



Advancing child rights in the proposed EU Corporate Sustainability Due Diligence Directive

Joint Position Paper

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INTRODUCTION

Following a roadmap and public consultation¹ and several postponements, the European Commission published a draft Directive on Corporate Sustainability Due Diligence on 23 February 2022.² The Draft Directive will now be negotiated within the European Parliament and the European Council with an estimated final adoption later this year or in 2023. The steps taken by European Union institutions to regulate business conduct in the form of the Directive are generally welcome, and the proposal itself contains a number of positive elements that should be maintained or developed.

The proposed Directive has the potential to have substantial impact on the conduct of businesses incorporated in and/or with operations in the European Union and the ability of these businesses to respect, protect and promote human rights and protect the environment, particularly if it embeds a more robust human rights and rights of the child approach. It is therefore important to assess how this proposed Directive complies with the State obligation to respect, protect, and fulfil human rights and fundamental freedoms, the corporate responsibility to respect and the need for rights and obligations to be matched to appropriate remedies. Such compliance is required under international law and standards, including human rights treaties and the UN Guiding Principles on Business and Human Rights (UNGPs).³

Also, we shall consider to what extent the proposed Directive relates to specific obligations under the UN Convention on the Rights of the Child (CRC), as 196 States are party to this treaty including all EU Member States and the rights of the child are included in the EU Charter of Fundamental Rights.⁴ The Committee on the Rights of the Child has developed further guidance on State's obligation under the CRC concerning the business sector (CRC General Comment 16).⁵

The impact of business activities on human rights, including children's rights, has long been a matter of concern. This led to the development of specific children's rights and business frameworks, including voluntary initiatives such as the Children's Rights and Business Principles (CRBPs),⁶ developed jointly by UNICEF, Save the Children and UN Global Compact, in collaboration with industry stakeholders, civil society and children themselves. We shall also consider the CRBPs as a relevant framework as they build on international law, including international human rights law, and are complementary to political commitments under the 2030 Agenda for Sustainable Development.

1 European Commission. (2021). *Sustainable Corporate Governance. Public Consultation*, available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance/public-consultation_en

2 European Commission. (2022, 23 February). *Just and sustainable economy: Commission lays down rules for companies to respect human rights and environment in global value chains*, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1145

3 United Nations. (2011). *Guiding principles on business and human rights: Implementing the United Nations "Protect, Respect and Remedy" framework*, available at: https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf

4 See references to the rights of the child in the EU Charter of Fundamental Rights, especially Articles 24 and 32.

5 UN Committee on the Rights of the Child (CRC), *General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights*, 17 April 2013, CRC/C/GC/16, available at: <https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.16.pdf>

6 UNICEF, UN Global Compact & Save the Children. (2012). *Children's Rights and Business Principles*, available at: <https://resourcecentre.savethechildren.net/document/childrens-rights-and-business-principles-crbp/>

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The draft EU Directive and the rights of the child

Children, in addition to enjoying the rights afforded to adults under international law, also have specific rights as enshrined in the UNCRC that are universal, inalienable, and indivisible, which need to be considered in the elaboration of States' general laws and policies and conduct of practices. The references to the UNCRC and specific children's rights in the Annex of the proposed Directive, in addition to references to ILO core/fundamental conventions are a positive step in this direction.

We acknowledge the reference to "protected persons" in paragraph 25 of the preamble that refers to Annex 1 and the consideration of persons from groups in vulnerable situations as set out in the UN Guiding Principles on Business and Human Rights (UNGPs). A further positive element is the reference to the EU's zero tolerance of child labour policy in paragraph 32 of the preamble.

However, overall, the proposed Directive contains scant reference to human rights and, specifically,

rights of the child instruments and language. To be fully captured and considered by sustainable corporate due diligence processes, children's rights need to be treated as a whole, visibly, and explicitly mentioned in the text. The consideration of children's rights should therefore permeate the entire proposal beyond the definition of "adverse human rights impacts" that refers to rights in Annex I (Article 3 (iv) (b)).

To better mainstream children's rights in the proposal, there should be references to the CRC and the Children's Rights and Business Principles (CRBPs) in the preamble of the Directive, as proposed in the European Parliament in its resolution of 10 March 2021.⁷

⁷ European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)), available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021IP0073>



Castella works in her vanilla farm in the Sava region of Madagascar.

