JUNE 2023

ACHIEVING ALIGNMENT:
Syncing EU due diligence legislation with the updated OECD Guidelines

EXECUTIVE SUMMARY

The three European Union (EU) institutions - the Commission, Council, and Parliament - have begun tripartite negotiations, known as 'trialogues', to reconcile their positions for a Corporate Sustainability Due Diligence Directive (CSDDD). **A priority of many EU policymakers, businesses, and civil society has been to achieve impactful and workable due diligence while avoiding a proliferation of conflicting expectations for enterprises. The key to this is ensuring coherence between the proposed CSDDD and existing authoritative international norms on due diligence.**

The OECD Guidelines for Multinational Enterprises on Responsible Business Conduct ('the Guidelines') - which are, along with the UN Guiding Principles on Business and Human Rights (UNGPs), the leading international norm on due diligence - have recently been updated. The update was undertaken through a three-year multi-stakeholder process involving 51 states (including 25 EU members), businesses, unions, and civil society. The updated Guidelines remain fully aligned with the UNGPs and were unanimously endorsed by the full OECD Council on 8 June 2023. **Given the broad buy-in and high degree of authority of the updated OECD Guidelines, it is crucial that the proposed CSDDD be aligned with them.**

This paper evaluates the degree to which the three EU institutions' proposals on the CSDDD align with or diverge from the updated OECD Guidelines on four key aspects:

1. *Personal scope* of covered enterprises;
2. *Material scope* of human rights and environmental impacts, including *climate* change;
3. *Value chain scope* over related business relationships; and
4. *Due diligence duty* expected of corporations.

As is shown in Table 1 below, while none of the three EU institutions' position is fully in line with the OECD Guidelines, **the European Parliament's position is most closely harmonised, and all three institutional positions have their own opportunities for further alignment.** Regarding *personal scope*, the Parliament's position should be followed as it is closest to the Guidelines, covering the greatest number of enterprises among the three, including the financial sector at least to some degree, without exemptions for other sectors. In terms of *material scope*, the Parliament's position includes the most comprehensive and expansive list of protected human rights rights and international instruments, and the Parliament is best aligned with the updated OECD Guidelines regarding environmental issues, including *climate change*. Meanwhile, the Council proposal usefully proposes a wider range of concrete instruments. With regard to *value chain scope*, the Parliament's position is again most aligned with the Guidelines because it covers a broad range of business relationships both upstream and downstream in the value chain, though it also falls short of the Guidelines' standard on coverage of downstream use and financial value chains. Finally, regarding the *due diligence duty*, both the Council and Parliament shift toward a risk-based, context-specific duty as laid out in the updated OECD Guidelines, and the Parliament does so most fully.

OECD Watch recommends that the EU institutions agree on directive text maximising alignment with the updated OECD Guidelines. Based on this paper's evaluation, **in most cases, this will mean adopting the European Parliament's position, occasionally following elements of the other two institutions' positions.** By seeking alignment with the updated OECD Guidelines, EU lawmakers can avoid a proliferation of conflicting norms and laws and achieve the correct balance between providing companies and rightsholders with sufficient legal certainty and allowing companies enough flexibility to ensure the due diligence duty is workable, proportionate, and responsive to actual human rights and environmental risks and impacts.

TABLE 1: ALIGNMENT OF EU INSTITUTIONS' PROPOSALS ON CSDDD WITH UPDATED OECD GUIDELINES

ELEMENT		UPDATED OECD GUIDELINES	EU COMMISSION	EU COUNCIL	EU PARLIAMENT
PERSONAL SCOPE	Covers companies of all sizes	✓	✗	✗	~
	Covers companies of all forms	✓	~	~	~
	Covers all sectors	✓	~	✗	~
MATERIAL SCOPE	Covers all human rights	✓	~	✗	~
	Covers broad selection of environmental impacts	✓	✗	~	✓
CLIMATE	Covers climate change as an environmental impact	✓	✗	✗	✓
	Requires development of climate plan covering scope 1, 2, and 3	✓	~	~	✓
VALUE CHAIN	Covers all business relationships	✓	✗	~	✓
	Covers full upstream & downstream value chain	✓	✓	✗	~
DUTY	Requires initial broad scoping to identify risks & impacts	✓	✗	~	✓
	Requires in-depth assessment of prioritised risks & impacts	✓	✓	✓	✓
	Prioritisation based on severity; no "prioritisation haven"	✓	✗	~	~
	Response based on relationship to & severity of impact; no closed list of measures	✓	✗	~	✓
	Views MSIs/schemes as piece, not proxy, for due diligence	✓	~	~	✓
	No over-relying on audits	✓	~	~	✗
	Seeks meaningful stakeholder engagement throughout DD	✓	✗	✗	✓
	Considers a broad range of stakeholder	✓	✗	✓	✓
	Disengagement can be appropriate but must be responsible	✓	~	✗	~
	Requires remediation of harm	✓	~	~	✓

INTRODUCTION

The EU is currently in the process of legislating a Directive on Corporate Sustainability Due Diligence. As of June 2023, the three main EU institutions - the EU Commission, Council, and Parliament - have clarified their position on how to require companies operating in the EU to undertake due diligence to identify and address human rights, environmental, and labour rights impacts associated with their own operations and those of their business partners.

Due diligence expectations are well established in the international normative framework on responsible business conduct (RBC). In 2011, the corporate responsibility to undertake due diligence was clarified in the UNGPs and OECD Guidelines. In the decade that followed, these expectations were elaborated and solidified through the development of the OECD's multi-sector and sector-specific due diligence guidance, the creation of 'jurisprudence' by OECD National Contact Points (NCPs) interpreting and applying the OECD Guidelines in non-judicial responsible business conduct complaints, and the uptake of due diligence expectations in numerous other international instruments and industry and company policies. **Most recently, the 2023 update of the OECD Guidelines has reinforced the scope and nature of the international due diligence principles.**[1]

The missing piece in the current 'smart mix of measures' envisioned by the UNGPs is binding law on due diligence. The adoption of legislation enshrining corporate due diligence expectations into national, regional, and international law is critical in helping ensure compliance by enterprises, through applying sanctions and material consequences to enterprises for instances of non-compliance or harm. The EU's effort to legislate the CSDDD is thus both very timely and absolutely necessary.

A top priority in the process to develop binding laws on due diligence is to ensure their alignment with established international norms. Alignment between new laws and existing international standards supports coherence, legal certainty, predictability, and efficiency in implementation across jurisdictions. The call for policy and legislative coherence has not only been made by civil society, but also by states: In December 2022, OECD member states adopted the *Recommendation on the Role of Government in Promoting Responsible Business Conduct*, which recommends that states develop legal frameworks to enable RBC, and in so doing to align new laws and regulations with RBC standards including in particular the OECD Due Diligence Guidance.[2] **As recently as February 2023, 50 states, including 25 of the 27 EU Member States, signed a declaration calling for alignment between national and regional RBC initiatives and the OECD Guidelines.**[3] **A similar call has also been made repeatedly by enterprises, who seek policy coherence as key to avoiding a proliferation of diverse and, at worst, conflicting expectations.**[4]

OECD Watch recommends that the EU institutions agree on directive text that maximises alignment with the updated OECD Guidelines. This would help to avoid confusion and fragmentation and achieve the objective of increased corporate respect for human rights and the environment. Regrettably, the three institutional positions for the upcoming due diligence directive do not take maximum advantage of all opportunities for alignment with the OECD Guidelines. Policymakers' well-intentioned desire to ensure legal certainty for enterprises has overshot its mark, resulting in proposals that are overly narrow in scope and rigid in their application, which would limit companies' ability to respond proactively and flexibly to the

1 Given the alignment between the OECD Guidelines and UNGPs, references to the OECD Guidelines in this paper also invoke and imply reference to the UNGPs.
2 OECD REcommendation the Role of Government in Promoting Responsible Business Conduct, adopted 12 December 2022, OECD/LEGAL/0486, https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0486.
3 OECD Declaration on Promoting and Enabling Responsible Business Conduct in the Global Economy, adopted on 15 February 2023, OECD/LEGAL/0489, https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0489.
4 In September 2020, 26 companies, business associations, and initiatives signed a joint statement calling for EU-wide, cross-sectoral mandatory human rights and environmental due diligence legislation: 'Support for EU framework on mandatory human rights and environmental due diligence', 2 September 2020, https://media.business-humanrights.org/media/documents/EU_Business_Statement_Mandatory_Due_Diligence_02092020.pdf. In February 2022, more than 100 companies, investors, business associations, and initiatives released a joint statement urging the EU to quickly adopt a legislative proposal on mandatory human rights and environmental due diligence: 'Making EU legislation on mandatory human rights and environmental due diligence effective', 21 February 2022, https://media.business-humanrights.org/media/documents/EU_Business_Statement_February2022.pdf.

actual human rights and environmental risks and impacts they are associated with, in a manner suited to their own business context (their size, operating context, sector, business partners and other stakeholders).

