *as defined in the proposed directive* (i.e., not necessarily in the sense meant in the UNGPs). Article 3(c) of the proposed directive defines "adverse human rights impact" as "an adverse impact on protected persons resulting from the violation of one of the rights or prohibitions listed in the Annex, Part I Section 1, as enshrined in the international conventions listed in the Annex, Part I Section 2." The Annex to the proposed directive contains a list of such "violations," followed by a list of "human rights and fundamental freedoms conventions."

OHCHR comment

The definition of "adverse human rights impact" under the proposed directive departs from the way this concept has come to be understood in connection with the UNGPs.

The Annex, which references only certain articles (often only certain provisions) of certain international instruments, is at odds with the UNGPs, which addresses "internationally recognized human rights." As noted above, "internationally recognized human rights" are understood, *at a minimum*, as those rights expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the ILO's Declaration on Fundamental Principles and Rights at Work; further, companies are expected to consider additional standards depending on circumstances. The piecemeal and prescriptive (as opposed to illustrative) approach of the Annex is problematic, as it omits references to key rights in the International Bill of Rights (e.g., to social security, to freedom of opinion and expression, or to a fair trial),[15] widely-ratified human rights instruments (e.g., the first two optional protocols to the Convention on the Rights of the Child), and a range of other standards businesses are expected to take into account depending on the circumstances (such as those relating to international humanitarian law or to the right to a clean, healthy and sustainable environment).

Under the UNGPs, an "adverse human rights impact" occurs when an action removes or reduces the ability of an individual to enjoy his or her human rights. Under the proposed directive, on the other hand, adverse impacts refer to "violations" of this restricted list of human rights of "protected persons," potentially excluding numerous relevant business-related human rights harms.

A legal definition of the term "protected persons" is lacking. Further, it is not clear what would be needed in order to establish a "violation" of the listed international standards. Given that States, not companies, are the primary bearers of obligations under the listed conventions, this could be taken to imply that a "violation" would require some breach by a State actor. The lack of clarity on this important point is concerning. If some violation of human rights by a State actor is indeed necessary to establish the presence of an "adverse human rights impact," then many adverse impacts that would be detected and analysed under a UNGPs-compliant process would seem to fall outside the scope of companies' human rights due diligence obligations under this proposed directive. The language of "violations" used in the proposed directive also risks deflecting the analysis towards the actions of State actors and away from the central purpose of human rights due diligence: namely to ensure that businesses identify and address harms in which *they themselves* might be involved. It would also be at odds with the provisions of the Guiding Principles that make it clear that the corporate responsibility to respect "exists independently of States' abilities and/or willingness to fulfil their own human rights obligations."[16]

[15] While Annex, Part I, Section I, para. 21 does encompass the rights in the International Bill of Rights, there are added qualifications that are not applicable to paras. 1-20. For an overview of how these rights are relevant for business, see Monash University, *Human Rights Translated 2.0: A Business Reference Guide* (2016) (developed in coordination with OHCHR and the UN Global Compact).
[16] Guiding Principle 11, Commentary.

Recommendations to improve alignment with the UNGPs

- **Amend the definition of "adverse human rights impact" in the proposed directive to remove the requirement for there to have been a "violation" of human rights standards for an adverse human rights impact to be deemed to have occurred.**
- **Adopt a definition of "internationally recognised human rights" (building on the commentary to the Guiding Principles) as the normative framework against which human rights due diligence activities are to be conducted.**
- **Avoid the use of selective lists of standards which, even if complete at the time of publication, risk becoming outdated quickly. Instead, provide for the incorporation of new standards into the mandatory regime in other appropriate ways, including through the issuance of authoritative guidance.**
- **Rather than restricting the scope of "adverse human rights impacts" for the purposes of the mandatory regime, enhance legal certainty about the required subject-matter scope in other ways, e.g., through the issuance of authoritative guidance by supervisory bodies, developed in consultation with affected stakeholder groups (see below).**

3. Taking action (including the use of leverage to prevent and mitigate adverse human rights impacts)

Why is this an important issue?

