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ICBHR Briefing Paper:

HOW DO WE IMPROVE THE EU CORPORATE SUSTAINABILITY DUE DILIGENCE LAW?

The European Commission has recently published its long-awaited new draft rules on corporate accountability. The proposed new EU **Corporate Sustainability Due Diligence** (CSDD) Directive is aimed at cleaning up global supply chains and minimising the negative global impacts of business on workers, communities, and the environment. This is an important opportunity to ensure that those who profit from human rights and environmental violations are held to account and that affected communities can access justice.

The Irish Coalition for Business and Human Rights (ICBHR) welcomes the publication of this draft Directive, which will ultimately need to be transposed into Irish law, as a significant milestone in shifting away from the current reliance on predominantly voluntary standards towards firmer legal requirements for mandatory human rights and environmental ‘due diligence’ rules for businesses. **However, at present there are significant weaknesses and serious flaws in the draft text that risk it being an ineffective tick-box exercise.**

This paper outlines key recommendations for the Irish Government, MEPs, TDs, and Senators to strengthen the draft Directive. We are keen to ensure that this CSDD Directive is as effective as possible, and truly transforms the situation on the ground for the impacted communities and human rights defenders, particularly women and indigenous peoples, who are most affected by corporate abuses of power.

The Irish Coalition for Business and Human Rights (ICBHR) is a coalition of over 20 members including human rights, international development and environmental organisations, trade unions and academic experts, working collaboratively to progress corporate accountability, based on respect for human rights and the environment.

Members include: Centre for Business and Society of University College Dublin, Christian Aid Ireland, Comhlámh, DCU Business School, Fairtrade Ireland, Friends of the Earth Ireland, Front Line Defenders, Global Legal Action Network, Irish Congress of Trade Unions, Irish Council for Civil Liberties, Latin American Solidarity Centre, National Women’s Council of Ireland, Oxfam Ireland, Proudly Made in Africa, Trinity College Dublin Centre for Social Innovation, Trócaire.

Summary :

Key areas to Maintain:	Key areas to Improve:
<p>From voluntary to mandatory: the proposed Directive marks a major shift away from purely voluntary approaches which seek to ‘encourage’ responsible corporate behaviour to binding human rights and environmental obligations</p>	<p>Applies to very few businesses: 99% of businesses would be excluded from these new EU rules, including the vast majority of Irish companies</p>
<p>Responsibility for activities overseas: the Directive will enshrine a responsibility for companies to do due diligence and check for harms not just in their own activities, but also along their value chains. This is a crucial step.</p>	<p>Dangerous loopholes: However, companies may be able to avoid being held accountable by including ‘get out’ clauses in contracts with suppliers, effectively shifting the burden down the supply chain and evading responsibility. Also, only ‘established business relationships’ will be covered, leaving out short-term and informal suppliers.</p>
<p>Civil liability: victims of human rights violations will be able to take cases against companies in European courts and seek compensation where harm occurs.</p>	<p>Access to justice: the significant barriers to communities being practically able to take complex and expensive cases against EU companies remain unaddressed, and the remedies foreseen are limited.</p>
<p>People and planet: the Directive covers both human rights and the environment, recognising the link between the two, and introduces mandatory climate transition plans for some companies.</p>	<p>Climate ambition: the Directive’s climate provisions are weak, with vague standards and limited enforcement. Greenhouse gas emissions are not included in the list of environmental harms to be assessed by companies.</p>
	<p>Putting people first: The Directive is weak on meaningful engagement with impacted communities, trade unions and protection of human rights defenders.</p> <p>Furthermore, the draft law doesn’t address specific challenges faced by marginalised groups, particularly women and indigenous people. Victims and rights-holders need stronger recognition in the text.</p>
	<p>Conflict contexts: The Directive doesn’t outline specific responsibilities for businesses operating in or sourcing from conflict situations or occupied territories, which require a higher duty of care. Companies should be required to undertake conflict-sensitive due diligence checks.</p>

Recommendations:

We are urging the Irish Government, MEPs, TDs, and Senators to ensure Ireland uses its influence, particularly in the Council of the EU and the European Parliament, to strengthen the draft Directive.