Yet while none of the three positions aligns perfectly with the Guidelines, **the European Parliament's position is most closely harmonised and would be the most effective in avoiding duplicate standards and ensuring appropriate breadth, scope, and flexibility in the due diligence duty.** Based on this paper's evaluation, the EU can best achieve policy coherence with international norms by adopting the European Parliament's position, occasionally following elements of the other two institutions' proposals. This briefing paper compares the international norms (from the OECD Guidelines and UNGPs) to the positions of the European Commission[5], the Council of the European Union[6], and the European Parliament[7] on the proposed directive as regards four primary areas of potential alignment or divergence with the due diligence standards in the OECD Guidelines:

1. *Personal scope* of covered enterprises;
2. *Material scope* of human rights and environmental impacts, including *climate* change;
3. *Value chain scope* over related business relationships; and
4. *Due diligence duty* expected of corporations.

Each of the four sections and subsections explains the strengths and weaknesses of each EU approach vis-a-vis the OECD Guidelines, and explains which approach is strongest in achieving alignment with the standards, and therefore effectiveness in ensuring policy harmony, efficiency, and effectiveness. The paper concludes by recommending adoption of a directive that is harmonised with the Guidelines, drawing most heavily from the Parliament's position.

5 European Commission, Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, 23 February 2022, COM/2022/71 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071.

6 Council of the European Union, Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, 15024/1/22 REV 1, 30 November 2022, https://data.consilium.europa.eu/doc/document/ST-15024-2022-REV-1/en/pdf.

7 Amendments adopted by the European Parliament on the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, 1 June 2023, https://www.europarl.europa.eu/doceo/document/TA-9-2023-0209_EN.html.

1 PERSONAL SCOPE OF COVERED ENTERPRISES

Personal scope relates to the size, form, and sector of enterprises covered by the standard or law.

Enterprise size and form coverage

OECD Guidelines

The OECD Guidelines apply to all companies with international operations, business partners, or value chains, irrespective of their size, sector, location, ownership, or structure. The Guidelines implicitly recognise that size is not correlated with risk, as smaller companies can sometimes generate significant risks and impacts. The Guidelines also do not define a form for covered multinational enterprises and in practice are applied by states even to non-traditional enterprises, such as export credit agencies, multi-stakeholder initiatives, certification agencies, and international sports associations.[8]

Commission proposal

In a regressive departure from the OECD Guidelines, the Commission proposal would only apply the due diligence obligation to large, limited liability companies. For EU limited liability companies, the obligation would apply to those with:

- In non-"high impact" sectors, net global turnover of more than EUR 150 million and more than 500 employees on average, or
- In "high impact" sectors (see below), a global turnover of EUR 40 million, provided that at least EUR 20 million of this net turnover is generated in a high impact sector, and with more than 250 employees on average.

For non-EU limited liability companies, the number of employees is not considered, and the duty would apply to those with:

- In non-"high impact" sectors, turnover of more than EUR 150 million in the EU, or
- In "high impact" sectors, turnover of more than EUR 40 million but less than EUR 150 million in the EU, provided that at least EUR 20 million is generated in a high impact sector.

Council General Approach

The Council's approach worsens the Commission's proposal, by adopting the same restrictively high thresholds and additionally requiring that the threshold criteria be met for two consecutive financial years before applicability of the law.

Parliament position

More positively, the Parliament position echoes the OECD Guidelines and UNGPs by stating that all companies should respect human rights.[9] It is also comparatively better aligned with the Guidelines in relation to the broader due diligence expectation, by setting a lower threshold of personal scope to cover:

- Non-limited and limited liability companies with a turnover of EUR 40 million and, for EU companies, employing on average 250 employees, and
- Non-limited liability companies and group structures with a turnover of EUR 150 million and 500 employees on average.
- The Parliament position also counts part-time employees and franchise agreements toward these thresholds.

8 See for example, cases OECD NCPs have declared admissible against RSPO, RINA, Bonsucro, FIFA, and Formula One.
9 Recital 6a

Recommendation

While all three positions fall short of the Guidelines' expectation that all multinational enterprises should undertake human rights and environmental due diligence, without any limitation, the Parliament's approach is most closely aligned with the OECD Guidelines as more companies are included in its scope and the text acknowledges that all companies should respect human rights irrespective of their due diligence duty.

TABLE 2: OVERVIEW OF PROPOSALS ON SIZE AND FORM OF COVERED ENTERPRISES

OECD GUIDELINES	COMMISSION	COUNCIL	PARLIAMENT
All companies should respect human rights. The due diligence duty applies to all multinational enterprises.	The due diligence duty applies to limited liability companies in the EU and outside. Very large companies. (500+ employees* and 150M turnover). Different threshold for companies in high-risk sectors. (250+ employees* and 40M turnover).	The due diligence duty applies to limited liability companies in the EU and outside. Very large companies. (500+ employees* and 150M turnover). Different threshold for companies in high-risk sectors. (250+ employees* and 40M turnover).	All companies should respect human rights. The due diligence duty applies to limited and unlimited liability companies in the EU and outside. Applies for large companies. (250+ employees* and 50M turnover).** Consolidated threshold for groups. (500+ employees* and 150M turnover).**

* Employment criterium only applies for EU-based companies
** Part-time employees and franchises apply to the threshold

Sector coverage

OECD Guidelines

The OECD Guidelines do not prima facie distinguish between due diligence obligations of companies according to sector; the same due diligence standard applies to companies in all sectors. This means that all companies, including those in what may be considered high impact sectors such as the arms industry, are expected to conduct due diligence.

Instead of rigidly and arbitrarily tying the due diligence expectation to certain sectors, the Guidelines state that companies should flexibly tailor their due diligence to the actual adverse impacts and risks associated with their operations, products, and services. According to the Guidelines, due diligence should be risk-based, meaning "commensurate to the severity and likelihood of the adverse impact and appropriate and proportionate to [the enterprise's] context. Where it is not feasible to address all identified impacts at once, an enterprise should prioritise the order in which it acts based on the severity and likelihood of the adverse impact."[10] This adaptable approach ensures that all companies, irrespective of sector, tailor their due diligence to their own potential or actual impacts.

10 OECD Guidelines, Commentary para 12 (on Chapter II General Policies).

In relation to the financial sector specifically, the Guidelines apply equally to the financial sector as to other sectors. Indeed, the OECD has published three distinct sectoral due diligence guidance documents setting out due diligence expectations for institutional investors, corporate lending and securities underwriting, and project and asset finance transactions.[11] The guidance confirm that entities in the financial sector can contribute to impacts of investees or clients, not merely be directly linked to them.

