



Undue limitations to the scope of human rights due diligence in the EU Council position

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Under international law companies must respect all human rights. If due diligence obligations don't cover the entire human rights body, they fall short of international standards. This is the case for the [Council of the EU's position](#) on the Corporate Sustainability Due Diligence Directive, as agreed on 1 December 2022, which aims not only to limit the material scope but also to limit the reach of the due diligence obligations through introducing a series of complex conditions.

Call:

All human rights must be included in the scope of companies' due diligence obligations. To provide businesses with clarity about their expected conduct, the Commission should develop practical guidance on the due diligence obligations, including on specific risks and sectors.

Analysis:

Current suggestions propose undue limitations on the material scope in relation to human rights protection

In its proposal, the Council seeks to significantly change the definition of human rights adverse impacts. It proposes cutting the list of human rights and international instruments which should be included in the due diligence process and adds a set of conditions under which certain instruments would fall in the scope of due diligence obligations. Despite naming legal certainty and simplification as one of the reasons to introduce changes to the European Commission's proposal, the suggested amendments in the Council proposal lack clarity not only regarding the language used but also in relation to the objective of the suggested text.

A. Proposals for amendments to Article 3 c

According to the Commission's proposal, companies must carry out due diligence obligations "regarding actual and potential human rights adverse impacts and

environmental adverse impacts,”¹ Article 3 (c) defines adverse human rights impact as an “adverse impact on protected persons resulting from the violation of one of the rights or prohibitions listed in the Annex, Part I Section 1”.

The Council proposes to amend article 3c to read as follows:

(c) ‘adverse human rights impact’ means an impact on persons resulting from the violation of one of the rights or

(i) an abuse of one of the human rights prohibitions listed in the Annex I, Part I Section 1, as those human rights are enshrined in the international instruments listed in the Annex I, Part I Section 2,

(ii) an abuse of a human right not listed in the Annex I, Part I Section 1, but included in the human rights instruments listed in the Annex I, Part I Section 2, provided that:

– **the human right can be abused by a company or legal entity other than a Member State or a third country or their authorities,**

– **the human right abuse directly impairs a legal interest protected in the human rights instruments listed in the Annex I, Part I Section 2, and**

– **the company could have reasonably identified such human right abuse in its own operations, those of its subsidiaries or its business partners, taking into account the circumstances of the specific case, including the nature and extent of the company’s business operations and its value chain, characteristics of the economic sector and geographical and operational context;**

Under this approach, unconditioned due diligence obligations would only arise in relation to a selected and narrow list of human rights (Article 3 c (i)). Many of them are particularly linked to the organisation of a business and its operations, such as just and favourable conditions of work, and the prohibition of interference with a person’s privacy or with freedom of thought. Beyond this selected list of rights, companies would have to include human rights in their due diligence only as far as those rights are covered by the international conventions and instruments listed in the Annex, Part I Section 2 of the legislation and **under the condition** that an abuse by businesses would directly impair the affected protected position and could have been reasonably been foreseen by the company.

I. On article 3 c (i)

¹ DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, Article 1.

According to international standards, due diligence obligations arise regarding all human rights (see also the section in relation to the annex below).

It has been argued that a list of selected human rights might provide greater clarity for businesses as regards typical risks they should cover with their due diligence processes. This argumentation however neglects that the risks companies face may differ greatly depending on where companies are positioned in the value chain, what the nature of their operations and business relationships is or in what sector they operate. The legislators should on the one hand establish a principal obligation for undertakings to carry out due diligence regarding all human rights and on the other provide practical detail to businesses by means of sectoral legislation or guidelines detailing how to implement the principal obligation.

Suggested wording Article 13:

In order to provide support to companies or to Member State authorities on how companies should fulfil their due diligence obligations, including in relation to rights and protections enshrined in international human rights instruments listed in Annex Part I, the Commission, in consultation with Member States and stakeholders, the European Union Agency for Fundamental Rights, the European Environment Agency, and where appropriate with international bodies having expertise in due diligence, may issue guidelines, including for specific sectors or specific adverse impacts.

II. On article 3 c (ii)

Under the catch-all clause of article 3 c (ii), due diligence obligations arise **under certain conditions** for the rights enshrined in the –limited – list of instruments and conventions of Annex I, Part I, Section 2.