Furthermore, the areas where the draft Directive is strong and robust should be protected and defended from any weakening or watering down during negotiations. In particular, civil liability should be protected. The possibility to hold companies liable for failing to prevent and for causing harm has been a key ask of civil society for many years, and could make a significant difference to the communities, workers and human rights defenders that we work with around the world. Furthermore, responsibility along the full depth of the value chain, recognition of climate impacts, and the inclusion of duties for directors should also be retained.

Yet there are still significant weaknesses in the text, which may undermine these positive aspects and render the Directive ineffective unless they are addressed.

Key areas to strengthen:

1. Widen the scope of companies included

All companies should have to adopt proportional human rights and environmental due diligence measures and take responsibility for impacts

The proposed law would apply only to companies with an annual turnover of over €150 million and more than 500 employees. In high-risk industries (defined extremely narrowly as only three sectors: agriculture, garments and extractives), the scope is wider: companies with more than 250 employees and a net turnover of more than €40 million would be covered. All other businesses would be exempt.

Based on latest CSO data, we estimate **that fewer than 700 Irish companies** will have to check for human rights impacts along their value chains. The European Commission has stated that if passed in its current form, 99% of companies would be exempt. By limiting the scope to so few companies, the proposal will fail to meaningfully address many harmful business impacts, including child labour, deforestation, oil spills and land grabs.

Neither turnover nor staff size alone can properly measure a company's capacity to harm human rights or the environment. In the Irish context in particular, a blunt threshold of 250+ or 500+ employees would be ineffective. There are many businesses in the State with a significant scale of assets and activities, with balance sheets totalling billions of euro, and a comparatively low number of employees. For instance, the Dublin-based coal company CMC (Coal Marketing Company) has an annual turnover of over half a billion euro, yet only has 27 employees, so wouldn't be covered. CMC markets coal from the infamous [Cerrejón mine in](#)

2. Address loopholes which could make Due Diligence a tickbox exercise

Due diligence obligations should extend along the whole chain with no loopholes

The proposal requires companies to undertake due diligence throughout their global value chains. This is essential and very welcome within the draft Directive. However, there are two dangerous loopholes which need to be urgently addressed which undermine this principle in effect.

Limiting to ‘Established business relationships’

Firstly, the Directive outlines that the requirement to conduct due diligence along the full value chain only applies with regard to so-called ‘established business relationships.’ Business relationships that are not expected to be lasting would fall outside the scope. This could leave out short, unstable or informal relationships, which are ones where severe impacts are actually more likely (such as labour rights abuses in poorly regulated informal work settings). It could also incentivise companies to switch suppliers more regularly.

To be effective, the Directive should be revised in line with UN and OECD standards for human rights due diligence (to cover the full value chain, upstream and downstream), adopt a risk-based approach, and prioritise impacts on the basis of their severity and likelihood, not the characteristics (duration or intensity) of their business relationships.

Contractual assurances should not be used as a way to avoid responsibility

Secondly, the draft Directive implies that companies could fulfil their due diligence obligations by simply adding certain clauses in their contracts with suppliers and offloading the verification process to third parties. This loophole risks making the law ineffective in preventing harm beyond the first tier of the supply chain – and impeding victims from holding companies liable.

What could this mean in practice? Experts fear that if an affected person (for instance, a garment worker exploited in a factory in South East Asia) tried to take a case against an Irish company (which for instance, had a controlling influence over the working conditions in the supplier’s factory) through the courts in Ireland, the case potentially might fail if the Irish company had simply signed contractual agreements with its suppliers further down the supply chain.

This prominence given to ‘contractual assurances’ by business partners and third-party verification of compliance is highly problematic. Both are widely known to be insufficient for prevention and mitigation purposes and risk watering down obligations by limiting

them to a mere box-ticking exercise. Companies should not be allowed to shift their due diligence responsibilities on to their suppliers or to outsource their responsibilities to third parties using voluntary industry schemes. If companies can easily evade accountability through loopholes, the Directive will lack real teeth.