Commission proposal

In contrast with the flexible approach of the international norms, the Commission proposal identifies several "high impact" sectors (including textiles, agriculture, food, metals, and mineral extraction). In contradiction to what one might assume, "high impact" sector companies are not asked to meet a higher due diligence duty; instead, companies operating within "high impact" sectors are subject to lower personal scope thresholds, simply resulting in more companies in these sectors falling within the scope of the proposed directive - but otherwise adopting no more heightened due diligence. Even more concerningly, the Commission proposal states that small companies in "high impact" sectors should only do due diligence on their "severe impacts" which, in stark contrast to the Guidelines, transforms "severity" into an absolute threshold rather than a tool to prioritise responses to impacts.

The Commission asserts its selection of "high impact" sectors is not arbitrary, but based both on clear evidence of higher adverse impacts in these sectors, and on the existence of OECD sectoral guidance documents on these sectors. This blunt approach is short-sighted, overlooking the pervasive high risk of adverse impacts that exist equally in other sectors not (yet) considered by the OECD, such as construction and infrastructure, information technology, weapons, shipbreaking, and transport to name a few. Further, the Commission fails to identify the financial sector as high impact, despite the sector's contact with severe human rights and environmental harms across numerous other sectors, and despite the existence of the three aforementioned OECD financial sector due diligence guidance documents.

For the financial sector (whose impacts are primarily downstream), the Commission proposal would allow EU states to apply the law to regulated financial undertakings in a limited fashion. The proposal states that due diligence for companies in the financial sector should focus on clients. Further, the proposal provides that due diligence by actors in the financial sector need only occur before contracts are signed, rather than in the *ongoing*, risk-based manner set out in international due diligence standards.

Council General Approach

The Council largely follows the Commission's proposal on high impact sectors with its expanded personal scope and limited duty. Regarding the financial sector, the Council adopts the same approach as the Commission, but makes the inclusion of the sector voluntary for Member States. Additionally, the Council's approach excludes almost all investment activities and other financial services, except credit provision, insurance, and re-insurance.

Under the Council's approach, arms, weapons, and dual-use items would only be subject to the due diligence duty until the award of an export licence. As the award of an export licence is separate from the due diligence duty, this carve out is inconsistent with international normative standards.[12]

11 For due diligence in the financial sector the OECD has produced several guidance documents on Responsible Business Conduct in the Financial Sector. See e.g. OECD (2017) Responsible Business Conduct for Institutional Investors, available at: https://mneguidelines.oecd.org/RBC-for-Institutional-Investors.pdf; OECD (2019) Due Diligence for Responsible Corporate Lending and Securities Underwriting, available at: https://mneguidelines.oecd.org/final-master-due-diligence-for-responsible-corporate-lending-and-securities-underwriting.pdf and OECD (2022) Responsible business conduct due diligence for project and asset finance transactions, available at: https://www.oecd-ilibrary.org/docserver/952805e9-en.pdf?expires=1682345942&id=id&accname=guest&checksum=F301B710372A108BDA676B690D7AF5F9.

12 On arms, especially noteworthy is the report of the UN Working Group on Business and Human Rights, 'Responsible business conduct in the arms sector: Ensuring business practice in line with the UN Guiding Principles on Business and Human Rights - Information Note by the UN Working Group on Business and Human Rights', 2022, https://www.ohchr.org/sites/default/files/2022-08/BHR-Arms-sector-info-note.pdf

Parliament position

In a more positive turn, the Parliament position does not differentiate between high impact and low impact sectors.

Regarding the financial sector, the Parliament position does include an option for a broader ongoing duty for the financial sector, and specific due diligence duties for institutional investors and asset managers. However, the due diligence extends only to direct clients, excluding SMEs, natural persons, and households, and presumes that clients are only directly linked. The Parliament position also provide a reduced list of regulated financial undertakings as it removes benchmark administrators, certain pension institutions, alternative investment funds, and undertakings for collective investment in transferable securities.

Recommendation

The Parliament text aligns best with the OECD Guidelines by avoiding arbitrary distinctions between high and low impact sectors. Regarding the financial sector, while the Parliament position does echo elements of the other EU institutions' more limited coverage of financial institutions and transactions, the Parliament position is limited but comparatively broader in its coverage of the financial sector.

TABLE 3: OVERVIEW OF PROPOSALS ON SECTOR COVERAGE

OECD GUIDELINES	COMMISSION	COUNCIL	PARLIAMENT
The due diligence duty applies to all sectors.	The due diligence duty applies to most sectors. Lower size threshold for companies in "high impact" sectors". For smaller companies in "high impact sectors", only severe impacts need to be addressed. For the financial sector, the duty is limited to the provision of the financial service.	The due diligence duty applies to most sectors. Lower size threshold for companies in "high impact" sectors". For smaller companies in "high impact sectors", only severe impacts need to be addressed. Member states have the option to include financial services or not. Weapons, arms and dual-use items are only covered until the award of the license.	The due diligence duty applies for most sectors, without distinction between "high impact" and non-"high impact" sectors. For the financial sector, the duty is more spelled out and ongoing, but the company is presumed to be directly linked to any impacts.

2 MATERIAL SCOPE OF HUMAN RIGHTS AND ENVIRONMENTAL IMPACTS

Material scope relates to the range of human rights (including workers' rights) and environmental impacts covered by the due diligence duty.

OECD Guidelines

With regard to human rights, the OECD Guidelines calls on companies to respect all human rights, including workers' rights, that are internationally recognised in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Declaration on Fundamental Principles and Rights at Work. Companies should also consider additional guidance on human rights belonging to specific groups (e.g. rights of Indigenous Peoples; women; national or ethnic, religious and linguistic minorities; children; persons with disabilities; and migrant workers and their families). The Guidelines seek "special attention" or "enhanced" or heightened due diligence over particularly vulnerable or marginalised individuals or groups, including human rights defenders and Indigenous Peoples, and in specific contexts, such as conflict-affected areas.

With regard to the environment, the OECD Guidelines call for due diligence over potential and actual adverse environmental impacts, defined as "significant changes in the environment or biota which have harmful effects on the composition, resilience, productivity or carrying capacity of natural and managed ecosystems, or on the operation of socio-economic systems or on people". The Guidelines include a non-exhaustive list of examples of adverse impacts to be assessed in due diligence, including climate change; biodiversity loss; air, water and soil pollution; degradation of land, marine and freshwater ecosystems; deforestation; and harmful generation and mismanagement of waste, including hazardous substances. The Guidelines' environment chapter also calls on enterprises to ensure good animal welfare. In general, the environment chapter gives guidance for responsible business conduct in relation to the environment that is beyond integrating environmental due diligence into the human rights due diligence duty.

The Guidelines give extensive detail on due diligence expectations for companies in relation to climate change. Within the environment chapter, the Guidelines refer to the Paris Agreement and assert the important role enterprises play in contributing to net-zero greenhouse gas (GHG) emissions, necessary for achieving global goals on climate change mitigation and adaptation. The Guidelines call on enterprises to ensure their GHG emissions and impact on carbon sinks are consistent with internationally agreed global temperature goals based on best available science, including from the Intergovernmental Panel on Climate Change. The Guidelines expect that enterprises will implement transition plans and adopt, implement, monitor and report on short, medium, and long-term mitigation targets, including absolute GHG reduction targets, that take into account scope 1, 2, and 3 GHG emissions. With respect to climate adaptation in particular, the Guidelines state that enterprises should avoid activities that undermine climate adaptation for, and resilience of, communities, workers and ecosystems.

The Guidelines expect that enterprises will prioritise eliminating or reducing sources of GHG emissions over offsetting, compensating, or neutralising measures. Carbon credits are framed as a "last resort" that should be of high environmental integrity and should not contribute to locking in GHG-intensive processes or infrastructures, and should be publicly reported separately from reporting on emissions reductions. The Guidelines also highlight that sustainability risks such as climate change, among others, may be considered financially "material" and therefore subject to higher disclosure expectations.

