

# Strengthening Stakeholder Engagement in the EU Corporate Sustainability Due Diligence Directive

## Policy Briefing Paper

Global Justice Clinic at Erfurt University in cooperation with the German Institute for Human Rights and Luxembourg University

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# Executive Summary

The proposal for a directive on corporate sustainability due diligence, adopted by the European Commission on 23 February 2022, is an important step forward for human rights protection in global value chains. However, this proposal **neglects a key element for effective due diligence: engagement with rights-holders**, particularly those in the Global South. The provisions on stakeholder engagement are fragmented, vague, and underdeveloped. Additionally, these provisions do not adequately reflect the current state of international human rights law and international guidelines. The Commission's proposal falls short of creating the regulatory environment necessary to enable effective implementation of sustainability due diligence.

Therefore, this policy briefing paper discusses the rationales for including more substantive provisions on engagement with stakeholders in general and with rights-holders in particular. It also pinpoints areas for improvement in the current draft and makes recommendations for **strengthening the provisions on stakeholder engagement**, proposing [specific language for amendments](#) in the final text of the directive.

## Key recommendations:

1. Adopt a rights-holder centered approach throughout the CSDDD **and emphasize the agency of rights-holders** in the recitals as well as in the general provisions on subject matter and due diligence (Art. 1, 4).
2. Revise the definition of stakeholders in Art. 3 and **identify rights-holders as the central category of stakeholders for HREDD**, distinguish between **potentially or actually affected rights-holders**, and other types of stakeholders that legitimately represent rights-holders, such as trade unions, NGOs and human rights and environmental defenders.
3. Include **a new stand-alone provision on stakeholder engagement** (Article 11a). This provision should include the following legal requirements: 1) A duty of meaningful engagement throughout the due diligence process as provided for in Articles 4-11; 2) Adequate identification and prioritization of stakeholders in general and rightsholders in particular; 3) Adequate and timely information to rights-holders and their legitimate representatives; 4) proactive removal of barriers to engagement for marginalized and vulnerable groups; 4) Safety, security and confidentiality; 5) Documentation and clear internal responsibilities.
4. **Remove vague language** limiting stakeholder engagement (“where relevant”) from Articles 6(4) and 8(3) and **make engagement mandatory in all phases of the due diligence process**, including engagement with affected rights-holders when remediating actual adverse impacts; remove limiting language from Art. 9(2) and allow complaints by NGOs regardless of whether they are active in the respective value chain or not; require stakeholder engagement in monitoring under Art. 10.

# 1. Introduction: Context and aims of this policy briefing paper

The proposal for a directive on corporate sustainability due diligence (hereinafter “the CSDDD”), adopted by the Commission on 23 February 2022 (hereinafter “the Commission”) is an important step forward for human rights protection in global value chains. However, the proposed text **neglects a key element for effective due diligence: engagement with rights-holders**, particularly those in the Global South.

When conducting human rights & environmental due diligence (hereinafter “HREDD”), engagement with affected stakeholders is essential to finding meaningful solutions. It is therefore considered a key element of HREDD by the Organization for Economic Co-operation and Development (OECD) Guidance for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights (hereinafter “the UNGPs”), and international human rights law increasingly requires it. The Commission’s draft does not adequately provide for this requirement, leaving the **provisions on stakeholder engagement vague and at risk of undermining international standards**.

In this policy briefing paper, we: (1) Explain what stakeholder engagement is, and why it is essential for sustainable due diligence; (2) Analyze the shortcomings of the current provisions on stakeholder engagement; and (3) Make recommendations to amend the draft to strengthen stakeholder engagement. These recommendations partly align with amendments proposed by the European Parliament in 2020/2129(INL), and go beyond these proposed amendments in important respects.

This policy briefing paper is motivated by a significant imbalance in the drafting process of the proposed directive. Unlike other EU legislation, the proposed directive is intended to have a significant impact outside the EU. Yet, stakeholders from outside the EU were disproportionately under-represented during the online requests for input announced by the Commission. The Commission first opened a public call for feedback from 30 July 2020 to 08 October 2020 during its inception impact assessment phase. Only 3% of the respondents were based in the Global South. The Commission then held a consultation from 26 October 2020 to 08 February 2021. Only 4% of the responses were submitted by stakeholders in the Global South. Another call for feedback was opened from 28 March 2022 - 23 May 2022. Only 6% of responses were submitted by stakeholders from the Global South.<sup>1</sup> Unsurprisingly, the Commission proposal does not adequately reflect the need for meaningful engagement with rights-holders, especially those in the Global South.

Therefore, this policy briefing paper is based on research and expert consultations conducted by public policy professionals, including those from the Global South, who are

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<sup>1</sup> Directorate-General Justice and Consumers, European Commission, ‘Sustainable Corporate Governance Initiative Summary Report – Public Consultation’, 2021; European Commission. ‘Feedback and Statistics: Proposal for a Directive’. European Commission - Have your say. Accessed 1 June 2023. [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance/feedback\\_en?p\\_id=29288521](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance/feedback_en?p_id=29288521).

enrolled at the Willy Brandt School of Public Policy at Erfurt University. Moreover, input and comments from scholars from Africa, Asia and Latin America were solicited and incorporated throughout the drafting process. This paper is published by the Global Justice Clinic at Erfurt University in cooperation with the German Institute for Human Rights and Luxembourg University. For more information on the Clinic and its policy work project, please visit the [Clinic's website](#).