- 1) **Condition 1: The human right can be abused by a company or legal entity other than a Member State or a third country or their authorities.**

According to international standards, undertakings must assess and address not only the human rights impacts of their own operations but also those of their business partners. This means that they must scrutinise whether their business partners failed THEIR human rights responsibilities and obligations. Those business partners might have human rights duties which cannot be abused by a company, for instance, if the business partner is a state authority or a state-owned enterprise. In those cases, even when the risks to be assessed

might involve a state's failure to meet its obligation to protect or fulfil a human right, it does not undermine the obligation of corporate actors to engage in activities which can negatively impact such rights. Under the Council's proposal, the due diligence obligation would not cover such assessments and thus fall short of international standards.²

2) **Condition 2: The human right abuse directly impairs a legal interest protected in the human rights instruments listed in the Annex I, Part I Section 2.**

The UN Guiding Principles establish that companies have due diligence obligations not only when causing or contributing to the human rights impact with their operations themselves, but also when they are connected to the impact by their business relationships. According to the Council position, the due diligence obligation would be conditional on the human right abuse directly impairing a legal interest. This provision is tautologic in its formulation and may thus lead to confusion. This provision also seems to imply that companies would only be required to scrutinize activities which may directly cause or contribute to impairments of human rights listed in the instruments in the Annex of the legislation but not those to which they are connected to by their business relationships. Therefore, for **human rights other than those on the list of selected rights in Section 1 of the Annex, companies would only have to address human rights impacts by their own operations but not within their value chain.** This would contradict the very objective of the legislative initiative.

3) **Condition 3: The company could have reasonably identified such human right abuse in its own operations, those of its subsidiaries or its business partners, taking into account the circumstances of the specific case, including the nature and extent of the company's business operations and its value chain, characteristics of the economic sector and geographical and operational context.**

The foreseeability requirement of human rights abuse as a pre-condition for due diligence obligations again seems tautologic given that the due diligence exercise itself serves to identify human rights risks and harms in the first place. Limiting due diligence obligations to those risks and harms which are obvious even prior to a due diligence exercise

² See e.g. Art. 5(1) ICESCR: "Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.". For a practical example, see Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26, Award, 8 December 2016, at 1196-1196.

undermines the purpose of establishing due diligence obligations.

Suggested wording Article 3:

(c) ‘adverse human rights impact’ means an adverse impact on a person’s or a group’s full enjoyment of and protection by internationally recognised human rights and humanitarian law as well as customary law and case law.

B. Proposals for amendments to Annex I

Any list of human rights instruments as part of the legislation should serve as guidance for businesses only, but not establish limits to the material scope of the due diligence obligations.

The list in Annex I Part II, as suggested in the Council position, seems at a minimum arbitrary, lacking even the Universal Declaration of Human Rights. UN Guiding Principle 12 namely states that *the responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.*

The commentary continues by stating that *(a)n authoritative list of the core internationally recognized human rights is contained in the International Bill of Human Rights (consisting of the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights), coupled with the principles concerning fundamental rights in the eight ILO core conventions as set out in the Declaration on Fundamental Principles and Rights at Work. ...Depending on circumstances, business enterprises may need to consider additional standards. For instance, enterprises should respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them. In this connection, United Nations instruments have elaborated further on the rights of indigenous peoples; women; national or ethnic, religious and linguistic minorities; children; persons with disabilities; and migrant workers and their families. Moreover, in situations of armed conflict enterprises should respect the standards of international humanitarian law.*³

³ UN Guiding Principles on Business and Human Rights, Principle 12 and Commentary,

The OHCHR’s interpretative guidance to this principle acknowledges “[t]he corporate responsibility to respect human rights applies to all internationally recognized human rights, because business enterprises can have an impact— directly or indirectly—on virtually the entire spectrum of these rights.” Most importantly, the OHCHR declares that it is **“not possible to limit the application of the responsibility to respect human rights to a particular subset of rights for particular sectors.”**⁴

It has also been questioned whether it is customary for the EU law to refer to non-binding human rights instruments. In fact, this has been done in the operative part of legislative acts, such as in Article 18 of the EU Regulation 2020/852 which specifically points to soft law (non-binding instruments):

*“The minimum safeguards referred to in point (c) of Article 3 shall be procedures implemented by an undertaking that is carrying out an economic activity **to ensure the alignment with the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights**, including the principles and rights set out in the eight fundamental conventions identified in the Declaration of the International Labour Organisation on Fundamental Principles and Rights at Work and the International Bill of Human Rights.”*

C. Conclusion

The Council’s General Approach seeks to drastically limit the human rights scope of the legislation. It does so by limiting the range of human rights applicable, but also by attaching a string of conditions under which only due diligence obligations for a limited list of human rights would be triggered. These conditions undermine the objective and concept of due diligence and would therefore question the purpose of the legislation.

Instead, the co-legislators should ensure that companies must carry out due diligence regarding all human rights. Where businesses are in need for further clarity about their expected conduct, the Commission should develop practical guidance on the due diligence obligations, including on specific risks and sectors.

https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

⁴ Interpretive guide to UN Guiding Principles’ corporate responsibility to respect human rights. Page 18.

https://www.ohchr.org/sites/default/files/Documents/publications/hr.puB.12.2_en.pdf#page=18.