The OECD Guidelines also seek due diligence over impacts related to science, technology, and innovation, consumer interests, as well as corruption. Further, the Guidelines set out expectations for responsible business conduct related to disclosure, competition, and taxation.

Commission proposal

The Commission sets a far narrower material scope than that found in the OECD Guidelines. It seeks due diligence over human rights and environmental impacts highlighted in a limited list of conventions,[13] out of which it highlights a few specific impacts from these instruments[14] as well as a general catch-all clause which has a higher threshold. The Commission text notably excludes climate from the scope of the due diligence obligation. Instead, the proposal obliges companies to develop and implement, separate from the due diligence duty, a plan to align with the 1.5 degree target set in the Paris Agreement. This plan contains emission reductions in case climate change is a principal risk to the company.

Council General Approach

The Council limits the coverage of human rights even further than the Commission by removing several human rights instruments from the Annex. In contrast, the catalogue of environmental impacts is expanded, with additions of conventions on wetlands[15], heritage sites[16], pollution of marine environments, and pollution from ships. Yet the Council follows the Commission in also excluding climate change from the scope of the due diligence obligation and giving it a separate and autonomous obligation.

The Council also limits the reach of the due diligence obligation by introducing a series of additional conditions for an impact to be in scope, such as that the human right must be abusable by a company (rather than a state) and that the company could have reasonably foreseen the human right violation.

Parliament position

Regarding human rights, the Parliament significantly expands the list of covered impacts and conventions by adding human rights conventions and declarations protecting specific rightsholders, as well as treaties on international humanitarian law.

Regarding environmental impacts, the Parliament position defines the material scope by listing environmental impact categories based on the OECD update, both adds[17] and removes[18] additional conventions. Concerning climate change, the Parliament position includes climate change as a covered environmental impact. According to the Parliament, development of a transition plan in line with the 1.5 degree target of the Paris agreement shall be considered an appropriate measure to prevent environmental adverse impacts related to climate change mitigation. Transition plans should not only cover principal risks but must include time-bound targets covering scopes 1, 2, and where relevant 3.

The Parliament position also envisions the potential to update the material scope should it prove insufficient.

13 For example, the annex does not list all fundamental ILO Conventions nor International Humanitarian Law.
14 For example, while the list of specific impacts does recognise land rights for Indigenous Peoples, it does not refer to the Principle of Free Prior and Informed Consent contained in other paragraphs of the UN Declaration on the Rights of Indigenous Peoples.
15 Convention on Wetlands of International Importance especially as Waterfowl Habitat of 2 February 1971 (Ramsar Convention)
16 The Convention Concerning the Protection of the World Cultural and Natural Heritage of 16 November 1972 (the World Heritage Convention)
17 Paris Agreement, Aarhus Convention, Convention on Transboundary Watercourses.
18 Convention on Biodiversity, Rotterdam Convention, Marpol, World Heritage Convention, Ramsar Convention on Wetlands

Recommendation

In all three positions, the closed nature of the different lists (conventions and impacts) contrasts with the open-ended and comprehensive material scope of the OECD Guidelines. Because the Parliament position includes the most comprehensive and expansive list of protected rights and international instruments, and an option to amend the material scope to potentially cover additional human rights and environmental impacts in the future, it should be favoured as regards alignment with the international norms. On the subject of climate change in particular, although the Parliament's text aligns most closely with the Guidelines, all three institutions' positions fail to address the enterprise's responsibility not to undermine climate adaptation for, and resilience of, communities, workers and ecosystems. This is critical and distinct from corporate efforts to preserve the climate resilience of the enterprise's own business model.

TABLE 4: OVERVIEW OF PROPOSALS ON MATERIAL SCOPE OF HUMAN RIGHTS AND ENVIRONMENTAL IMPACTS

OECD GUIDELINES	COMMISSION	COUNCIL	PARLIAMENT
The due diligence duty covers all internationally recognised human rights. The due diligence duty covers all environmental impacts, including climate change, under a broad definition. Climate change is identified as an environmental impact and enterprises should develop transition plans in line with the Paris agreement covering scope 1, 2, and 3 emissions. The due diligence duty covers impacts related to science, technology, and innovation, corruption, and consumer interests. The Guidelines additionally set out expectations for responsible business conduct related to disclosure, competition, and taxation.	The due diligence duty covers human rights and environmental obligations referenced in specific articles in a (fragmented) list of conventions, as well as any other foreseeable impact in these conventions. Climate change is not covered by the due diligence duty, but enterprises required to develop separate plan to address climate change.	The due diligence duty covers human rights and environmental obligations referenced in specific articles in a (fragmented) list of conventions, as well as any other foreseeable impact in these conventions. The Council reduces the Commission's list of specific articles, limiting the list of human rights conventions while slightly expanding environmental conventions. Climate change is not covered by the due diligence duty, but enterprises required to develop separate plan to address climate change.	The due diligence duty covers human rights and environmental obligations referenced in specific articles in a (comparatively broader) list of conventions, as well as any other foreseeable impact in these conventions. Of note, Parliament includes international humanitarian law and Indigenous Peoples' right to free prior and informed consent. The Parliament also adds a list of categories in relation with the updated OECD Guidelines*, while both adding and removing environmental conventions. Climate change is covered as an environmental impact and enterprises should develop transition plans in line with the Paris agreement covering scope 1, 2, and 3 emissions.

* a) climate change; b) biodiversity loss; c) air, water and soil pollution; d) degradation of land, marine and freshwater ecosystems; e) deforestation; f) overconsumption of material, water, energy and other natural resources; g) harmful generation and mismanagement of waste, including hazardous substances.

3 VALUE CHAIN SCOPE OVER RELATED BUSINESS RELATIONSHIPS

Value chain scope relates to the business partners (or relationships), including both up and/or downstream of a covered enterprise, over which the enterprise must undertake due diligence.

OECD Guidelines

The OECD Guidelines expect enterprises to carry out due diligence on their own activities and those of their business relationships both upstream and downstream in the full value chain. The Guidelines define "business relationships" to include sub-contractors, franchisees, investee companies, clients, and joint venture partners, including relationships beyond "first-tier" or immediate relationships. The Guidelines do not prioritise focus on long-standing or more frequently-engaged business relationships; instead, enterprises should flexibly and dynamically prioritise business relationships associated with actual highest risk of adverse impacts.

Regarding downstream impacts, due diligence should cover not only entities in the supply chain that provide products or services contributing to the enterprise's own operations, products, or services, but also entities that "receive, license, buy or use products or services from the enterprise". Due diligence over downstream "use" should also include potential impacts from foreseeable "improper or misuse". And while natural persons, users, or consumers are not considered business relationships, the Guidelines make clear that enterprises can contribute to adverse impacts caused by such persons.

Commission proposal

In stark contrast to the OECD Guidelines, the Commission proposal calls on enterprises to undertake due diligence over their own operations and those of "established" business relationships. Under the proposal, once the direct business relationship is deemed "established", the duty extends to indirect business relationships. The concept of "established" business relationships is highly problematic. It arbitrarily narrows a company's due diligence focus to its longer-term and more frequent business relationships, even if those are not the relationships most subject to risk. This would result in significant oversight of business relationships and actual risks, undermining the purpose of the law. Independent to the issues with the established business relationship, the Commission does define the value chain in a comprehensive way which, standalone, is aligned with the Guidelines.