Human rights due diligence involves taking action to prevent and mitigate identified human rights risks.[17] The UNGPs adopt a nuanced and pragmatic position on the steps needed to address adverse human rights impacts identified through human rights due diligence processes. Where a business enterprise causes or may cause adverse human rights impacts, it should take necessary steps to cease or prevent those impacts.[18] Where a business enterprise contributes or may contribute to an adverse human rights impact, it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible. Where the situation is not one of causation or contribution but a case of "direct linkage" (i.e., where the adverse impacts are directly linked to its operations, products or services by its business relationship with another entity), the situation is more complex, but a key expectation is that businesses will use whatever leverage they have to prevent or mitigate the adverse impact. Moreover, if they lack leverage, they should seek out ways to increase it. For the purposes of applying the UNGPs, leverage is understood as "an advantage that gives power to influence[;] … it refers to the ability of a business enterprise to effect change in the wrongful practices of another party that is causing or contributing to an adverse human rights impact."[19] Where it is necessary to prioritise actions to address actual and potential adverse human rights impacts, companies should prioritise the risks that are most severe or where delayed response would make them irremediable.[20]

[17] Guiding Principle 19 and Commentary.
[18] Guiding Principle 19, Commentary.
[19] OHCHR, *The Corporate Responsibility to respect human rights: An Interpretative Guide*, p. 7.
[20] Guiding Principle 24 and Commentary.

Relevant provisions in the proposed directive

The proposed directive lists a number of actions that companies will be required to take in response to identified risks, including making a prevention action plan, seeking contractual assurances and investing in processes or other innovations to help reduce risk.

The recitals of the proposed directive make a number of references to the importance of "leverage," highlighting the different ways that leverage can be gained and enhanced, including through contractual means, collaboration between businesses, and industry, sector-level and multi-stakeholder initiatives. The need for a certain amount of leverage to be able to prevent and mitigate business-related human rights harms within supply chains is used (in the recitals) as a justification for restricting the scope of the mandatory human rights due diligence obligations to "established business relationships" (see section 1 above).[21]

In terms of the ways that companies can gain, maintain and enhance leverage over other companies in the supply chain in practice, the proposed directive appears to place most emphasis on "contractual" methods, such as cascading terms up or down the supply chain[22] and ensuring that provision is made for verifications and audits designed to establish whether the contracted entity (e.g., supplier or distributer) is meeting its contractual obligations (e.g., vis-à-vis compliance with workplace health and safety standards, or other labour rights). The proposed directive also anticipates the development and issue of "model contractual clauses."[23]

With respect to impacts of partners that could not be prevented, adequately mitigated, or ended, the directive requires that no further (or extended) contractual relationships are entered into with the relevant party, followed by either suspension or termination of contractual arrangements, or both.[24]

Financial undertakings have the benefit of certain "carve-outs" from the provisions relating to taking action in the proposed directive. For instance, whereas companies operating in other sectors may be obliged under the proposed directive to terminate or suspend a contractual relationship if there are adverse impacts which cannot be prevented or mitigated through certain measures set out in the directive itself, no such obligation applies to financial undertakings. Moreover, the wording of Article 6(3) suggests that financial undertakings will not be expected to take an interest in the human rights impacts of recipients of financial services subsequent to finance being provided and that human rights impact assessments will be confined to *pre-project* checks.