## 2. What is stakeholder engagement and why is it essential for sustainability due diligence?

Stakeholders are individuals or groups who are affected, or may potentially be affected, by a company's operations, products, or services. In conducting HREDD, the most important category of stakeholders should be rights-holders. Rights-holders may be employees of the company or its subsidiaries, workers in supply chains, contractors, local communities near company operations or consumers and end-users of products.<sup>2</sup> The first step in stakeholder engagement is to identify rights-holders, especially through human rights impact assessments. For businesses with complex operations and supply chains, rights-holder identification is a challenging process, and they may need to prioritize particularly affected rights-holders in their due diligence.<sup>3</sup>

Engagement with rights-holders can range from providing information and disclosure, to hearings and consultations, to seeking the consent of rights-holders. For engagement to be meaningful, it must employ 'a participatory approach ... at every stage of the project cycle'<sup>4</sup> and amount to 'a process that creates a dynamic context of interaction, mutual respect, dialogue, and change, not a unilateral management of stakeholders'.<sup>5</sup> Specific engagement practices may already be required by national law, and international human rights law imposes further obligations to ensure participation, consultation, and at times obtaining the free, prior, and informed consent (FPIC) of individuals and groups. To achieve 'effective participation of – not merely consultation with' stakeholders, it is essential to address the power imbalance between corporations and communities.<sup>6</sup>

Stakeholder engagement is essential for at least three reasons: (1) It ensures effective implementation of HREDD; (2) It is required by international human rights law; and (3) It enhances the sustainability of business activities in the long-term. Moreover, stakeholder

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<sup>2</sup> See Curphey, Shauna, and Cole, Jared, Stakeholder Engagement in *Human Rights Due Diligence* (January 2, 2022). A Guide to Human Rights Due Diligence for Lawyers, Chicago: ABA Publishing, American Bar Association, Forthcoming and Freeman, R. Edward. 2010. Strategic Management: A Stakeholder Approach. Cambridge University Press.

<sup>3</sup> Curphey and Cole, 2022

<sup>4</sup> Kujala, Johanna, Sybille Sachs, Heta Leinonen, Anna Heikkinen, and Daniel Laude. 2022. 'Stakeholder Engagement: Past, Present, and Future'. *Business & Society* 61 (5): 1136–96.

<sup>5</sup> Manetti, Giacomo, and Simone Toccafondi. 2012. 'The Role of Stakeholders in Sustainability Reporting Assurance'. *Journal of Business Ethics* 107 (3): 363–77.

<sup>6</sup> Deva, Surya. "Mandatory Human Rights Due Diligence Laws in Europe: A Mirage for Rightsholders?" *Leiden Journal of International Law*, 2023, 1–26.

engagement can be implemented efficiently, drawing on established good practices, without overburdening businesses.

### ***1) Stakeholder engagement strengthens effective implementation of due diligence and improves human rights outcomes***

Stronger stakeholder engagement provisions in the directive will enhance the effectiveness of due diligence, thereby realizing the objectives of the directive, namely improved protection of human rights and the environment. Consultation of rights-holders has been deemed a ‘gateway to human rights outcomes’,<sup>7</sup> as rights-holders possess unique insights into the adverse human rights impacts. There is considerable evidence that stakeholder engagement enhances understanding, prevention, mitigation, tracking and remediation of their environmental and human impact throughout the value chain.<sup>8</sup> For example, by supporting rights-holders in involving them to propose their own risk and adverse impact mitigation strategies, businesses can achieve improved protection of human rights and the environment. A corporation’s ability to consider and make decisions is also improved through stakeholder engagement, particularly when seeking out the input of several different types of stakeholders.<sup>9</sup> Likewise, enforcement agencies can tap into local knowledge and complement information sources when they include stakeholder engagement in their enforcement procedures.

### ***2) International human rights law requires meaningful engagement with affected rights-holders***

Participation rights are provided for in international law both as a specific human right and as a general principle of human rights law. Art. 25 of the International Covenant on Civil and Political Rights as well as other human rights instruments guarantee a right to participation in general or for specific groups of the population.<sup>10</sup> As a general principle of international human rights law, participation requires rights-holders to be heard and consulted in decision making processes that affect their ability to enjoy other human rights.<sup>11</sup> While

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<sup>7</sup> Mullen, Matthew. 2020. ‘Why Rightsholder Consultation Is the Gateway to Effective Human Rights Due Diligence’. Business & Human Rights Resource Centre. 28 July 2020.

<sup>8</sup> Remmert, Gwendolyn, Koalick, Madeleine and Wilde, Luke. 2014. ‘STAKEHOLDER ENGAGEMENT IN HUMAN RIGHTS DUE DILIGENCE’. Global Compact Network Germany, twentyfifty Ltd.

<sup>9</sup> Noordam, Katja. 2019. 7 Benefits of Quality Stakeholder Engagement.