Council General Approach

More positively, the Council has not adopted the Commission's "established" business relationship approach. However, regarding the definition of the chain of business relationships covered, the Council approach instead changes the scope of the due diligence from a comprehensive "value chain" approach, which aligns with the OECD Guidelines, to a more limited "chain of activities"[19] scope. The definition of "chain of activities" departs from the OECD Guidelines in numerous ways, including by significantly limiting the scope of companies' due diligence to tasks carried out on or behalf of the company under scope (e.g. recycling, disposal, and transport), and excluding foreseeable "provision", "use" or "misuse" of a company's products or services. Further, under the approach, companies would not be required to carry out due diligence on their customers or clients, even when these could connect them to salient risks (e.g. through the sale of pesticides, information technology, raw minerals, or pharmaceutical products to high-risk customers).

19 Article 3 g) defines "Chain of activities" as (i) activities of a company's upstream business partners related to the production of a good or the provision of services by the company, including the design, extraction, manufacture, transport, storage and supply of raw materials, products or parts of the products and development of the product or the service, and (ii) activities of a company's downstream business partners related to the distribution, transport, storage and disposal of the product, including the dismantling, recycling, composting or landfilling, where the business partners carry out those activities for the company or on behalf of the company, excluding the disposal of the product by consumers and distribution, transport, storage and disposal of the product being subject to the export control under the Regulation (EU) 2021/821 of the European Parliament and of the Council or the export control relating to weapons, munition or war materials, after the export of the product is authorised.

Parliament position

Like the Council approach, the Parliament position drops the restrictive focus on "established" business relationships. When it comes to downstream application of the duty, the Parliament takes a broader approach than Council, by on the one hand expanding the number of downstream services and activities taken into consideration, and on the other hand by requiring due diligence over the business relationship itself, not merely the narrow set of services and products delivered. However, the Parliament's position is more limited than the Guidelines by applying the due diligence duty only up to the point of sale, leaving it unclear whether due diligence is expected or not over potential impacts related to end consumers' use or misuse. This could concerningly exclude, for example, impacts related to climate change by end-users of products.

Recommendation

While the Council and Parliament's removal of the concept of "established" business relationships fWhile the Council and Parliament's removal of the concept of "established" business relationships from the Commission text is positive, the Council's, and to a lesser extent, Parliament's, focus on products and services, and prescriptive narrow list of upstream and downstream activities, leaves significant gaps in the due diligence obligation that diverge from the broad concept of up- and downstream "business relationships" in the OECD Guidelines. Among the three positions, the Parliament is most aligned with the Guidelines to the extent of the duty, as it takes on board the business partner rather than the specific product or service. Nevertheless, the Parliament position still diverges from the Guidelines in other ways, such as regards explicit coverage of foreseeable misuse of products or services, and full coverage of the financial sector.

TABLE 5: OVERVIEW OF PROPOSALS ON VALUE CHAIN SCOPE OVER RELATED BUSINESS RELATIONSHIPS

OECD GUIDELINES	COMMISSION	COUNCIL	PARLIAMENT
The due diligence duty applies to the enterprise's own activities and those of its "business relationships" both up- and downstream, beyond first-tier contracts.	The due diligence duty applies to the enterprise's own activities and those of its "established" business relationships both up- and downstream.	The due diligence duty applies to the enterprise's own activities and those of its "business relationships" both up- and downstream. For downstream impacts, the duty is limited to several specific activities and specifically excludes "use" of a product and the "provision" of a service.	The due diligence duty applies to the enterprise's own activities and those of its "business relationships" both up- and downstream. For downstream impacts, the duty is limited to activities up to and including the sale of a product or a service.

DUE DILIGENCE DUTY EXPECTED OF CORPORATIONS

4

The Due diligence duty relates to the nature of the actions companies are required to undertake to fulfil their due diligence obligation.

The OECD Guidelines outline a six-step process for the due diligence duty: 1) embed RBC into policies and management systems; 2) identify and assess adverse impacts in operations, supply chains, and business relationships; 3) cease, prevent, or mitigate adverse impacts; 4) track implementation and results; 5) communicate how impacts are addressed throughout the six-step process; and 6) provide for or cooperate in remediation where appropriate.

The sub-sections below discuss key issues related to the due diligence duty.

Broad initial scoping to identify and prioritise assessment of risks and impacts

OECD Guidelines

The OECD Guidelines expect companies to conduct a broad scoping exercise to identify the potential and actual adverse impacts they may cause, or to which they may be contributing or directly linked through business relationships. Relevant elements for the scoping include, among others, information about sectoral, geographic, product and enterprise risk factors, including known risks the enterprise has faced or is likely to face. Following their broad scoping, enterprises should identify the most significant RBC risk areas and prioritise these for iterative and increasingly in-depth assessment, including through mapping and cataloguing of risks and impacts. Enterprises should then assess their relationship to the risks and impacts identified by assessing whether they are causing or could potentially cause the impact; contributing to or could potentially contribute to the impact; or directly linked to the impact through business relationships.

Commission proposal

The Commission's proposal requires companies to identify actual and potential impacts in their own operations, those of their subsidiaries, and those of their (direct and indirect) established business relationships.

Council General Approach

The Council approach requires companies to identify actual and potential impacts in their own operations, those of their subsidiaries, and those of their business relationships. It gives enterprises the option (voluntary) of identifying impacts through a mapping exercise covering "all areas of operations, those of subsidiaries, and those of business partners". The mapping option is not itself risk-based, but rather serves as a platform for developing further risk-based assessments.

Parliament position

The Parliament's position requires enterprises to identify actual and potential impacts in their own operations, those of their subsidiaries, and those of their business relationships through a two-step, risk-based analysis. As part of their initial scoping, enterprises should undertake basic risk assessments of all impacts in order to identify impacts of highest risk. Second, enterprises should undertake in-depth assessments of the highest risk impacts. The Parliament position also foresees additional analysis for impacts in conflict affected areas.

Recommendation

The Parliament's position is the most closely aligned with the Guidelines by incorporating risk-based assessment into the impact identification phase, and by ensuring a more in-depth assessment for higher risk impacts. However, while the OECD Guidelines envision that enterprises should continue to carry out "iterative and increasingly in-depth assessment" for all impacts after prioritised (higher risk) impacts are addressed, the Parliament's position limits in-depth assessments only to prioritised operations, subsidiaries and business relationships.

Prioritisation in addressing impacts

OECD Guidelines

Under the OECD Guidelines, due diligence should be adequately resourced to ensure enterprises can take appropriate response to all risks and impacts. This means there should be very few cases in which companies cannot address all risks and impacts simultaneously. Only where it is not feasible to address all identified adverse impacts simultaneously, enterprises may conduct a prioritisation exercise to sequence actions to address all (potential) adverse impacts. Where prioritisation occurs,

- Enterprises should prioritise for action any activities that are causing or contributing to adverse impacts on RBC issues.
- Enterprises should also prioritise their responsive action based on the likelihood and severity of the (potential) adverse impacts. Severity is judged by the scale, scope and irremediable character of the impacts: "scale refers to the gravity of the adverse impact; scope concerns the reach of the impact, for example the number of individuals that are or will be affected or the extent of environmental damage; and the irremediable character of the impact considers limits to the ability to restore the individuals or environment affected to a situation equivalent to their situation before the adverse impact."

Prioritisation is not intended to give enterprises an excuse for not addressing all impacts, or to absolve them of remediation responsibilities for impacts not prioritised. Instead, prioritisation is merely a tool to sequence response to impacts. Further, prioritisation seeks to remind enterprises that when addressing all impacts, they must prioritise the most salient and severe ones even if those are the most costly and complex to address.

Commission proposal

The Commission proposal does not explicitly call for prioritisation. The definition of what responsive measures may be appropriate does contain room for prioritisation among impacts, without further explanation of methodology for determining priority. Allowance of prioritisation without framing of clear and narrow grounds for it would be a harmful departure from the Guidelines.