Photo: Charlie Forgham-Bailey / Save the Children

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Scope

The proposal's scope of businesses covered by the Directive (Article 2) is insufficient, as only large, limited liability companies operating in the EU will be covered by the directive. Currently the scope is limited to EU companies and third-country companies with significant EU operations with more than 500 employees and a net worldwide turnover of EUR 150 million preceding the last financial year. Companies with 250 employees on average and more than EUR 40 million worldwide net turnover which operate in high-impact sectors would have a further two years to comply. Although some Small and Medium Enterprises (SMEs) may be indirectly covered because they are part of larger companies' value chains, that coverage is not explicit and is likely to remain uncertain. It is clear that most companies operating in the EU will not be covered, as companies of this size comprise less than two per cent of the number of companies active in the EU market. Hence, the potential impact of the proposed Directive will be limited to an extremely small group of companies, and consequently limit positive impact on beneficiaries.

Although the rationale behind the exclusion of micro or small enterprises (less than 50 employees) may be grounded on the need to have a staggered approach, there is a risk of double standards for companies and a lack of legal certainty in supply chains. This problem is compounded by further limitation in the scope of due diligence obligations under the

proposed Directive Article 1(1)(a) to actual and potential human rights adverse impacts with "respect tovalue chain operations carried out by entities with whom the company has an established business relationship". The term "established relationship" is understood as a lasting relationship in time and intensity. This limitation may potentially exclude large portions of a company's value chain, where many child rights abuses occur. These limitations put the proposed Directive at odds with existing standards on company human rights responsibilities under the UNGPs and States obligations under the UNCRC, as described in the UNCRC's General Comment 16. These standards require a broad scope to all business enterprises, nuanced only by needs of prioritization (Principle 17) and proportionality (Principle 11) to the context and size of the enterprise. The proposed Directive should be brought into line with these standards.

Furthermore, the scope of the corporate sustainability due diligence requirements for the financial sector is also limited to their stakes in large companies and the pre-contractual phase. The Directive risks undermining the crucial role of the financial sector in addressing human rights risks. Aligning these provisions with the UNGPs would ensure the positive catalytic impact the financial sector has on other sectors. We recommend reviewing and revising the scope to ensure coherence between different sectors.

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Child Rights Due Diligence – Impact assessments

Many child rights violations, including child labour, occur in up-stream tiers of value chains. It is therefore crucial that the proposed Directive provides for due diligence requirements for the entire product cycle from raw materials to disposal/recycling. Only in this way will the EU-wide regulation be in line with the CRC and the UNGPs, in which the risk of (potential) rights violations - and not the stage of the value chain - are the starting point for a due diligence obligation.

Environmental and climate degradation affect a wide range of children's rights. These include, the right to life, survival and development, the right to the highest attainable standard of health, the right to education, the right to play, freedom from discrimination and participation rights (the right to be heard, the right to information, freedom of expression, freedom of association and freedom of assembly).⁸ It is the obligation of states to protect children from the negative consequences of climate and environmental degradation. This includes substantive requirements, such as higher environmental health standards for children, as well as procedural requirements, such as access to information obligations. In addition to the UNGPs, the CRC General Comment 16 provides a practical framework to ensure that children, their families, and communities are not negatively affected by business activities and their impact on the environment and climate.

⁸ See also EU Charter of Fundamental Rights Article 37 on environmental protection, read in conjunction with Article 24 on the rights of the child.



Jean Elye, 18, stands near a vanilla plantation in the Sava region of Madagascar.

Photo: Charlie Forgham-Bailey / Save the Children

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Children’s participation and consultations – essential element for an effective system

Stakeholder participation is crucial for the effectiveness of due diligence and remediation processes. Worker and stakeholder early involvement in the planning, execution and evaluation of activities provides firsthand quality information vital to identification of risks and impacts, mitigation and eventually remediation and redress. Because of the serious impacts of business operations on children’s lives, children must be recognized as a specific stakeholder group, explicitly identified, and consulted as (potentially) affected rights holders in corporate risk assessments and in the whole human rights due diligence process. This imperative was already emphasized in the European Parliament’s resolution of 10 March 2021 recommendation to the Commission on corporate due diligence and accountability. The right of children to be heard is a State obligation and central pillar of the CRC, applicable to the implementation of the Convention across the board, and also to the EU Charter of Fundamental Rights (Article 24.1) as outlined in the EU Strategy on the Rights of the Child.⁹ This is also in line with the UNGPs, which stipulate that potentially affected stakeholders should be involved in the development of human rights due diligence processes.