<sup>10</sup> For a discussion of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) see Barelli, in: *The International Journal of Human Rights*, Free, prior and informed consent in the aftermath of the UN Declaration on the Rights of Indigenous Peoples: developments and challenges ahead, 2012 16:1, 1-24. See also ILO Convention No. 169; Article 25 of the International Covenant Civil and Political Rights, Article 15.1 of the International Covenant on Economic, Social and Cultural Rights (cf. McMurry et al in: *Studies in Social Justice, A Human Rights-based Approach to Participation*, November 2022 16(3):554-570), Articles 7 and 8 of the Convention of Elimination of Discrimination Against Women (cf. Temperman, in: *Erasmus Law Review*, Public Participation in Times of Privatisation: A Human Rights Analysis, 2, 201), Articles 41 and 42 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Articles 29 and 30 of the Convention on the Rights of Persons with Disabilities and the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters and Ryall in: *Journal of Environmental Law*, Volume 35, Issue 1, March 2023, Pages 161–166, A Brave New World: The Aarhus Convention in Tempestuous Times’.

<sup>11</sup> For more discussion of participatory justice, see Liebenberg in: *Human Rights Law Review*, Participatory Justice in Social Rights Adjudication, Volume 18, Issue 4, December 2018, Pages 623–649. About theoretical perspectives on participation, particularly for rights-holders impacted by poverty, see Lister in: *Social Policy and*

these rights have traditionally been concerned with participation in public affairs and decision making, this concept has now evolved as contexts and challenges for the realization of human rights change, i.e. through privatization of basic services or dysfunctions of public institutions that put private businesses in positions that are functionally equivalent to states with regard to human rights protection.<sup>12</sup>

Correspondingly, the right to participation also entails positive obligations for states which oblige them to ensure participation rights vis-à-vis private parties, especially businesses.<sup>13</sup> Therefore, a positive view towards expanding the right to participation to private actors is essential to ensure that other substantive human rights are realized.

This expansion is captured in the OECD Guidelines for Multinational Enterprises, which stipulate that companies should “engage with relevant stakeholders in order to provide meaningful opportunities for their views to be taken into account in relation to planning and decision making for projects or other activities that may significantly impact local communities”.<sup>14</sup> Relatedly, Principle 18 of the UNGPs prescribe that due diligence “should [...] involve meaningful consultation with potentially affected groups and other relevant stakeholders”. The UNGPs represent an international consensus that the CSDDD has set out to respect and implement. Other EU legislation also recognizes the importance of these standards, i.e., making compliance with them the central element of minimum social safeguards in Art. 18 of the Taxonomy Regulation.<sup>15</sup>

Moreover, courts in different jurisdictions have imposed requirements to ensure participation between rights-holders and corporate actors. In the case of *Kaliña and Lokono Peoples v. Suriname*,<sup>16</sup> the Inter-American Court of Human Rights (IACtHR) referred to the UNGPs to interpret obligations under the American Convention on Human Rights in relation to prior social and environmental impact assessment in extractive activities. This court established that the purpose of such an assessment is to ensure the participation of the communities, especially during the initial stages of the project, as well as their right to be informed (para. 215, 224 and 226).<sup>17</sup> The Constitutional Court of Colombia also relied on

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*Society*, A Politics of Recognition and Respect: Involving People with Experience of Poverty in Decision making that Affects their Lives, 1(1), 37-46.

<sup>12</sup> About the impact of privatization on substantive rights and corporate accountability in these contexts see Temperman, in: *Erasmus Law Review*, Public Participation in Times of Privatisation: A Human Rights Analysis, 2, 201, 43-69 and Riegner in: *Die Friedens-Warte/Journal of International Peace and Organization*, Regionalizing Business and Human Rights: Corporate Accountability in the European, African and Inter-American Human Rights Systems, 2020, 93(1-2).

<sup>13</sup> *Ibid*

<sup>14</sup> OECD. 2011. ‘OECD Guidelines for Multinational Enterprises’

<sup>15</sup> On the need to interpret due diligence legislation in line with UNGP and OECD Guidance see Grabosch in: *Das neue Lieferkettensorgfaltspflichtengesetz*, ed. Robert Grabosch, 1st ed. (Nomos Verlag, 2022) ‘§ 2 Grundlagen, Prinzipien und Begriffe’, Rn. 15, 21–66.; Deutscher Bundestag, ‘Das Gesetz Über Die Unternehmerischen Sorgfaltspflichten in Lieferketten Und Die VN-Leitprinzipien Für Wirtschaft Und Menschenrechte’, p. 6; Fleischer in: *Corporate-Compliance-Zeitschrift* ‘Grundstrukturen der lieferkettenrechtlichen Sorgfaltspflichten’, 20 July 2022, 205–14.; Rothermel, LkSG: Lieferkettensorgfaltspflichtengesetz: Kommentar. Compliance Berater Schriftenreihe 2022, § 4 Rn. 38; Johann and Sangi, eds. LkSG: Lieferkettensorgfaltspflichtengesetz: Handkommentar, 2023., Einl, Rn. 12.

