



# FROM POLICING TO PARTNERSHIP

DESIGNING AN EU DUE DILIGENCE DUTY  
THAT DELIVERS BETTER OUTCOMES

MAY 2023

**Shift**

# CONTENTS

## A. INTRODUCTION

1

CONTENT OF THIS REPORT

METHODOLOGY

## B. WHAT DID WE HEAR?

4

EXPERIENCE OF ONE-SIDED RELATIONSHIPS BETWEEN BUSINESS PARTNERS

LACK OF POSITIVE INCENTIVES TO DELIVER ON HUMAN RIGHTS EXPECTATIONS

LACK OF FINANCIAL AND CAPACITY-BUILDING SUPPORT TO SUPPLIERS

LOW LEVELS OF REFLECTION ON EU COMPANIES' POTENTIAL ROLE IN CONTRIBUTING TO IMPACTS

ENGAGEMENT WITH AFFECTED STAKEHOLDERS IS LOW

## C. WHAT IS DIFFERENT ABOUT THE INTERNATIONAL STANDARDS, AND WHAT IS THE OPPORTUNITY IN THE DRAFT DIRECTIVE?

9

FROM UNILATERAL TO MUTUAL RESPONSIBILITIES

FROM PUNISHMENT TO INCENTIVES

FROM PASSIVE TO ACTIVE

FROM 'OUT THERE' TO 'IN HERE'

FROM AVOIDANCE TO ENGAGEMENT





# From Policing to Partnership: Designing an EU Due Diligence Duty that Delivers Better Outcomes

May 2023

## A. INTRODUCTION

The European Union is currently negotiating a draft Directive on Corporate Sustainability Due Diligence (CS3D).<sup>1</sup> By mid-2023, the three law-making institutions – the Council of the EU, the Parliament, and the European Commission – are expected to begin negotiations on a final law that will determine the scope and nature of sustainability due diligence requirements for companies operating in the single market.

The draft Directive, as originally proposed by the Commission, aims to ensure that companies active in the single European market contribute to sustainable development and the wider sustainability transition of economies and societies by preventing and addressing negative human rights and environmental impacts. This important and ambitious goal requires a carefully crafted ‘corporate sustainability due diligence’ duty and appropriate administrative supervision and civil liability accountability measures to support it.

There is no doubt that the development of this Directive represents a momentous opportunity to ensure that companies conduct meaningful human rights and environmental due diligence throughout their value chains. But **the content of the duty matters just as much as its existence**. To truly realize the potential of this opportunity to deliver better outcomes for people and planet, the new duty **must incentivize the right kinds of approaches by companies that are more likely to deliver better outcomes in practice**. As Shift and many other stakeholders have argued,<sup>2</sup> the single best way to do this is to **align the duty as closely as possible with the existing, authoritative international standards** for sustainability due diligence – the UN Guiding Principles on Business and Human Rights (UNGPs) and the OECD Guidelines for Multinational Enterprises.

While the new duty will only apply to certain companies headquartered or operating in the single market, their business partners and other companies in their value chains in key sourcing and production markets outside the EU will also be affected by the law. Their first-hand experience of their European business partners’ current approaches to management of human rights and environmental risks can provide **vital insights into the kinds of practices and behaviors that should be incentivized in the new Directive** – and those that should be discouraged.

In the last quarter of 2022, as part of a project funded by the Swedish Ministry of Foreign Affairs, Shift collaborated on a series of interviews with businesses and local stakeholders in four sourcing and production markets – **Bangladesh, Kenya, Tanzania, and Thailand**. The interviews explored some of the challenges and opportunities companies in those markets currently face in complying with the human rights and environmental expectations of their EU business partners and in preventing and addressing human rights impacts in their own operations.

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<sup>1</sup> See the initial proposal from the European Commission: [Just and sustainable economy: Commission lays down rules for companies to respect human rights and environment in global value chains](#), February 2022.

<sup>2</sup> See, for example: [Shift’s Analysis of the EU Commission’s Proposal for a Corporate Sustainability Due Diligence Directive](#), March 2022; [Joint letter by ILO, OECD, OHCHR regarding the European Commission’s proposal for a corporate sustainability due diligence directive](#), March 2022.

This report draws on these discussions in making recommendations about how to better align the draft Directive with the international standards in a way that is more likely to drive the right kinds of behaviors by EU companies. It seeks to complement efforts by other stakeholders to bring the vital perspectives of directly affected stakeholders in production and sourcing markets into the current European debate (for more, see the Box below). It focuses on the actions of local companies that can directly impact workers' and communities' human rights and looks at how the practices of EU companies can help or hinder progress in preventing or addressing those impacts. This report aims to show how the perspectives of companies outside the EU can help inform the current debate about how to craft an effective and meaningful duty.