3. Ensure effective Civil Liability and meaningful access to justice

Address the barriers that prevent victims of corporate abuse obtaining remedy

The proposal includes civil liability, where victims will now be able to take cases against EU companies through EU courts. Civil liability is a crucial element to advance corporate accountability, ensure judicial remedy and incentivise compliance.

Address barriers for victims to take cases

However, the draft Directive fails to address the many and well documented practical barriers to taking transnational human rights cases, including cost as a barrier, lack of access to information and evidence, and lack of collective redress mechanisms where violations are widespread and diffuse. Without addressing these issues it falls on the under-resourced victims to collect the evidence which is often in the hands of a company and inaccessible, and also to finance a court case, which is often thousands of miles from the community where harm occurred. Given that many instances of corporate exploitation affect the most marginalised communities and individuals, including women, indigenous people and poorer communities, these barriers are prohibitive.

As such, the Directive needs to ensure a fair distribution of the burden of proof, ensure that the limitation periods for bringing liability claims is reasonable, that claimants have recourse to collective redress mechanisms, and that civil society organisations and trade unions are entitled to bring representative actions on behalf of victims, and that the risks they may face in doing so are mitigated. Member States also need to set up measures to provide support and legal aid to claimants.

Include different forms of effective remedy

The Directive also needs a much more thorough consideration of effective remedy, which takes account of responsibility and different contexts. Under the current proposal, companies are expected to remedy impacts by payment of damages. It fails to mention other important forms of remedy beyond financial compensation such as guarantees of non-repetition, restitution (such as returning land or a natural resource), rehabilitation (like restoring a river or the natural environment) or even apology.

Include criminal liability

The proposal should also include provisions on criminal liability for the most egregious abuses, such as large-scale environmental damage, or for repeated breaches. Without any criminal provisions at all, companies may foresee the paying of fines as an acceptable cost of a particularly lucrative business practice or model.

4. Don't leave women behind

Due diligence obligation needs to be gender-responsive

The draft EU Directive fails to acknowledge how women are disproportionately affected by abuses in global value chains. The proposal lacks specific reference to the impacts of corporate activities on women – this is a very significant shortcoming which needs to be addressed.

Women are over-represented in precarious work with poor working conditions and are vulnerable to exploitation and abuse, including sexual abuse. Women are also more vulnerable to corporate land grabs. Women also face legal barriers including not being equal before the law, lack of legal fees, failure to follow up on the reported crimes by authorities, and unsuitable remedies in a context whereby remedial mechanisms adopt gender-neutral processes that do not take account of the specific harms experienced by women.

Human rights and environmental due diligence should be gender responsive and should take into account the fact that human rights, environmental, and governance risks and impacts are not gender neutral. Gender responsive due diligence requires that attention be paid to the specifics of women's experiences, is informed by gender disaggregated data, and requires business to ensure meaningful participation of potentially affected women, women's organisations, women human rights defenders and gender experts in all stages of human rights due diligence. Gender-responsive remedies should also be adopted that could change discriminatory power structures and reduce violence against women.

5. Ensure meaningful engagement with communities

Affected communities need to be informed and consulted, and human rights defenders need to be protected

As laid out in the UN Guiding Principles on Business and Human Rights, human rights due diligence is fundamentally intended as a process to protect against human rights abuses by business enterprises. It is about assessing and addressing risks and harms to people, rather than risks to the business. Therefore, we need to put people first - the centrality of rights-holders is crucial for the effectiveness of human rights due diligence.

The draft Directive should be improved to ensure companies are engaging meaningfully with communities and other stakeholders such as human rights defenders and trade unions. At present, it does not make it a requirement for companies to engage with affected stakeholders such as communities, trade unions and human rights defenders, in

the assessment of human rights and environmental risks, only saying that companies shall carry out consultations with potentially affected groups where relevant.

Furthermore, a corporate obligation to obtain the Free, Prior and Informed consent of Indigenous Peoples when business projects may affect their land, territory and resources, as recognised in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), is also missing from the text. Around the world, indigenous peoples are dispossessed or denied rights to their land and attacked, threatened, and killed for defending their territories, often from corporate activities.