OHCHR comment

Given that strategies for addressing human rights risks will always be context dependent, companies will need flexibility in deciding how best to respond. On the question of "taking action," the UNGPs do not try to spell out in advance the kinds of actions that will be needed; the test of the "appropriateness" of a company's actions is ultimately what can reasonably be expected of a company in those circumstances to prevent or mitigate human rights harms.[25]

While there may be good reasons to set out corporate requirements in more detail in the context of a legally binding regime, the proposed directive's provisions on "taking action" arguably tend towards over-prescription in places and risk placing more emphasis on process than effective outcomes. For instance, while the description of the "prevention action plan" contains some elements of an effective risk management system,[26] there is no clear mechanism for ensuring that it is actually implemented. There is

[21] See proposed directive, recital (20).
[22] "Cascading terms" refers to the legal technique whereby terms are inserted into a "Tier 1" contractual relationship to ensure that similar provisions or protections are required from the next party up or down the contractual chain.
[23] Proposed directive, Article 12.
[24] Proposed directive, Articles 7(5) and 8(6).
[25] Guiding Principle 19 and Commentary.
[26] See proposed directive, Article 7(2)(a).

also no requirement for companies to prioritise those risks that appear to be more severe or which risk becoming irremediable over time, a key expectation reflected in the UNGPs.[27] Rather, the definition of "appropriate measure" in the proposed directive suggests that companies would be able to prioritize risks based on a number of factors, such as the amount of influence they have over business relationships, that are not relevant to the prioritization analysis under the Guiding Principles.

Similarly, while setting out explicit expectations and standards in a contract may be an important way of gaining and enhancing leverage with respect to other actors in a supply chain, there may be other steps that a company could take to prevent and mitigate human rights risks which would be more effective at delivering the desired outcomes. The list of actions set out in Articles 7(2)(a-e) and 8(3)(a-f), which presumably provides the benchmark against which the quality of corporate responses will be assessed, appear to reflect an over-reliance on risk management techniques (i.e. contractual assurances based on codes of conduct coupled with auditing and other verification activities) that have been shown to be ineffective at driving up standards and delivering better human rights outcomes in practice.

As well as pushing companies towards legalistic and compliance driven approaches that do not have a strong record when it comes to delivering measurable improvements, these provisions do not appear to take proper account of the range of possibilities for enhancing leverage and improving outcomes that responsible companies have been exploring in practice. Examples include technological innovations that allow companies to track components and end products from source to destination, investment in initiatives aimed at addressing root causes of abuse, and "grassroots" capacity-building projects of the kind alluded to in the UNGPs.[28] The prescriptive list of actions may not leave enough space for the independent expert input called for in the UNGPs in complex cases, and may discourage companies, and the supervisory bodies responsible for implementing regimes at the Member State level, from innovating further.

A further example of provisions that arguably tend towards over-prescription, and which appear to fall short on incorporating key aspects of the Guiding Principles, are those relating to the suspension or termination of contractual relationships.[29] Under these provisions, a company is required not to enter into any further or extended contractual relationships with a partner and may even be obliged to terminate or suspend the relevant arrangements, notwithstanding that there may have been other risk mitigation options which offered a potential solution. While the UNGPs urge care when ending relationships,[30] the proposed directive does not suggest this be taken as a measure of last resort, nor does it appear to sufficiently take into account any adverse human rights impacts that could arise as a result of terminating contractual arrangements in this way.

The regime for financial companies (which demands human rights due diligence only in relation to direct clients and which are pre-contractual only) reflects a lack of ambition as regards human rights risk management by this sector when compared to the efforts of many financial companies themselves. If these exemptions are to remain, they could be better targeted to different types of financial services. OHCHR understands why the proposed directive tries to guard against disruption to access to financial services, loans and credit. However, the justifications for limiting the scope of the regulation to providers of consumer finance would not seem to apply with the same force to providers of project finance, for instance, where financial undertakings have ample opportunities and commercial incentives to monitor the human rights risk management of corporate recipients of funds.