## WHAT ARE OTHER STAKEHOLDERS SAYING?

There are many resonances between what other local stakeholders are saying and the perspectives of local companies in the production and sourcing markets captured in this report.

**Lack of focus on outcomes:** In 2022, UNDP [reported](#) on the status of business and human rights broadly in Asia based on the insights of different groups of stakeholders. The report concluded that the problem is that prevailing practices may not be geared towards outcomes for affected rights holders. *“There is much talk about achieving outcomes for rights holders, but there appears to be a pervasive gap between rhetoric and practice.”*

**Workers and trade unions:** A forthcoming report by the Business and Human Rights Resource Centre (BHRRC) that profiles the voices of NGOs and trade unions in different sourcing and production markets draws attention to increasing crackdowns on trade union rights and urges policy-makers to acknowledge the vital role played by independent representative trade unions in securing freedom of association. It also calls on policy-makers to ensure that the definition of affected stakeholders in the draft Directive includes temporary and informal workers. Similarly, over 100 civil society and trade union organizations launched a [campaign](#) calling on the EU to issue a robust due diligence law that guarantees collective bargaining by trade unions and gives workers' representatives a real say at every step of due diligence.

**Pricing and purchasing practices:** In an [event](#) organized by several NGOs and cohosted by members of the European Parliament, smallholder farmers from Africa demanded that the law incentivize companies to think about how their own practices, including pricing, are connected to some of the most severe human rights issues on the ground. This is backed up

by [research](#) from The University of Greenwich, among others, that recommends defining human rights due diligence in the Directive to ensure it includes pricing and procurement practices that directly and indirectly affect workers' and farmers' access to living wages and living incomes. As one stakeholder cited in the abovementioned report by BHRRC said: *“Due Diligence is a band-aid only if purchasing practices aren't included.”*

**Vulnerable stakeholders:** Ensuring due diligence legislation amplifies the voices of affected stakeholders is a recurring demand. Another [report](#) from the BHRRC, which is based on engagements with civil society organizations and communities in Africa, Asia and Latin America, highlights the particular vulnerabilities of human rights defenders (HRDs) and calls on the EU to include a duty for companies to engage safely and meaningfully with affected stakeholders and HRDs and an obligation to prevent retaliation against HRDs across their operations and value chains.

**Limitations of social audits:** Many [organizations](#) have highlighted the limitations of the current social audit model – which is often mistakenly seen as equating with human rights due diligence. For example, a [report](#) by European Center for Constitutional and Human Rights (ECCHR) based on several case studies found that audits and certifications were connected with increased human rights risks in various sectors. The study concludes that ‘outsourcing’ human rights due diligence to third parties will not deliver improved outcomes. As the forthcoming BHRRC report based on interviews with workers and their representatives in Cambodia and India reminds policy-makers, workers can provide up-to-date and ongoing information on the impact of business practices far more reliably and robustly than methods such as social auditing or industry-led certification schemes.

## CONTENT OF THIS REPORT

This report is the first of a pair of reports addressing policy-makers in the CS3D debate. It looks at some of the current dynamics between EU companies and their non-EU business partners in managing human rights risks, and explores the opportunity the Directive presents **to shift from a top-down ‘policing’ approach to one**

**based on collaboration and mutual responsibility.**<sup>3</sup> The second report will explore complementary policy measures to support a new due diligence duty and the array of actors that play a role in influencing company behaviors in production and sourcing markets beyond those companies' EU business partners.

**This report is divided into two main sections:**

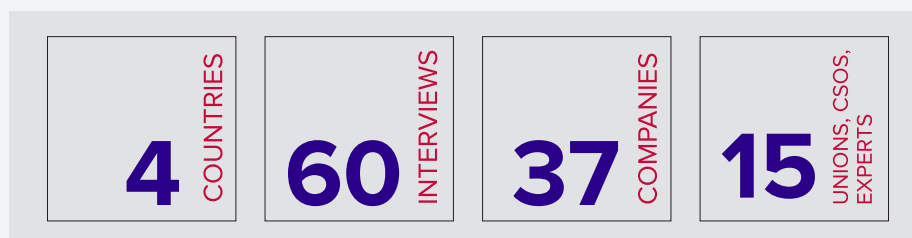
**Section B, What did we hear?** Provides an overview of current behaviors and practices that are often not conducive to meaningful human rights due diligence.