6. Address reprisals against human rights defenders and whistle-blowers

Ensure the protection of human rights defenders, whistle-blowers and others put at risk due to their engagement with the human rights due diligence process

Human rights defenders, whistle-blowers and other actors face huge risk for speaking out about the negative impact of business enterprises through consultations, grievance mechanisms or other means. Yet for human rights due diligence to be effective, companies need to hear from these groups so that their assessment of the potential negative impacts of their activities, and their development of prevention plans, can be properly informed. However, they are unlikely to speak up if they face significant risks for doing so.

Currently the draft Directive proposes the expansion of the EU Directive on the protection of persons who report breaches of Union law (the Whistleblower Protection Directive) to also cover breaches in this new directive. However, the Whistleblower protection Directive only applies to a small group of persons– employees, contractors etc. and it would not apply to most human rights defenders. The CSDD directive should ensure protection covers all stakeholders who may be at risk for raising their voice.

Given the unique knowledge of local and specific human rights situations that human rights defenders hold, they should be named as key stakeholders to be consulted by companies when carrying out their due diligence obligation to identify and assess negative human rights and environmental impacts and to design and implement plans to mitigate and address such impacts. Given the recognised and well-documented risks that human rights defenders face in the context of business operations, the UN Declaration on Human Rights Defenders should be specifically referenced in the Annex to the Directive.

7. Strengthen Climate Change provisions

Environmental impacts need to be sufficiently covered and climate measures need teeth

Insufficient list of environmental impacts

The proposal includes a limited definition of environmental impacts for companies to address in their due diligence process. It is narrowed down to a noticeably insufficient list of environmental violations, and does not cover for example marine protection, air pollution or oil spills on water.

Furthermore, the proposal also fails to explicitly include greenhouse gas emissions within this list. Climate impacts should be included in the list, among the impacts that companies must identify, prevent and mitigate through their due diligence processes, in line with international agreements and national climate strategies and policies.

Climate transition plan lacks teeth

The draft rules would require large companies to adopt a climate transition plan in line with the 1.5 degree target of the Paris climate agreement. However, it does not outline any specific consequences for the breach of this duty, which risks making this climate duty ineffective. As such, the climate duty reads as a weak, formal requirement, limited in scope, rather than as a substantive obligation to reduce climate impacts.

The Directive should require companies to have concrete obligations to develop and implement an effective transition plan in line with the Paris Agreement, including short, medium, and long term reduction targets. These obligations should be enforceable by courts and public authorities.

Just Transition

It is important that principles of a 'Just Transition' are adhered to as companies undertake their due diligence. A Just Transition secures the future and livelihoods of workers and their communities in the transition to a zero-carbon economy. As the world shifts away from harmful fossil fuels, it is essential that private actors do not simply leave communities to pick up the pieces and as such, the Directive should encourage responsible disengagement.

8. Include responsibilities for situations of conflict and occupation

Businesses active in or sourcing from conflict situations or occupied territories should be required to undertake conflict-sensitive due diligence checks

We know from our work around the world, and decades of evidence, that operating in fragile or conflict-affected contexts carries heightened risks. The draft Directive fails to outline the specific requirements of businesses related to situations of conflict and occupation. This is despite the UN Working Group on Business and Human Rights having set out recommendations that businesses should conduct conflict analysis and plan to prevent and mitigate abuses so their activities do not exacerbate tensions, create new ones, or aggravate grievances.

Moreover, in situations where businesses cannot ensure compliance to enhanced due diligence, because either the conditions are connected to serious violations of

international law (for example, business activities connected with illegal Israeli settlements in the occupied Palestinian territories) or flagrant breaches of democratic principles (Myanmar), they should not operate there, or responsibly disengage from suppliers.

As such, the Directive should outline that a heightened standard of care is expected where a business operates in, or sources within its global value chain, from situations of occupation or conflict. Businesses operating in conflict-affected areas should be expected to conduct appropriate due diligence, respect their international humanitarian law obligations, and refer to existing international standards and guidance including the Geneva Conventions and its additional protocols.