Over the past decade, a considerable amount of work has been done to clarify the implications of the UNGPs for the financial sector, to identify best practice, and to express expectations as regards identifying

[27] Guiding Principle 24 and Commentary. See OHCHR, *The Corporate Responsibility to respect human rights: An Interpretative Guide*, pp. 82-84.
[28] See UNGP 19, Commentary.
[29] Proposed directive, Articles 7(5) and 8(6).
[30] In situations where the enterprise lacks the leverage to prevent or mitigate adverse impacts and is unable to increase its leverage, "the enterprise should consider ending the relationship, taking into account credible assessments of potential adverse human rights impacts of doing so." Guiding Principle 19, Commentary.

and addressing human rights risks in the form of detailed and widely adopted sector-specific guidance.[31] By not adequately reflecting these advances, these provisions risk diverting corporate efforts towards more limited, compliance-driven approaches, with poorer human rights outcomes.

Recommendations to improve alignment with the UNGPs

- **Amend Articles 7 and 8 of the proposed directive so as to move from a highly prescriptive approach to "taking action" and the use of leverage to a more principles-based one, which has the flexibility to allow companies to innovate bespoke solutions for different situations and contexts and which gives greater weight to the quality of implementation and to actual human rights outcomes.**
- **Amend Articles 7 and 8 to make it clear that severe impacts and those that may become irremediable over time must be prioritised.**
- **Authorise supervisory bodies to amplify and clarify principles-based provisions on "taking action" through timely issuance of authoritative guidance aimed at achieving better human rights outcomes.**
- **Amend Articles 7(5) and 8(6) so as to ensure that human rights impacts of terminating relationships are properly taken into account in decisions about how best to address human rights related risks in a company's value chain.**
- **Amend provisions relating to financial undertakings to better reflect best and emerging practice for the financial sector, especially as regards corporate and project finance, and reconsider the appropriateness of blanket "carve-outs" in light of the regulatory objectives.**

4. Compliance, enforcement and remedy

Why is this an important issue?

Ensuring proper enforcement of laws that relate to business respect for human rights is fundamental to meeting the State duty to protect, the first pillar of the Guiding Principles.[32] Moreover, it is a fundamental principle of international human rights law that when human rights are violated, there must be effective remedy. The steps that need to be taken to ensure access to an effective remedy – whether through judicial or non-judicial routes – are set out in the third pillar of the UNGPs (also known as the "access to remedy pillar").[33]

There is a close correlation between proper enforcement of laws and remedy. One reason for this is the preventative effect that is associated with effective deterrence from wrongdoing. International standards on accountability and remedy for human rights harms confirm the importance of preventative measures as part of an effective remedy. Effective enforcement can also provide the affected person with a form of "satisfaction," another well-established aspect of effective remedy. While discussions about civil liability regimes often focus on the prospect of financial compensation, they may also be able to offer other types of remedy as well, for instance the satisfaction of seeing wrongdoers held accountable, and the possibility that the company (and others carrying out similar activities) will be enjoined from similar abusive practices in the future.

Beyond the use of judicial action, certain non-judicial bodies can help ensure accountability and remedy. As highlighted in a joint policy paper by OHCHR and Shift, regulatory regimes which provide for both civil liability and administrative supervision are most effective when there is complementarity between both types of accountability "recognising the distinct roles, advantages and disadvantages of each, and

[31] OHCHR itself has developed resources regarding the application of the UNGPs to nominee shareholdings, the banking sector, the financial sector, and minority shareholdings of institutional investors.
[32] Guiding Principle 3 and Commentary.
[33] See Guiding Principles 1 and 3 and Commentary.

building space for both into a coherent national approach."[34] Further, effective non-State-based grievance mechanisms can be key to identifying and addressing human rights issues early, before they escalate to major problems.

Relevant provisions in the proposed directive

The enforcement and remediation "package" envisaged in the proposed directive involves both civil liability and administrative supervision. Civil liability is seen as the principal way in which remedies (anticipated to be mainly in the form of financial compensation) will be delivered to affected people and communities. Administrative supervision is seen as the main way in which compliance by companies with the new legal obligations will be secured, through means ranging from educational activities, guidance, advisory work and other forms of support to the imposition of administrative sanctions in cases of non-compliance.