<sup>16</sup> *Kaliña and Lokono Peoples v. Suriname*, IACtHR (2015) Series C, No. 309

<sup>17</sup> See Riegner, in: *Die Friedens-Warte/Journal of International Peace and Organization*, Regionalizing Business and Human Rights: Corporate Accountability in the European, African and Inter-American Human Rights Systems, 2020, 93(1-2) and Fergus, in: *Erasmus Law Review*, The Case of the *Kaliña and Lokono Peoples v.*

the UNGPs in several decisions to impose legal obligations for corporate actors related to HREDD. In their decision SU 123-18, this court stated that the right to prior consultation and consent creates obligations for the private sector: enterprises are required to consult with indigenous peoples when they are affected by a project.<sup>18</sup> Likewise, the Constitutional Court of South Africa, in *Occupiers of 51 Olivia Road v. Johannesburg*, 2008 established that the meaningful participation of rights-holders is necessary, particularly in the context of evictions (para. 15).<sup>19</sup>

### ***3) Stakeholder engagement enhances the sustainability of business activities in the long-term***

Stronger stakeholder engagement provisions enable businesses to identify problems in their value chains early, thereby preventing disruption of their business activities and avoiding costly litigation. Engagement ensures sustainable relations with local communities, which contributes to obtaining and maintaining a business's social license to operate. There is also evidence that meaningful stakeholder engagement holds economic benefits for corporations. For example, one study found that corporations which maintain strong relationships with stakeholders have the potential to increase market valuation by 40%-80%.<sup>20</sup> Another study found that investors appraise mining companies which maintain strong relationships with their stakeholders an average of 46%-86% higher than those who have average or weak stakeholder relationships.<sup>21</sup>

Despite these benefits, relying on social norms and economic pressures is insufficient in motivating businesses to respect human rights in their supply chains. And of course, forms of participation that are not meaningful, and not well regulated, can also have risks for sustainability. Therefore, it is important that the directive adequately regulate and support corporations to genuinely fulfill human rights obligations.<sup>22</sup>

A useful example for demonstrating the risks associated with insufficient stakeholder engagement, and the problems that meaningful engagement can avoid, is the Norsk Hydro case.

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Suriname and the UN Declaration on the Rights of Indigenous Peoples: Convergence, Divergence and Mutual Reinforcement, 1, 2018:31-42.

<sup>18</sup> Constitutional Court of Colombia, SU 123 of 2018, <https://www.corteconstitucional.gov.co/relatoria/2018/SU123-18.htm>; on this, see Sanabria and Schönfelder, *Recognising Nuances: Mandatory Human Rights Due Diligence in Mexico and Colombia*, *VerfBlog*, 2021/4/21

<sup>19</sup> Constitutional Court of South Africa, [2008] ZACC 1; 2008

<sup>20</sup> On the advantages of corporate social responsibility, see IO Sustainability and Lewis Institute for Social Innovation at Babson College. (2015). "Project ROI: Defining the Competitive and Financial Advantages of Corporate Responsibility and Sustainability." On the relationship between sustainability and participation in general, see Riegner 2023.

<sup>21</sup> See Wang et al. in: *Journal of Management* 'A New Look at the Corporate Social-Financial Performance Relationship: The Moderating Roles of Temporal and Interdomain Consistency in Corporate Social Performance'. 39 (2): 416-41.

<sup>22</sup> On mandatory human rights due diligence in Europe, see Deva in: *Leiden Journal of International Law* 'Mandatory Human Rights Due Diligence Laws in Europe: A Mirage for Rightsholders?' 2023, 1-26.

### **Norsk Hydro Case**

*Norsk Hydro is a Norwegian aluminum supplier of automotive parts in Europe that operates internationally. Its Bauxite refinery in Barcarena and Alunorte, Brazil, is the second largest aluminum refinery in the world.<sup>23</sup> A combination of negligent waste management and flooding due to extreme rainfall in February 2018 caused a leak of toxic waste into the Murucupi River.<sup>24</sup> Local communities, which are predominantly indigenous, lost access to clean water due to toxic residues from the leakage. Consequently, Norsk Hydro faced both judicial and extrajudicial proceedings in Brazil.<sup>25</sup> The company was asked to make reparations to the local communities and to halt its operations temporarily.<sup>26</sup> After multiple audits were conducted and the company made a commitment to local engagement, Norsk Hydro resumed operations at the end of 2018.<sup>27</sup> The company still faces legal proceedings, including in the Netherlands.<sup>28</sup>*

*Although Norsk Hydro was duly licensed by official environmental agencies, and the local community detected waste management issues early on and submitted a complaint to the federal prosecution,<sup>29</sup> the harm was not prevented. Before the incident, in 2017, the local association CAINQUIAMA – Associação dos Caboclos, Indígenas e Quilombolas da Amazônia - had initiated lawsuits in Brazil against Norsk Hydro.<sup>30</sup>*

*If Norsk Hydro had meaningfully engaged with the rights-holders, i.e., through an effective complaint mechanism, violations of the right to a healthy environment as an underlying condition for the right to health could have been prevented or mitigated. Moreover, the business could have remained operational and other ill effects, i.e., unemployment, reputational damage and negative financial consequences could have been avoided.*

#### **4) Businesses can draw on established practices to implement stakeholder engagement efficiently**

There are established practices on how stakeholder engagement can be implemented in an efficient manner that improves outcomes for human rights, the environment, and businesses, while not overburdening companies.

One example is the Partnership for Sustainable Textile, which focuses on the HREDD in Germany and Europe through multi-stakeholder initiatives and projects ('Multi-Stakeholder Partnerships and Human Rights' 2030).<sup>31</sup> When the partnership was developed, it involved a broad consultation process considering all stakeholder groups including civil society organizations and human rights institutions.<sup>32</sup> There are other ways in which entities can employ and develop innovative solutions to center rights-holders across multiple jurisdictions. For example, the Netherlands Environmental Assessment

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<sup>23</sup> Hydro. 2022. 'Civil lawsuit in the Netherlands'. 2022.