Children and child rights actors and experts can provide important guidance and support to make processes more relevant, effective, and sustainable. They can also link actions and processes that take place in value chains as well as in the broader field of action, for example in communities and collaboration with governments on the ground, enabling holistic and systemic approaches to resolve complex situations. Participation in the whole process entails a

necessary level of transparency and enables external scrutiny and accountability, necessary elements for the effectiveness and improvement of company schemes. Further, in addition to principle of children’s participation, including through consultations, being strengthened in the proposed Directive, consultative processes should also be ensured in planned guidance and institutional development for supporting businesses and monitoring compliance of the proposed Directive.

The current draft Directive presents glaring gaps in terms of participation, transparency, and accountability by stakeholders. Apart from Article 6(4) and 7(2), which contains a qualified element of consultations with stakeholders “where relevant” (presumably to be decided by the company itself), other articles concerning other steps of the process do not embed meaningful forms of stakeholder participation. Such participation could be suitable and even necessary, for instance, in the verification of “contractual assurances” from commercial partners, which are now potentially left to outsourcing to third parties. Similarly, in relation to Article 9, which requires the establishment of company grievance mechanism, early involvement, and participation of stakeholders, including children or their representatives, would lend legitimacy to company complaints mechanisms and contribute to mutual trust. UNGP 31(h) assigns great importance to consultation and participation of stakeholders in the design and functioning of company operational level grievance mechanisms.¹⁰ Article 10 on monitoring could also benefit from stakeholder participation to improve the effectiveness of the whole process and its monitoring and evaluation. In sum, participation of stakeholders, including children when relevant, should be mainstreamed along the Directive.

⁹ The EU Strategy on the Rights of the Child and the European Child Guarantee, available at: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/rights-child/eu-strategy-rights-child-and-european-child-guarantee_en#the-eu-strategy-on-the-rights-of-the-child

¹⁰ An elaboration on these principles with concrete operational standards can be found at “Effective Operational-level Grievance Mechanisms”, International Commission of Jurists, 2019

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Remedies and reparations

Child-sensitive corporate grievance processes: participation, transparency, accountability

A key part of any sustainable corporate strategy is access to effective remedies through accessible grievance procedures at the company or other levels. The requirement to establish grievance processes in accordance with international standards should be mandatory but be in line and supportive of national protection systems. Pursuant to Article 9 of the proposed Directive, Member States will require companies to provide processes to address complaints based on “actual or potential adverse human rights impacts and adverse environmental impacts with regards to their own operations, the operations of their subsidiaries and their value chains”. Article 9(2) grants legal standing to file complaints to a large group of stakeholders, although it is not clear if children’s parents or legal guardians can file complaints since there is no explicit provision for them. The company will deal with the complaint and inform the complainant on whether or not it is well founded. These provisions on company grievance mechanisms constitute a step forward, but as they are currently drafted, they are totally insufficient to meet the needs and do not comply with international standards set out in the UNGPs (principle 31).

The proposed Directive needs to be amended with robust language that takes into account the best interests of children, the special needs and position of children and the specific barriers faced by potentially affected persons in the accessibility requirements of the complaint procedures, thus implementing the requirements of the UNCRC, as set out in the Committee’s General Comment No. 16 and in Article 24 of the EU Charter of Fundamental Rights. In this regard, children constitute not only a group with vulnerabilities due to potential impact of business practices and their level of development, but they traditionally lack access to or capacity to voice complaints in grievance procedures.

The proposed Directive should require the establishment of companies’ grievance processes that are fully compliant with their responsibilities. In developing such structures and processes, it is imperative to include children’s participation to ensure that guidance for companies is informed by children themselves. Promoting cooperation between companies and non-governmental organizations (NGOs) is of particular importance, as civil society can bring extensive experience in the practical implementation of human rights-based intervention approaches - including in contexts close to supply chains - to the shaping of due diligence.