The mandate and powers of the proposed supervisory bodies (to be designated by Member States) are broadly set out in the proposed directive. Member States are required to take steps to ensure the independence of the body and that it is given adequate resources and legal powers (including powers of investigation). The proposed directive requires the establishment of a grievance mechanism by the supervisory body through which people can raise concerns about possible non-compliance by companies with their legal obligations. The proposed directive also contemplates a range of administrative measures in cases of non-compliance, including orders for cessation of infringements, pecuniary sanctions and "interim measures to avoid the risk of severe and irreparable harm."

Similarly, the provisions on civil liability leave much to domestic implementation. While not spelled out in detail, it appears that the primary (possibly only) form of remedy achievable through this route is likely to be financial (i.e., compensatory) damages. The intention also appears to be that, in making determinations about corporate liability, companies should receive credit for efforts to comply with orders by the relevant supervisory body, and other bona fide attempts at mitigation, although it is not clear what this would mean in terms of allocation of burdens of proof.

Finally, Article 9 of the proposed directive would make the provision of a company-based grievance mechanism a legal requirement, the purpose of which would be to enable affected people and interested trade unions and civil society organisations to raise "legitimate concerns regarding actual or potential human rights impacts" (as defined by the proposed directive, see section 2 above).

OHCHR comment

General: The provisions in the proposed directive on the different ways in which compliance will be secured, obligations will be enforced, and remedies sought are vaguely drawn, as are the roles and powers of the institutions responsible for ensuring that the regime works as intended. While some degree of flexibility in approach is needed to ensure that the directive's provisions are readily implementable in all 27 Member States (with different legal structures and background regimes to take into account), the lack of detail in the directive on matters such as the relevance of mitigation efforts to liability and the basis on which institutional, regulatory and administrative effectiveness will be judged, may not address concerns about fragmentation of domestic level responses to supply chain issues, and may risk undermining efforts to achieve a "level playing field" for companies. A possible solution – exemplified in the guidance produced by OHCHR at the conclusion of each phase of the Accountability and Remedy Project – would be to adopt a more principles-based and/or goals-based way of communicating expectations through the proposed directive, under which a desired outcome is clearly expressed, but the relevant actors are given the flexibility to decide the best way of achieving it in practice.

[34] OHCHR & Shift, *Enforcement of Mandatory Due Diligence: Key Design Considerations for Administrative Supervision* (2021).

Judicial remedy: Despite the clear direction to Member States to ensure that "companies are liable for damages" in the event of non-compliance leading to harm, the proposed regime provides limited guidance as to how the many barriers to judicial remedy for business-related human rights harms are to be addressed. Work under the first phase of the OHCHR Accountability and Remedy Project (ARP I) has stressed the need for policy-makers and legislators to pay closer attention to matters such as

- Clear management standards against which to judge the performance of the company in question;
- Thoughtful allocation of the burden of proof so as to achieve an appropriate balance between fairness to all parties and access to remedy;
- A clear mandate and political support for law enforcement bodies responsible for investigating and enforcing non-compliance;
- Transparency and accountability about the use of enforcement discretion;
- Strategies for ensuring the safety of rights holders, witnesses and whistle-blowers;
- Robust arrangements for mutual cooperation in cross-border cases;
- Strategies to help relieve the financial burdens faced by private litigants; and
- Discretion, on the part of judges, to award non-financial as well as financial damages.

Greater clarity about the potential role of supervisory bodies in civil liability cases brought under the regime (e.g., whether they could be called as expert witnesses) would also be useful.

State-based non-judicial remedy: The "effectiveness criteria" referred to in Guiding Principle 31 set out the international standard through which non-judicial mechanisms relevant to business respect for human rights, notably the "substantiated concerns" mechanism provided for under Article 19 of the proposed directive, are to be assessed. Work under the second phase of the OHCHR Accountability and Remedy Project (ARP II) gathered together examples of practical ways in which grievance mechanisms can implement the UNGP 31 effectiveness criteria. While the proposed directive recognises the importance of some of these criteria (such as "legitimacy" and, to a degree, "transparency"),[35] other important elements of effectiveness identified in the Guiding Principles, such as "accessibility," "predictability," "equitability," and "rights compatibility," are barely mentioned, if at all. When Member States come to designate their supervisory bodies under the regime and frame their powers and mandates, it is recommended that the OHCHR guidance presented to the Human Rights Council at the conclusion of ARP II should be a vital point of reference.