<sup>24</sup> See Reuters, and Gwladys Fouche. 2021. 'Brazil Group Sues Norsk Hydro over Alleged Pollution'. *Reuters*, 9 February 2021, sec. Environment, and MPF. 2022. 'Caso Hydro: Histórico — Procuradoria Da República No Pará'. 2022.

<sup>25</sup> MPF. 2022.

<sup>26</sup> Reuters, and Gwladys Fouche. 2021.

<sup>27</sup> MPF. 2022.

<sup>28</sup> Reuters, and Gwladys Fouche. 2021.

<sup>29</sup> MPF. 2022.

<sup>30</sup> See Reuters, and Gwladys Fouche. 2021 and MPF. 2022.

<sup>31</sup> Partnerships 2030, 'Multi-Stakeholder Partnerships and Human Rights' April 2021

<sup>32</sup> 'Interview on Inclusion and Diversity in the Textile Industry'. 2022. Bündnis Für Nachhaltige Textilien. 23 August 2022.



Agency has a structured stakeholder consultation process in which they involve multiple actors to address impact assessments ([‘Multi-Stakeholder Partnerships and Human Rights’ 2030](#)).<sup>33</sup>

***Practice examples on how to implement stakeholder engagement efficiently***

***Bangladesh Accord for Fire and Building Safety (“Accord”):*** The [Accord](#) is an independent, legally binding agreement between brands and trade unions for a fair and safe textile industry in Bangladesh. The Accord emerged as a response to the collapse of the Rana Plaza building in Bangladesh in April 2013.<sup>34</sup> This agreement can be considered a good practice of stakeholder engagement as its steering committee is made up of an equal number of representatives of signatory companies and trade unions and employees play a decisive role in the inspections and measures taken when risks are identified. The Accord also provides for a complaint mechanism, which ensures that rights-holders have an effective way to report concerns, as well as penalties for non-complying signatory brands.<sup>35</sup> As a consequence of the Accord, there is the reasonable assumption that, to date, many lives were saved, and working conditions were significantly improved.<sup>36</sup>

***Worker-driven Social Responsibility (“WSR”) programs:*** Within these programs, workers are directly involved in the creation, monitoring and enforcement of human rights policies, being thus central to the process, not only identifying issues but also in designing mechanisms for redress.<sup>37</sup> Examples of these programs are the US-based initiatives [Fair Food Program](#) and [Milk with Dignity Program](#). Rights-holders are key in designing a code of conduct; there is a 24-hour complaint hotline for investigating violations of the code of conduct; annual audits including workers, and “legally binding agreements with corporate buyers creating market consequences for violations. This is accompanied by a buyer-paid premium that goes into worker bonuses and defraying the supplier cost of implementation”.<sup>38</sup>

***Tchibo Worldwide Enhancement of Social Quality (“WE”) Program:*** The program’s intention is the empowerment of stakeholders, so that they can actively participate in identifying and tackling region-specific issues. The [WE Program](#) does not follow a predetermined pattern but is designed by employees, trade unions and managers to address the problems occurring in each factory. It is an example for a bottom-up approach of stakeholder engagement, as the participants define the priorities.<sup>39</sup>

*These initiatives center rights-holders within the HREDD process through meaningful communication and participation in the designing of programs, through the adoption of a bottom-up and worker-driven approach, and through effective complaint mechanisms.*

<sup>33</sup> Partnerships 2030, April 2021

<sup>34</sup> Kabeer, Naila, Lopita Huq, and Munshi Sulaiman. 2019. ‘Garment Supply Chain Governance Project’.

<sup>35</sup> Saage-Maaß, Miriam. 2021. ‘Legal Interventions and Transnational Alliances in the Ali Enterprises Case: Struggles for Workers’ Rights in Global Supply Chains’. In *Transnational Legal Activism in Global Value Chains*, edited by Miriam Saage-Maaß, Peer Zumbansen, Michael Bader, and Palvasha Shahab, 6:25–58. Interdisciplinary Studies in Human Rights. Cham: Springer International Publishing.

<sup>36</sup> See Saage-Maaß, Miriam. 2021 and Kabeer et al. 2019.

<sup>37</sup> McCorquodale, Robert, and Justine Nolan. 2021. ‘The Effectiveness of Human Rights Due Diligence for Preventing Business Human Rights Abuses’. *Netherlands International Law Review* 68 (3): 455–78.

<sup>38</sup> Angelini, Antonella, and Shauna Curphey. 2022. ‘The Overlooked Advantages of the Independent Monitoring and Complaint Investigation System in the Worker-Driven Social Responsibility Model in US Agriculture’. *Business and Human Rights Journal* 7 (3): 494–99.