Council General Approach

The Council's approach would require Member States to ensure that companies prioritise impacts based on severity and likelihood where it is not feasible for them to address all identified impacts at the same time and to the fullest extent, using a similar definition of severity to that found in the Guidelines. While this is an improvement on the Commission proposal, the Council's approach later asserts that prioritised "significant" impacts should be addressed within a reasonable time in order to allow time to address impacts that were not prioritised because of their lesser significance. It is not clear whether the Council considers "significant" impacts the same as "prioritised" impacts, or whether (but without further explanation) it describes a subset of prioritised impacts that are more "significant" than others - or whether it considers "significance" a factor in determining severity and likelihood. The lack of clarity on "significance" confuses the effect of the prioritisation text.

The Council approach calls on enterprises to prioritise among both potential and actual impacts in an integrated fashion, measuring these against each other.

Parliament position

The Parliament text would require Member States to ensure that companies prioritise impacts based on severity and likelihood where it is not feasible for them to address all identified impacts at the same time and to the fullest extent. The text lacks adequate specificity in the definition of severity. The Parliament position makes clear that less-prioritised impacts should still be addressed. The Parliament text does not introduce the confusing "significant" terminology. The Parliament equally proposes an integrated prioritisation exercise for potential and actual impacts, while adding that this needs to be done in a reasonable amount of time.

Recommendation

Both the Council and Parliament echo the Guidelines in only allowing prioritisation where impacts cannot be addressed simultaneously, and in requiring that all impacts be addressed after prioritised impacts have been addressed in a reasonable amount of time. The Council's approach defines severity as the OECD Guidelines do. Meanwhile, the Parliament's position more closely follows the language of the Guidelines by not intermixing the vague term "significant" in the discussion of prioritised impacts. However, both the Council's and Parliament's texts create perverse incentives for enterprises not to prioritise risky issues, through creating a "prioritisation haven" defence protecting enterprises from liability for impacts they did not prioritise. Under the Guidelines, enterprises are always responsible for providing or cooperating in remediation (or for using leverage to encourage remediation) of harms they cause or contribute to (or are directly linked to) regardless of whether they prioritised addressing them.

Appropriate response determined by relationship to and severity of impact

OECD Guidelines

Under the OECD Guidelines, how an enterprise should respond to identified risks or impacts depends on its relationship to or involvement with them. Where an enterprise causes or may cause an adverse impact, it should take the necessary steps to cease or prevent that impact. Where an enterprise contributes or may contribute to an adverse impact, then it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impacts to the greatest extent possible. Where an enterprise is directly linked to an adverse impact through a business relationship, it is responsible for using leverage alone or in co-operation with others to influence the entity causing the adverse impact to prevent, mitigate or remediate that impact.

The Guidelines do not suggest a closed list of specific actions an enterprise should take to cease, prevent, or mitigate impacts, leaving enterprises flexibility to determine the right actions. Instead, the Guidelines provide overarching guidance that an enterprise's due diligence should be commensurate to the severity and likelihood of the adverse impact and appropriate and proportionate to its context.

The Guidelines see an enterprise's leverage (influence) over a business relationship not as a factor in whether it should or can respond, but in how it can respond. Leverage is also not conceived of as static:

enterprises are expected to increase their leverage where their leverage is low, such as through building expectations around due diligence into commercial contracts, establishing pre-qualification requirements for potential suppliers, and linking business incentives with performance on responsible business conduct.

Commission proposal

The Commission's proposal on addressing adverse impacts diverges from that in the OECD Guidelines in a few important ways. For one, it does not differentiate between impacts an enterprise causes or contributes to itself, and impacts that are caused by a (direct or indirect) "established" business relationship. Instead, the proposal simply requires that enterprises cease (not just mitigate) actual impacts or prevent potential impacts. This prevents companies from factoring in their relationship to the impact. And given the Commission's limitation of covering only established business relationships, this may leave out situations where the company is contributing to an impact.

The proposal also identifies a closed and specific list of measures enterprises must ("shall") take where necessary. Among these are seeking contractual assurances from business partners that they will ensure compliance with the company's code of conduct and prevention action plan, including by seeking corresponding contractual assurances from their own relevant partners (contractual cascading). Problematically, the proposal does not identify contractual cascading strictly as a way to use or build leverage, as under the Guidelines. As a result of this, contractual cascading is understood as a tool to address an enterprise's own impacts. Yet use of contractual cascading to address an enterprises own impacts would be harmful, involving an enterprise unhelpfully transferring responsibilities and costs to up- or downstream business relationships even where it itself is causing the harm, for example through its purchasing practices, design options, or business models. Further, over-reliance on contractual measures, alone among other potential options to build leverage, unhelpfully encourages up- or downstream business relationships simply to follow contractual expectations (i.e. check boxes) without thoughtfully and proactively undertaking their own due diligence. Finally, emphasis on a mandatory closed list of actions constrains enterprises' ability to respond appropriately to the risks and impacts at hand – or even could discourage them doing so.

The Commission proposal also includes as an element in the definition of an "appropriate measure" the level of the enterprise's "influence" over the entity causing the impact. This contrasts with the Guidelines' framing of leverage.

Council General Approach

Problematically, like the Commission's proposal, the Council's approach identifies a closed and narrow list of measures enterprises must ("shall") take, promoting contractual assurances, codes of conduct, and compliance verification without identifying them as tools only to build leverage over business relationships, not address impacts caused or contributed to by the enterprise itself.

As regards assessment of the appropriateness of responsive measures, the Council's approach is mixed. It helpfully requires enterprises to consider their relationship to the impact (i.e. whether the company caused, contributed to, or is directly linked to it) as a factor for determining if a specific due diligence measure is appropriate. This could help ensure low-level responses are not employed by enterprises causing or contributing to impacts. The Council's approach better aligns with the OECD Guidelines because it does not introduce "influence" into the definition of "appropriate measures" (which affects whether an enterprise should respond), but recognises that influence can be relevant to how a company responds to prioritised risks and impacts. Less positively, the approach identifies "what is reasonably available to the company" as another factor for determining appropriateness, separating appropriateness from factors around the severity of the impact.

Parliament position

The Parliament's position improves on the other two. It expands on the association between the responsive action and the company's relationship to the impact. The Parliament also drops the closed and narrow list of actions highlighted by the Commission and Council, instead identifying many possible responsive measures,[20] recognising that what is appropriate will depend on the specific situation.

Recommendation

The Council's approach is stronger than the Commission's in its framing of appropriate measures and influence. However, both the Commission's and Council's positions are concerning in their presentation of a closed list of measures, which could diminish the effectiveness of the directive. The Parliament's choice of an open list of measures better aligns with the OECD Guidelines and is therefore recommended.

MSIs, industry initiatives, and audits

OECD Guidelines

The OECD Guidelines suggest that participation in industry schemes and multi-stakeholder initiatives (MSIs) can, if aligned with the Guidelines and for particular purposes related to implementing due diligence (such as to increase leverage), be relevant for parts of the due diligence duty. The Guidelines also clearly state that, "[a]lthough enterprises can collaborate at an industry or multi-stakeholder level, they remain individually responsible for ensuring that their due diligence is carried out effectively."
In the context of business relationships, this means that enterprises are not permitted to conduct a "lighter" form of due diligence over business relationships that are participating in an industry scheme, MSI, or audit.

Commission proposal

The Commission proposal encourages reliance on industry cooperation, industry schemes, and MSIs throughout all phases of the due diligence process, but in particular as a means to verify compliance of business partners with the company's code of conduct and prevention plan

This approach is concerning for several reasons. First, the emphasis on using industry schemes to monitor partner compliance deepens the impression that the due diligence duty is a perfunctory box ticking exercise: tick if the partner agrees to meet the enterprise's code of conduct and prevention plan; tick again if the partner is in an industry scheme that corresponds with the code and plan. Instead, the duty is meant to encourage enterprises to sensitively and dynamically assess whether their own and business relationships' actions are adequate to address each impact scenario. Second, the apparent 'off-shoring' of both the responsibility to act (through contractual cascading) and to assess business relationships' actions (through reliance on MSIs) puts the enterprise in a passive instead of proactive position. Thirdly, use of the term "reliance", which has strong connotations under contract law, could be construed to absolve an enterprise of its own responsibility to assess business relationships' due diligence so long as the enterprise reasonably relied on what the MSI or industry scheme reported about the partner.