Company-based grievance mechanisms: While OHCHR acknowledges the difficulties in trying to lay out how company-based grievance mechanisms are to be set up ex-ante, the provisions relating to a complaints procedure in Article 9 depart from how such mechanisms are envisaged in the UNGPs and do not appear to take sufficient account of current practices in this area, as reflected in the third phase of OHCHR's Accountability and Remedy Project (ARP III). As noted in the UNGPs, company-based grievance mechanisms should serve two key functions: (1) to support the identification of adverse human rights impacts as a part of an enterprise's ongoing human rights due diligence, and (2) to make it possible for grievances to be addressed and for impacts to be remediated early and directly so as to prevent harms from compounding and grievances from escalating. This second key function is lacking in the proposed directive. Further, the UNGPs provide effectiveness criteria as a benchmark for designing such mechanisms, yet the proposed directive fails to acknowledge or attempt to incorporate them. During ARP III, OHCHR spent two years assessing company best practice around the world in relation to their grievance mechanisms and developed practical guidance on how States and companies could improve the effectiveness of such mechanisms.[36] A clear finding was that the level of meaningful stakeholder engagement in the design and performance of such mechanisms is one of the most important factors in ensuring affected stakeholders trust and use the mechanisms; however, the proposed directive simply calls for companies to "inform … relevant workers and trade unions" of the complaints procedure, neglecting other relevant stakeholders and failing to meaningfully involve any of them in the

[35] See, for instance, Article 17(8) of the proposed directive which obliges Member States to "guarantee the independence of the supervisory authorities and shall ensure that they exercise their powers impartially, transparently and with due respect for obligations of professional secrecy."
[36] A summary of ARP III guidance on meeting the effectiveness criteria was released in late 2021.

development of the mechanism. To ensure the complaints procedure is effective and advances the goals of the directive, the proposed directive would benefit from greater alignment with the UNGPs and OHCHR's work in this area.

Recommendations to improve alignment with the UNGPs

- **Drawing from ARP I guidance, include a clearer set of provisions**
  - **addressing existing legal, practical and financial barriers to remedy; and**
  - **on the factors that should be taken into account in determining liability under the civil liability mechanism in the proposed directive.**
- **Drawing from ARP II guidance, include a clearer set of provisions**
  - **on the various ways in which Member States will support the activities of supervisory bodies in practice; and**
  - **on the basis on which the effectiveness of the "substantiated concern" mechanism will be assessed (referencing the UNGP 31 "effectiveness criteria" in particular).**
- **Drawing from ARP III guidance, include a clearer set of provisions**
  - **addressing the remediation function of the complaints procedure; and**
  - **regarding the basis on which the effectiveness of company-based mechanisms will be assessed (referencing the UNGP 31 "effectiveness criteria" in particular).**
- **Consider including further provisions that would enhance the *opportunities for delivery of non-financial remedies*, and for the stakeholder consultation needed to identify the most effective forms of remedy in practice (see section 5 below).**

5. Stakeholder engagement

Why is this an important issue?

"[T]he key to human rights due diligence is the need to understand the perspective of potentially affected individuals and groups."[37] Proactive and meaningful stakeholder engagement occupies a central and crucial place in human rights due diligence. In the framework laid down in the UNGPs, it is a key source of information from which companies can better identify, understand and address human rights risks, and by which companies can track the effectiveness of their responses. It enables an enterprise to identify whether stakeholders have the same or different perspectives on what constitutes an impact on their human rights and on how significant an impact may be. Where direct consultation with (potentially) affected stakeholders is not possible, business enterprises are expected to consider reasonable alternatives such as consulting credible, independent expert resources, including human rights defenders[38] and others from civil society.