<sup>39</sup> Bergstein, Nanda. 2022. Das Lieferkettensorgfaltspflichtengesetz als Chance für echte Veränderung. Rethinking Finance. Februar 2022. ESG-Risk & Performance

### **3. What makes the Commission proposal underdeveloped and vague on stakeholder engagement?**

***1) When defining its aims and subject-matter in the recitals and Art. 1, the draft does not sufficiently recognize the agency and perspectives of rights-holders - whom the CSDDD ultimately aims to protect***

The recitals of an EU-directive define the object and purpose of the legislation and therefore serve as guidance for legal interpretation and implementation. The omission of stakeholder engagement in the recitals of the CSDDD does not do justice to the potential that this instrument holds. Moreover, Art. 1 does not mention rights-holders as part of the object and purpose of the Directive, thereby decentering those who are most affected.<sup>40</sup>

***2) The definition of stakeholders in Art. 3 is too vague and does not adequately differentiate between stakeholders in general and rights-holders in particular***

The definition of stakeholders contained in Art. 3(n) is broad and non-specific. It covers both stakeholders who may be impacted by a business and rights-holders who require higher levels of care and consideration when designing and carrying out due diligence plans. Therefore, it is essential to identify rights-holders as a distinct and central category of stakeholders. Moreover, there should be a differentiation between potentially and actually affected rights-holders, as well as other stakeholders who legitimately represent their interests, such as trade unions, NGOs, and human rights defenders.

Thus, the terms 'stakeholder' and 'rights-holder' must be distinguished, with the former including any individual or group that has an interest or stake in a company's activities, such as shareholders, employees, customers, and suppliers and the latter including individuals or groups whose human rights are directly or potentially affected by a company's activities. Specifically, rights-holders also include local communities, indigenous groups, and workers.

***3) The Commission's proposal lacks a systematic approach to stakeholder engagement throughout all stages of the HREDD process. It does not stipulate principles for stakeholder identification and prioritization or requirements for meaningful engagement, and does not adequately address the situation of marginalized groups and the barriers to engagement they face***

While providing an overly broad definition of stakeholders, the draft does not include provisions outlining principles for the identification and prioritization between various stakeholders for whom varying levels of due diligence would apply.

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<sup>40</sup> Lichuma, Caroline in: *Völkerrechtsblog*, Centering Europe and Othering the Rest: Corporate Due Diligence Laws and Their Impacts on the Global South, 2023, 16.01

The consultation process should not be a singular, isolated event, but requires ‘meaningful consultation’ with rights-holders.<sup>41</sup> The draft lacks guidance on establishing what successful stakeholder engagement would look like. Specifically, there is no requirement that such engagement should be ‘meaningful’. Without requiring that engagement should be meaningful or else prescribing minimum standards for a successful consultation process, the proposal is unsuitable to meet the object and purpose of due diligence requirements. This leaves rights-holders, businesses, enforcement agencies as well as members of the judiciary uncertain about when requirements for engagement are adequately met. Consequently, stakeholder engagement as a step in the HREDD per the Commission proposal could incentivize corporate actors to engage in mere tick-boxing exercises.

For example, the draft does not stipulate any requirements for gender-responsive due diligence. “Because gender discrimination is so universally entrenched - rendering it largely invisible - there is a high risk that such issues will not be identified unless explicitly addressed by government and businesses, including in corporate due diligence processes, meaning women’s rights will continue to be violated.”<sup>42</sup> References to the International Convention on the Elimination of All Forms of Discrimination Against Women are not sufficient to establish an effective due diligence framework which accounts for the unique impact of gender discrimination in the whole value chain.<sup>43</sup>

Gender-responsive due diligence necessitates that companies adopt a comprehensive perspective regarding their operational contexts, encompassing the recognition, prevention, reduction, and acknowledgment of the distinct impact their actions and omissions may have on individuals of various gender identities.<sup>44</sup>

It is imperative that the draft stipulate principles for stakeholder identification and prioritization, include provisions for meaningful engagement, support the need for gender-responsive due diligence, and promote the removal of barriers to participation faced by marginalized groups.

***4) The proposed provisions on stakeholder engagement in Art. 6(4), 8(3) and 9(2) create legal uncertainty as they are too fragmented and vague, requiring engagement only “where relevant”. Art. 10 fails to recognize the important role of stakeholders in monitoring***

Article 6(4) stipulates that when companies are gathering information on actual or potential adverse human rights impacts, they need to carry out consultations with potentially affected

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<sup>41</sup> Deva 2023

<sup>42</sup> Excerpt from Gender and Development Network (GADN) Women’s Economic Justice Group paper titled, ‘Why National Action Plans on Business and Human Rights must integrate and prioritise gender equality and women’s human rights’ November 2015, which discusses the increased vulnerability of women to corporate human rights violations.

<sup>43</sup> See Women’s Rights and Mining and OECD Secretariat’s Stakeholder Statement on Implementing Gender-Responsive Due Diligence and ensuring the human rights of women in Mineral Supply Chains, 2019

<sup>44</sup> See Bourke Martignoni et al. in The Geneva Academy of International Humanitarian Law and Human Rights’ briefing ‘GENDER-RESPONSIVE DUE DILIGENCE FOR BUSINESS ACTORS: HUMAN RIGHTS-BASED APPROACHES’. 2018.

groups only 'where relevant'. Likewise, should an adverse impact have materialized, Article 8(3)(b) grants companies disproportionate leeway to 'develop and implement a corrective action plan...' alongside stakeholders only 'where relevant'. Therefore, without a mandatory and clear obligation, stakeholder consultation could exist in a legal vacuum.