20 The Parliament defines 'appropriate measures' as "measures that are capable of achieving the objectives of due diligence and effectively addressing the adverse impact identified pursuant to Article 6 in a manner proportionate and commensurate to the degree of severity and the likelihood of the adverse impact, and proportionate and commensurate to the size, resources and capacities of the company.This shall take into account the circumstances of the specific case, including the nature of the adverse impact, characteristics of the economic sector, the nature of the company's specific activities, products and services, the specific business relationship"

Council General Approach

The Council's approach mirrors the Commission's proposal, also encouraging companies to rely on such initiatives to support implementation of their due diligence obligations to the extent that such schemes and initiatives are appropriate to support the fulfilment of those obligations.

Parliament position

The Parliament also describes sector initiatives, MSIs, certification, and auditing as useful parts of the due diligence ecosystem. But while it proposes that enterprises use these tools, the Parliament does not encourage over reliance on them as the other EU institutions do. Instead, under the Parliament proposal, companies should conduct their own assessment of the extent to which sector-specific schemes and initiatives align with their own due diligence obligations.

In relation to auditors and certifiers, the Parliament proposes that Member States should themselves accredit auditors. This is concerning, as regulators and judges might be more likely to excuse enterprises from liability for adverse impacts if they relied on an auditor accredited by an EU Member State.

Recommendation

None of the three institutions' proposals adequately discourage over-reliance on MSIs and third-party verification by companies. None includes a strategy on how to mitigate the risk of faulty assessments of fitness by schemes or MSIs. And while none goes so far as to grant explicit exemption from liability for scheme participants, all the positions (in particular the Parliament's) risk encouraging regulators and judges to excuse enterprise's from liability for adverse impacts if their reliance on an auditor appeared reasonable.

The Parliament position is more closely aligned with the Guidelines than the others as regards use of industry initiatives by clarifying that companies remain responsible to conduct their own assessment of the extent to which sector-specific schemes and initiatives align with their due diligence obligations. If the Parliament's position is adopted, the Commission and Member States should facilitate the dissemination of information on industry schemes or MSI and their outcomes and could (or according to the Council, should) issue guidance for assessing the fitness of these schemes and initiatives.

Meaningful stakeholder engagement

OECD Guidelines

According to the Guidelines, due diligence must be informed by meaningful engagement with stakeholders. The Guidelines describe "meaningful stakeholder engagement" as "a key component of the due diligence process. In some cases, stakeholder engagement may also be a right in and of itself. Stakeholder engagement involves interactive processes of engagement with relevant stakeholders, through, for example, meetings, hearings or consultation proceedings. Relevant stakeholders are persons or groups, or their legitimate representatives, who have rights or interests related to the matters [assessed through due diligence] that are or could be affected by adverse impacts associated with the enterprise's operations, products or services."

If enterprises prioritise engagement with certain stakeholders, they should prioritise engagement with "the most severely impacted or potentially impacted stakeholders" - not those most easily accessed by or amenable to the company. Under the Guidelines, meaningful stakeholder engagement must be ongoing, two-way, conducted in good faith, responsive to stakeholders' views, timely, accessible, appropriate, safe for stakeholders, and should involve identification and removal of potential barriers to engaging with stakeholders in positions of vulnerability or marginalisation.

Commission proposal

The Commission's proposal departs from this standard, foreseeably resulting in less meaningful stakeholder engagement, especially for affected stakeholders. The Commission defines a number of specific situations when stakeholders' views should be integrated into the duty, while leaving out other moments crucial for engagement - such as when scoping for risks, identifying and assessing risks, and monitoring and verifying due diligence actions taken. The proposal does not recognise scenarios where engagement with rights-based stakeholders may not be appropriate (for example, because it could cause risks leading to (additional) harm, and thus where engagement with relevant proxies (such as civil society actors and experts) could be preferred. This piecemeal approach contradicts the continuous and dynamic involvement of stakeholders described in OECD Guidelines.

Council General Approach

The Council's text broadly follows the Commission's proposal for stakeholder consultation, although adds a recital of continuous stakeholder-involvement.[21] The Council also helpfully broadens the definition of "stakeholders", and thus better captures other groups whose rights may be affected or who can act on behalf of rightsholders, such as civil society actors, national human rights and environmental institutions, and human rights and environmental defenders.

Parliament position

The Parliament's position mainstreams stakeholder engagement throughout the entire due diligence process. It differentiates between affected stakeholders and experts, which are external to the company, and workers and unions, which are internal. The parliament also introduces the category of vulnerable stakeholders. It further foresees a right to reply to the complainant as well as guarantees against retaliation against stakeholders that speak out against the business activity.

Recommendation

The OECD Guidelines frame ongoing meaningful stakeholder engagement as an overarching component of the due diligence process. The Parliament position also presents stakeholder involvement as relevant throughout the duty, in contrast with the piecemeal approach of the Commission. While a recital in the Council approach on the continuous nature of stakeholder involvement hints at alignment with the Guidelines, the Parliament approach provides more clarity and greater detail to how to operationalise continuous engagement.

As to the definition of stakeholder, couple different positions have different strengths in aligning with the Guidelines: the Council invites engagement with a broader range of stakeholders. The Parliament in turn calls on enterprises to recognise and address the additional vulnerabilities stakeholders may have.

21 Recital 26a

Responsible disengagement

OECD Guidelines

The OECD Guidelines identify responsible disengagement as a tool of leverage over business relationships that are failing adequately to address identified adverse impacts. In this regard, enterprises are encouraged to build leverage by, among other things, communicating (in advance) to the business partner the possibility of the enterprise's disengagement if they do not meet expectations around RBC. The Guidelines state that disengagement from a business relationship or activity may be an appropriate response, including where the enterprise's efforts to encourage its business relationship to improve its practices have not been effective. But importantly, the Guidelines do not mandate disengagement. This enables the enterprise flexibility to take the approach that is best for the situation at hand, informed by meaningful stakeholder engagement: the Guidelines underscore that "when deciding to disengage [from a business relationship or activity], enterprises should do so responsibly including by seeking meaningful consultation with relevant stakeholders in a timely manner." Critically, the Guidelines also underscore that enterprises should take "reasonable and appropriate measures to prevent or mitigate adverse impacts related to their disengagement". The Guidelines can also be interpreted to expect that disengagement for any reason should be undertaken responsibly.

Commission proposal

The Commission proposal foresees a duty to disengage when the enterprise is unable to encourage prevention or cessation of an impact. But the proposal does not call on enterprises to address the impacts that disengagement itself could generate.

Council General Approach

The Council's approach worsens the Commission's proposal. It seems to include the possibility for companies not to terminate the business relationship if there is a reasonable expectation that termination would cause more severe impacts than the potential underlying impact. The approach ignores that these are two separate sets of impacts (i.e. the initial impacts and impacts caused by disengagement), and that the adverse impacts of disengaging may be more effectively addressed than the original impacts. Additionally, the Council's approach prioritises business needs over rightsholders' needs by allowing enterprises to continue engagement with irresponsible partners if there is no other entity that can provide an alternative raw material, product, or service, and where termination (or the prospect thereof) would therefore cause substantial prejudice to the company.

Parliament position

The Parliament's position on responsible disengagement is mixed. The Parliament's position calls on enterprises to assess and address the new and additional impacts of disengagement. More negatively, it rigidly requires companies to disengage where their impact prevention or mitigation efforts fail. This rigidity contrasts with the flexible, stakeholder input-driven approach of the OECD Guidelines. In addition, the Parliament's position would only apply when companies are causing or contributing to adverse impacts, not when they are merely directly linked through business relationships. In situations of direct linkage, leverage is typically lower, making (the threat of) responsible disengagement a more important tool for addressing adverse impacts. The Parliament's failure to extend responsible disengagement to these scenarios vastly reduces its effectiveness and significance.