What happens next?

The Directive when passed will have to be transposed into national law across all EU Member States. Yet the draft proposal still has a long way to go before being finalised. The proposal will next be progressed through the EU's institutions, before entering trilogue negotiations with the European Commission, MEPs in the European Parliament, and EU Member States in the Council of the EU. This means there is an important opportunity to address its flaws and loopholes, but also potential for the rules to be weakened even further still.

It is essential that Irish elected representatives and decision-makers show leadership to deliver a strong, robust, gender-responsive law that addresses and ultimately enhances the human rights of affected communities. More than a decade after the landmark *UN Guiding Principles on Business and Human Rights* were agreed, this is a crucial chance to put those voluntary principles on a firmer, legal footing.

Recommended actions:

- The Minister for Enterprise, Trade and Employment, in consultation with other relevant government departments, should lead on outlining publicly a clear policy position of the Irish Government on the CSDD, including discussion on key areas such as scope and civil liability, as has been set out by other EU Member States.
- The Irish Government should support robust mandatory human rights due diligence legislation in line with existing UN & OECD standards, and the principles set out in this paper and in the ICBHR's [Make it Your Business](#) report.
- At discussions and in key decisions at the Council of the EU, Irish decision-makers should seek to raise the ambition of the EU Directive and address the recommendations outlined above.
- Irish MEPs should also work to defend and strengthen the Directive, particularly in relevant committees of the European Parliament and in plenary votes.

How can Ireland prepare the Groundwork?

In order for Ireland to make the above contribution at EU level, we urgently need a detailed and thorough national debate that can inform Government policy. It is essential that Ireland

follows the example set by other European countries and begins the necessary preparatory work now for an Irish due diligence framework, and a suite of primary national legislation that can enable a smooth transposition of the EU Corporate Sustainability Due Diligence Directive when passed.

Consultation with relevant stakeholders, parliamentary debate, scrutiny in the relevant Oireachtas Committees, cross-departmental collaboration on workable legislation and an effective regulatory framework will all take time. We need to start this process now rather than waiting until a final Directive is agreed, which would only add further years of delay to the wait for meaningful, effective laws for corporate accountability. Beginning a detailed and thorough national debate and preparing a strong domestic framework would also help to raise the bar for the European Directive as it progresses.

Recommended actions:

- The Joint Oireachtas Committees on Enterprise, Trade and Employment; EU Affairs; Justice; Foreign Affairs; Environment and Climate Action; should conduct hearings and carry out full legislative reviews of the draft CSDD Directive to ensure parliamentary oversight of the process and progress cross departmental collaboration.
- The Department of Enterprise, Trade and Employment should progress a time-bound public consultation with relevant stakeholders, including human rights defenders and affected communities, trade unions, civil society organisations and business groups on the CSDD Directive and the development of an effective national ‘due diligence’ framework.
- In setting out a clear, public policy position on the CSDD Directive, the Irish Government should instruct the relevant Government Departments to work collaboratively across their areas of relative competence. This could include, but is not limited to: Department of Justice (access to justice through Irish courts), Department of Foreign Affairs (human rights standards and international law), and the Department of Enterprise, Trade and Employment (company regulation). The relevant Departments should conduct and publish analysis setting out the key areas of existing Irish law that would need to be amended or expanded to introduce an effective due diligence framework¹.
- The Government should outline a clear timeframe with steps for the preparatory work, development and ultimate transposition and implementation of the CSDD Directive in Irish law.

Further analysis:

- **Detailed analysis from the European Coalition for Corporate Justice :** [“The European Commission’s proposal for a Directive on Corporate Sustainability Due Diligence”](#)
- **Make it Your Business:** The Irish Coalition for Business and Human Rights has recently published a report [“Make it Your Business”](#) which proposes principles for a strong and effective mandatory human rights and environmental due diligence legislation.

¹ The [Review of Access to Remedy in Ireland](#) report published by the Dept of Foreign Affairs in 2020 contains useful recommendations and analysis