The notion of 'relevance' might be well-intended and driven by the need to balance the feasibility of implementation of due diligence obligations by businesses against the obligation to engage with a multitude of different rights-holders. It is important to impose realistic obligations on corporate actors which they can implement. Attaching an undefined notion of "relevance" to stakeholder engagement, however, is insufficient in achieving meaningful engagement. Carrying out stakeholder engagement only "where relevant", leaves companies with a wide discretion to decide whether it should be conducted or not and creates a lack of legal certainty. This wide discretion creates the risk that companies would limit stakeholder engagement to very limited situations. Therefore, it risks undermining the established principle of stakeholder participation in HREDD. A more suitable way to make stakeholder participation feasible for companies is to introduce the notion of "prioritization" – as proposed by the European Parliament resolution 2020/2129(INL). Accordingly, where affected stakeholders exist, they should always be consulted. In limiting obligatory stakeholder participation to some parts of the HREDD process, the proposal also undermines such participation from the outset. The EU has rightly set out to create rules for carrying out HREDD with the legislative process for the forthcoming directive that are consistent with international standards and the rules that the EU has established. To achieve this goal, clear and realistic standards for stakeholder participation should be contained in the text of the legislation.

Notably, Article 7(2)(a) on preventative action plans for possible and adverse impacts is the only provision expressly requiring stakeholder participation instead of only "where relevant". Regarding formulating corrective action plans in situations of actual adverse impacts, the wording of Article 8(3)(b) does not require mandatory stakeholder engagement. This is somewhat contradictory, as the threshold for a corporation to engage with stakeholders should be higher in the case of potential adverse impacts than it is for established adverse impacts.

Similarly, stakeholder engagement is limited in Article 9(2)(c) as the type of civil society organizations (CSOs) which can bring a claim under the directive is restricted to those which are 'active in the areas related to the value chain concerned'. This limitation could severely impede the ability of certain rights-holders, who lack the necessary resources to submit a complaint, in particular those belonging to vulnerable groups. For instance, a disenfranchised group in one location may require assistance from a CSO based in another, less hostile location. CSOs are key players in bringing claims and can often be 'the only way to bring a case in practice'.<sup>45</sup>

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<sup>45</sup> European Union Agency for Fundamental Rights. 2020. Business and Human Rights: Access to Remedy. LU: Publications Office.

### ***5) The draft text of the CSDDD lacks coherence with respect to stakeholder engagement provisions in other instruments of EU law and falls behind existing requirements in member states law***

Firstly, the Commission's proposal is incongruent with existing EU legislation regarding taxonomy compliance. The Platform on Sustainable Finance, the European Commission's official advisory body for taxonomy,<sup>46</sup> points out that Art. 18 on Taxonomy hardens the soft law provisions of the UNGP and OECD.<sup>47</sup> As the UNGPs and OECD guidance apply via Art. 18, it is clear that stakeholder consultation is an obligatory element of the HREDD procedures, which companies need to implement.<sup>48</sup> Therefore, adhering to the current text of the provisions with a limited obligation for stakeholder consultation could lead to the risk that companies will fall short of complying with the taxonomy legislation, even if they fulfill the CSDDD. Likewise, the EU Conflict Minerals Regulation requires specific companies to implement the OECD sector guidance on Conflict Minerals,<sup>49</sup> which explicitly require stakeholder consultation.<sup>50</sup> Moreover, the proposed EU Battery Regulation also requires stakeholder engagement.<sup>51</sup> Finally, the current draft also falls behind requirements of domestic law. For example, under Section 4 of the Norwegian Transparency Law, stakeholder consultation is required as part of HREDD measures in line with the OECD Guidelines. Another example is the German Due Diligence Act, which could be interpreted to require stakeholder consultation as part of risk management under Section 4(4), in line with UNGP and OECD Guidance.<sup>52</sup>

## **4. Strengthening Stakeholder Engagement in the Final Directive: Policy Recommendations**

1. Adopt a rights-holder centered approach throughout the CSDDD and emphasize the agency of rights-holders in the recitals as well as in the general provisions on subject matter and due diligence (Art. 1, 4).
2. Refine the definition of stakeholders in Art. 3 and distinguish between potentially or actually affected stakeholders, identify rights-holders as a distinct subcategory of stakeholders and other types of stakeholders that legitimately represent rights-holders, such as trade unions, NGOs and human rights and environmental defenders.

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<sup>46</sup> Art. 20 k) Taxonomy Regulation.

<sup>47</sup> Platform on Sustainable Finance (PoSF), Final Report on Minimum Safeguards, October 2022, S. 8. See further, Schönfelder and Neitzel, REF 2023, 55 "Menschenrechte als "S" in ESG - Updates aus Europa"

<sup>48</sup> PoSF, Final Report on Minimum Safeguards, Oktober 2022, S. 10.n

<sup>49</sup> See the ample referrals in Artt. 4-6 and 2 o), f), v).

<sup>50</sup> OECD (2016), OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Third Edition, OECD Publishing, Paris.

<http://dx.doi.org/10.1787/97892264252479-en> p. 44, 47, 49, 52, 101, 104.

<sup>51</sup> Draft Regulation concerning batteries and waste batteries, repealing Directive 2006/66/EC and amending Regulation (EU) No 2019/1020, Artt. 39 No. 3 b), 47 No. 11, 72 No. 2.