The Directive should also clearly provide for requirements of transparency in relation to procedures, type and number of complaints, and criteria for addressing them. It is currently silent on grievances in the supply chain, always a source of unclarity and uncertainty, although the language of Article 9(1) suggests grievances in subsidiaries and value chain could be also subject to complaints to the parent or controlling company. But in reality there are important gaps exist in this respect. A provision on contractual assurances with commercial partners including an obligation to cascade down the obligations to lower supply tiers, subject to verification and auditing with strong worker and stakeholder participation, could bridge areas of uncertainty here. Finally, it is important that the highest levels of corporate governance are appraised and discussed regularly on the implementation and ways to improve due diligence and grievance procedures in the company.

Legal remedies, accountability and access to justice: ensuring child-sensitive processes

Legal protection for victims of rights violations is critical. Under international human rights instruments, including the UNCRC, and article 13 of the European Convention on Human Rights and Article 47 of the EU Charter of Fundamental

Rights, access to an effective remedy is not only a human right in itself, but is also a prerequisite for the protection of all other rights. This also applies to children's rights. But due to their age and status, legal recourse is often particularly difficult or impossible for children. Power relations between companies and affected children are even more unbalanced, information is usually less accessible to them, fear of retaliation, physical distance to law offices, police stations or courts as well as lack of possibilities to pay the costs or legal fees often prevent the judicial enforcement of their rights.

States have a duty under international law to protect people and children from rights violations - including by third parties such as companies. The proposed Directive assigns the bulk of responsibilities to enforce its provisions to a national supervisory authority established in each country. The detailed provisions about the powers and eventual sanctions to be adopted by these administrative bodies are positive steps. However, Article 19(1) could more clearly provide for the right for children and their representatives, with legal standing to submit complaints to the Supervisory Authority. Here again, in the establishment and functioning of this body, more participation of workers and stakeholders could be beneficial.

It is also positive that the Draft Directive contemplates civil liability for damages, but the formulation of Article 22 make this remedy inaccessible and compromises its effectiveness as a reparation avenue and deterrent against future violations in the supply chain. Civil liability is made contingent on two elements: the failure to carry due diligence processes and the occurrence of damage. When a company has carried out the formal due diligence steps - even if perfunctory or otherwise ineffective - it should be exempted from civil responsibility for damages resulting from "activities of an indirect partner" with whom it has an established business relationship.

Commentators have pointed out that "Articles 7 and 8 may be satisfied by entering into contracts with business partners to respect a code of conduct or prevention plan, and that the code is verified by a third-party auditor."¹¹ This means, the conditions necessary for civil liability to arise are too exacting for complainants and easy to circumvent by companies. This should be corrected, enabling those affected to take legal action against the companies causing or allowing human and children's rights violations also in their supply chain. In addition, the burden of proof lies on the affected parties, which have to prove a company's breach of duty of due diligence. As this is often impossible, a reversal of the burden of proof is necessary. Accused companies should have to prove that they fully complied with their due diligence obligations.

11 Danquah, P., Subasinghe, R., & Vogt, J. (2022, March 18). A Missed Opportunity to Improve Workers' Rights in Global Supply Chains. *Opinio Juris*, available at : <https://opiniojuris.org/2022/03/18/a-missed-opportunity-to-improve-workers-rights-in-global-supply-chains/>

CONCLUSIONS AND RECOMMENDATIONS

According to international human rights law, including all human rights treaties, as well as the UNGPs, States have an obligation to regulate business activities and their impact on the realization of human rights. These include impacts on children, in compliance with the UN Convention on the Rights of the Child and other international human rights treaties.

We therefore recommend that European Parliament and European Council members consider:

- Mainstreaming children's rights in the Directive, including via explicit incorporation by reference to the CRC and relevant frameworks such as the Children's Rights and Business Principles (CRBPs) in the preamble;
- Expanding the scope of companies covered by the Directive to ensure alignment with the UNGPs and the UNCRC, as construed by the Committee in its CRC GC 16;
- Ensuring that the Directive's due diligence requirements covers the entire product cycle from raw materials to disposal/recycling, in line with the UNGPs;
- Strengthening participation, transparency, and accountability by stakeholders, including children, where relevant, throughout the Directive;
- Ensuring that the Directive requires company grievance processes to be fully accessible to children and child-sensitive, transparent in terms of procedure, type of complaints, number, and criteria, in compliance with international standards; and
- Ensuring access to justice and legal remedies are fully accessible to children and are child-sensitive, in compliance with international standards.



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