Stakeholder engagement is also key to ensuring the effectiveness of grievance mechanisms and remedial efforts. The extent to which stakeholders are consulted – e.g., about the remedial options most likely to address the harm they have suffered – is in many cases the most important factor in realizing an effective and sustainable outcome. Further, people who have been properly consulted at the design stage of a remediation mechanism are more likely to trust and use that mechanism, and to recommend it to others. And regulatory bodies that consult regularly and meaningfully with (potentially) affected stakeholders can reap rewards in terms of more efficient use of resources and better decision-making, for instance about which areas to prioritise, and how best to address key issues.

[37] OHCHR, *The Corporate Responsibility to respect human rights: An Interpretative Guide*, p. 33.
[38] For more on the implications of the Guiding Principles for human rights defenders, see A/HRC/47/39/Add.2.

Relevant provisions in the proposed directive

The proposed directive includes a call for stakeholder consultation only with respect to identifying impacts (Article 6), preventing impacts (Article 7), and ending impacts (Article 8); however, such consultation is to take place only "where relevant" in relation to identifying impacts and developing a corrective action plan to end impacts. There is no call for stakeholder consultation with respect to monitoring (Article 10). Similarly, stakeholder consultation is not addressed in relation to the design and performance of remedial mechanisms, nor with the resolution of grievances.

OHCHR comment

Despite being one of the most important determinants of the effectiveness of human rights due diligence processes, stakeholder consultation (directly with (potentially) affected stakeholders, as well as with human rights defenders and other credible proxies) does not appear to have been given the prominence it has under the UNGPs. With respect to identifying impacts, Guiding Principle 18 notes that this should "involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation." Such consultation "is not something to be done only 'where relevant' in the opinion of the company."[39] Additionally, Guiding Principle 20 calls for companies to draw on feedback from affected stakeholders when tracking the effectiveness of their responses; however, the proposed directive does not reflect this expectation in its article on monitoring.

Moreover, opportunities to reiterate and reinforce the value of stakeholder engagement in the functioning of non-judicial grievance mechanisms and in the shaping of remedies in particular seem to have been largely overlooked. For instance, there are no reminders of the role that stakeholder engagement can play in the provisions on the establishment and powers of supervisory bodies (Articles 17 and 18), in the provisions on the "substantiated concern" process (Article 19), in the shaping of administrative sanctions (Article 20), or in the provisions on company-based complaints procedures (Article 9). These omissions can have the effect of being disempowering, and they may likely have real implications for the way in which the proposed directive is received, implemented and used.

Recommendations to improve alignment with the UNGPs

- **Remove the qualifier "where relevant" in Articles 6(4) and 8(3)(b).**
- **Delete the word "affected" in Article 7(2)(a), or alternatively add the word "potentially" before the word "affected."**
- **Revise the provisions on the establishment of supervisory bodies (Articles 17 and 18), the "substantiated concern" process (Article 19), administrative sanctions (Article 20), and on the creation of company-based complaints procedures (Article 9) to reinforce the importance of stakeholder consultation in the design and administration of processes relevant to realising human rights.**

Conclusion

OHCHR reiterates that it welcomes the European Commission's commitment to advancing the protection of human rights and the environment through due diligence and appreciates the efforts to align with and build upon relevant international standards such as the UNGPs. Translating the inherently flexible human

[39] Shift, *The EU Commission's Proposal for a Corporate Sustainability Due Diligence Directive: Shift's Analysis* (2022), p. 8.

rights due diligence standards of the UNGPs into an implementable legal regime with the needed level of legal certainty is a challenging task, and OHCHR recognizes that difficult choices need to be made. The comments provided above are intended as constructive feedback to help ensure greater alignment of the proposed directive with the UNGPs. OHCHR would welcome the opportunity for constructive engagement with relevant EU institutions as the process to finalise the proposed directive enters the next phase.

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