Recommendation

All three positions fall below the standard of the Guidelines. The Commission's proposal aligns best with the Guidelines as regards explaining when a company should disengage. The Parliament's position aligns best in describing how disengagement should be undertaken responsibly, namely by addressing impacts related to disengagement itself.

Remediation

OECD Guidelines

The Guidelines provide that when companies are causing or contributing to an impact, they have an obligation to provide for or cooperate in remedy. The Guidelines also make clear that where an enterprise is directly linked to impacts through its business relationships, it has a responsibility to use leverage to influence the entity causing the impact to prevent, mitigate, or remediate it.

Commission proposal

The Commission proposal does not include language on remediation of impacts. The proposal does require companies to establish a complaints mechanism covering issues arising in their value chain - but this responsibility is merely procedural; the proposal does not elaborate on the needed outcomes of such a mechanism, including whether it should generate remedy of adverse impacts.

Council General Approach

The Council's approach calls for remediation of impacts as part of the due diligence duty, but only "where relevant." The text does not define where remediation is relevant. The Council's approach also requires companies to establish a grievance mechanism. Only partially positively, the approach calls for grievance mechanisms to meet some of the UNGPs' effectiveness criteria (namely, that the mechanisms be fair, accessible, and have transparent procedures), but inexplicably leaves out other criteria.

Parliament position

The Parliament clarifies that companies causing or contributing to actual impacts should provide for or cooperate in remediation, and that companies directly linked to impacts should use their leverage to seek remedy of impacts. The proposal refers to a range of remedial options focused not only on making rightsholders whole but also preventing additional harms, but it does not specify the relation to non-repetition of harm.

The Parliament's position requires enterprises to establish a grievance mechanism for redressal of impacts to affected stakeholders. The proposal requires that grievances mechanisms meet the majority of the UNGPs' effectiveness criteria, but excludes the requirement that the mechanism be "a source of continuous learning". The proposal also seeks that grievance mechanisms meet other overarching criteria, such as that they include gender-based perspectives, protect individuals at risk of retaliation, and ensure stakeholder engagement. The Parliament's position clarifies that the use of the grievance mechanism is not a prerequisite for use of other mechanisms, such as the OECD National Contact Points. Finally, the Parliament position also requires a notification mechanism through which stakeholders can inform the company of risks and impacts.

Recommendation

The Parliament position broadly aligns with the OECD Guidelines by addressing the remediation responsibilities of companies at all levels (cause, contribute, and directly linked) of relationship to adverse impacts. However, there is still scope for further alignment with the OECD Guidelines in the qualification of remedy.

TABLE 6: OVERVIEW OF PROPOSALS ON DUE DILIGENCE DUTY EXPECTED OF CORPORATIONS

ELEMENT	OECD GUIDELINES	COMMISSION	COUNCIL	PARLIAMENT
IDENTIFYING AND ASSESSING RISKS AS PART OF DUE DILIGENCE	The due diligence duty requires initial broad scoping followed by in-depth assessments starting first with higher risk impacts.	The due diligence duty requires assessments of operations, subsidiaries and established business relations.	The due diligence duty suggests an optional mapping exercise and then assessments of operations, subsidiaries and business relations.	The due diligence duty requires initial broad scoping followed by in-depth assessments of higher risk impacts (only).
PRIORITISATION IN ADDRESSING IMPACTS	The due diligence duty allows companies to prioritse actual and higher risk impacts where it is not feasible to address all impacts at once. Companies should address all impacts.	The due diligence duty does not explicitly allow prioritisation.	The due diligence duty allows companies to prioritise actual and higher risk impacts where it is not feasible to address all impacts at once, albeit with confusing terminology around "significant" impacts. Companies should address prioritised impacts in a reasonable amount of time to allow further addressal of all impacts.	The due diligence duty allows companies to prioritse actual and higher risk impacts where it is not feasible to address all impacts at once. Companies should address prioritised impacts in a reasonable amount of time to allow further addressal of all impacts.
RESPONDING APPROPRIATELY TO POTENTIAL AND ACTUAL ADVERSE IMPACTS	Responses to impacts should relate to the company's relation to the impact and be commensurate with the severity of the harm.	Companies need to take appropriate measures, but heavy reliance on contractual cascading and monitoring.	Companies need to assess their relation to the impact and take appropriate measures, but with heavy reliance on contractual cascading and monitoring.	Companies need to assess their relation to the impact and take appropriate measures which are commensurate with the severity of the harm.
PROMOTION OF INDUSTRY SCHEMES AND MSIS	Companies remain responsible for due diligence and need to assess whether the scheme/MSI/ auditor is fit for purpose.	Promotion of sector initiatives and companies can rely upon them for monitoring of contractual cascading.	Promotion of sector initiatives and companies can rely upon them for monitoring of contractual cascading.	Promotion of sector initiatives; however, companies should assess whether they align due diligence obligations. States recommended to promote use of auditors by accrediting auditors.

STAKEHOLDER INVOLVEMENT	Continuous stakeholder involvement, with broad coverage of stakeholders including rightsholders.	Ad-hoc stakeholder involvement (where relevant) with narrow coverage of stakeholders.	Ad-hoc stakeholder involvement (where relevant), but broader coverage of stakeholders.	Continuous stakeholder involvement, with broad coverage of stakeholders (affected stakeholders, experts, unions, …) and relevant dispositions (right to reply and protection).
RESPONSIBLE DISENGAGEMENT	When impacts are not addressed and company has insufficient leverage, the company can disengage. Company should address impacts associated with disengagement.	When impacts are not addressed, company has to suspend or terminate the relationship. No mention of addressing impacts associated with disengagement.	When impacts are not addressed, company has to suspend or terminate the relationship, unless the impact of such a decision is greater or if the product/service is difficult to substitute.	When impacts are not addressed and company has insufficient leverage, the company must disengage – but only where the company is causing or contributing to adverse impacts. Company should address impacts associated with disengagement.
PROMOTION OF INDUSTRY SCHEMES AND MSIS	Companies remain responsible for due diligence and need to assess whether the scheme/MSI/ auditor is fit for purpose.	Promotion of sector initiatives and companies can rely upon them for monitoring of contractual cascading.	Promotion of sector initiatives and companies can rely upon them.	Promotion of sector initiatives and companies can use them. However, does propose the accreditation of auditors.

CONCLUSION

While all three institutional positions have shortcomings, the Parliament's most closely aligns with the OECD Guidelines. The Parliament's position integrates much of the OECD Guidelines, including appropriate measures to be taken by companies commensurate with the severity of the harm, and a remedy framework recognising both the due diligence and remedial function of a grievance and notification mechanism. However, there are also limits to the Parliament's alignment with the Guidelines, for example, not requiring companies to exercise leverage to encourage remediation when they are directly linked to an impact, or regarding its proposal for States to accredit auditors.

OECD Watch recommends that trialogue negotiators take care to adopt the elements of the three positions that best align with the Guidelines. In so doing, they can help avoid a proliferation of conflicting norms and laws and achieve the correct balance between providing companies and rightsholders with sufficient legal certainty and allowing companies enough flexibility to ensure the due diligence duty is workable, proportionate, and responsive to actual human rights and environmental risks and impacts.

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About OECD Watch

OECD Watch is a global network with more than 130 members in over 50 countries. Membership consists of a diverse range of civil society organisations bound together by their commitment to ensuring that victims of corporate misconduct have access to remedy, that business activity contributes to sustainable development and poverty eradication, and that corporations are held accountable for their actions around the globe.

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