<sup>52</sup> Schönfelder 2023

3. Include a **new stand-alone provision on stakeholder engagement** (Article 11a). This provision should include requirements on: 1) an on-going duty of meaningful engagement throughout the due diligence process as provided for in Articles 4-11; 2) adequate identification and prioritization of stakeholders generally and rights-holders in particular; 3) provision of adequate and timely information to rights-holders and their legitimate representatives; 4) proactive removal of barriers to engagement for marginalized and vulnerable groups; 4) safety, security, and confidentiality; 5) documentation and clear internal responsibilities.
4. Remove vague language limiting stakeholder engagement (“where relevant”) from Articles 6(4) and 8(3) and make stakeholder engagement mandatory in all phases of the due diligence process, including engagement with rights-holders when remediating actual adverse impacts; remove limiting language from Art. 9(2) and allow complaints by NGOs regardless of whether they are active in the respective value chain or not; require stakeholder engagement in monitoring under Art. 10.

## 5. Drafting recommendations

Based on the foregoing arguments and recommendations, this policy briefing paper proposes specific language for amendments to the directive as proposed by the Commission.<sup>53</sup> In line with the draft report 2022/0051 of the Committee on Legal Affairs,<sup>54</sup> the proposals contained in this policy briefing paper suggest that the forthcoming CSDDD would benefit from being supplemented with a stand-alone article on stakeholder consultation as well as an accompanying recital, while also strengthening consultation requirements in the specific articles detailing due diligence obligations. While such consultation should be streamlined into the human rights due diligence process as a whole, a stand-alone provision provides clarity on how consultations should be carried out and operationalized. Going further than previous drafts, this policy briefing paper introduces rights-holders as a distinct subcategory of stakeholders.

### **Proposed text for the new recital on the new article 11a on stakeholder engagement**

The object and purpose of human rights due diligence is to ensure the practical effectiveness and full enjoyment of human rights by those affected by business operations. Engagement with stakeholders and rights-holders is required by international human rights law, is crucial to ensure effective implementation of due diligence, and enhances the sustainability of business activities in the long term. To ensure full enjoyment and coherent interpretation of human rights, provisions in this directive should be interpreted in line with OECD Guidelines on Multinational Enterprises, the UNGPs, as well as relevant human rights treaties and norms as interpreted by competent international organs.

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<sup>53</sup> These recommendations were drafted in an evolving policy context and while integrating new developments as far as possible, do not reflect developments past mid-April 2023

<sup>54</sup> See suggestions for a new article 11a (amendment 156).

### **Proposed text for Article 3 definitions**

*Stakeholders:* Means rights-holders, individuals, groups, communities, or entities whose rights or interests are or could be affected by the products, services and operations of that company, its subsidiaries and its business relationships, as well as organizations and individuals acting on their behalf as legitimate representatives, including trade unions, civil society organizations, national human rights institutions, and human rights and environmental defenders;

*Rights-holders as a subcategory of stakeholders:* Affected or potentially affected rights-holders are all those individuals or groups whose human rights are, were or could be adversely affected by business operations. These may, depending on the circumstances of the case, include workers of the company as well as those in the value chain, local communities and consumers;

*Marginalized and vulnerable stakeholders:* means affected stakeholders that find themselves in situations where they are marginalized and who experience vulnerability due to specific contexts or intersecting factors, including, among others, sex, gender, age, race, ethnicity, class, education, indigenous identity, migration status, disability, as well as social and economic status, and includes stakeholders living in areas affected by conflict and occupation, which are the causes of diverse and often disproportionate adverse impacts, and create discrimination and additional barriers to participation and access to justice;

### **Proposed text for the new article 11a, Rights-holder consultation:**

1. Member States shall ensure that companies consult affected or potentially affected rights-holders by carrying out effective, meaningful, and informed engagement with them on the actions provided for in Articles 4 to 11. 'Meaningful engagement' means an ongoing process of good faith interaction and dialogue between a company and rights-holders, including through collaborative approaches that inform the due diligence measures taken by the company. In this regard companies must fully respect the United Nations Declaration on the Rights of Indigenous Peoples including the principles of free, prior, and informed consent and the right to self-determination.
2. In complying with this obligation to consult, the company must adequately prioritize engagement with those most affected and potentially affected, paying special attention to marginalized and vulnerable rights-holders. When such consultation is not reasonably possible, companies should consult legitimate representatives of rights-holders, including trade unions, civil society organizations, human rights and environmental defenders, independent human rights experts, and national human rights institutions. Companies may prioritize engagement for identified risks according to severity and probability.
3. Companies shall provide relevant information to rights-holders and their legitimate representatives in a timely and culturally-sensitive manner about their actual or

potential adverse impacts on the environment and human rights, including information about any planned new operations, changes to operations and their value chain. Affected stakeholders shall have the right to request additional written information, which shall be provided by the company within a reasonable timeframe and in an appropriate and comprehensible format. If the company refuses a request for additional information, the affected stakeholder shall be entitled to written justification for that refusal. Supervisory and judicial authorities are entitled to the disclosure of the information.

4. The consultation of rights-holders shall include adequate steps to overcome barriers to participation such as: language, information, cultural, logistical, financial, and other barriers; and take account of the specific needs of marginalized and vulnerable stakeholders.
5. In consulting rights-holders, companies shall ensure that participants are not the subject of retaliation or retribution, including by maintaining confidentiality or anonymity.
6. The results of the consultation process must be adequately documented, including but not limited to, details of the type and number of rights-holders and legitimate representatives consulted, the extent to which participants' contributions were included in the final company decisions, and any reasons for non-inclusion of participants' views.

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