**Section C** contains two parts:

1. **What is different about the international standards?** benchmarks some of the problematic practices encountered against the international due diligence standards. It highlights what would signal more meaningful due diligence approaches, as compared to those that currently seem to dominate many of the relationships between EU companies and their business partners.
2. **What is the opportunity?** underscores the potential for the CS3D to define a carefully crafted due diligence duty that incentivizes a shift towards practices that are more aligned with meaningful due diligence.

## METHODOLOGY

This report is based on approximately 60 interviews that took place in the last quarter of 2022 with a range of actors in Bangladesh, Kenya, Tanzania, and Thailand.<sup>4</sup>



Several factors were considered in the selection of the countries, including the diversity of sectors represented (including foodstuffs, garment and footwear, fruit and vegetables, seafood, metals and minerals, oil and gas, and construction) and the nature of the countries' trade relations with the EU.<sup>5</sup>

Preparatory work included desk research on the country context and engagement with the Swedish Embassy and SIDA personnel in the region, as well as with other experts in the field that provided relevant country information. Local partners, including Sal Forest in Thailand and the Global Compact Local Networks in Tanzania and Kenya, supported the different engagements.

The majority of companies engaged were large in size as they are more familiar with complying with sustainability expectations from international business partners. Overall, it is important to acknowledge

<sup>3</sup> 'Policing' approach is used in this report to describe a set of practices by companies that can have the effect of outsourcing responsibility for the management of sustainability risks to their business partners through contracts, and then policing compliance through audits.

<sup>4</sup> All of the selected countries are official development assistance (ODA) recipients, meaning they all are low and middle-income countries based on gross national income (GNI) per capita.

<sup>5</sup> For example, EU imports from Bangladesh are dominated by clothing, accounting for over 90% of the EU's total imports from the country in 2021. See: "EU trade relations with Bangladesh. Facts, figures and latest developments," European Commission, accessed August 10, 2022, [https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/bangladesh\\_en#:~:text=EU%20imports%20from%20Bangladesh%20are,by%20machinery%20and%20transport%20equipment](https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/bangladesh_en#:~:text=EU%20imports%20from%20Bangladesh%20are,by%20machinery%20and%20transport%20equipment)

that the findings come from a relatively small sample of companies; thus, this report **is not meant to be representative of the situation in an entire country or sector**. The interviews focused on companies, but they also included representatives of local civil society organizations (CSOs) and trade unions, as well as human rights experts, to contextualize what we heard from the companies.

We particularly sought to capture the perspectives of women and impacts on their rights by engaging with women interviewees (with due attention to any risks they may face in sharing information) and asking participants about human rights impacts on women and girls.

We deliberately focused on business relationships supplying into the single market – but some of the lessons would also be applicable to downstream relationships, given that the same due diligence expectations apply to the whole value chain under the international standards. The standards rely on the same core concepts to make downstream and upstream due diligence both manageable for companies and meaningful in terms of outcomes for affected stakeholders.

We appreciate the time and engagement of everyone we spoke to for this project. The findings of this report remain Shift's own.

## **B. WHAT DID WE HEAR?**

This section provides insights into some of the general trends we heard from local interviewees that characterized the relationships between EU companies and their business partners. While not all points were present in all four countries to the same extent, there were many resonances across the responses.

We recognize that this summary focuses on one side of the relationship between EU companies and their business partners in third countries and that a growing number of EU companies have been working to improve their practices in line with the international due diligence standards by seeking to move away from a 'policing' approach to due diligence. However, **as the international standards have remained largely voluntary, it has been challenging to scale a more meaningful approach to due diligence** – and this is reflected in what we heard.

### **EXPERIENCE OF ONE-SIDED RELATIONSHIPS BETWEEN BUSINESS PARTNERS**

We heard that many EU companies continue **to base their due diligence efforts mainly or exclusively on social audits and third-party certifications**. European buyers typically incorporate their sustainability expectations in Supplier Codes of Conduct and contracts, then police compliance through audits. Some companies use shared audit platforms that work with affiliated audit companies to provide corrective action plans directly to suppliers. Many companies, especially in the agricultural sector, focus on requiring suppliers to certify their products under different social and sustainability standards in order to do business.

A company representative from the Agricultural sector in Tanzania mentioned: *“There is a multiplication of standards; it is a duplication of efforts with no added value.”*

The majority of company interviewees acknowledged the limitations of the audit-only model, including that the model does not encourage or measure progress over time, is ill-suited to deal with complex issues such as gender-based violence, and does not sufficiently take into account the perspectives of affected stakeholders in understanding impacts and evaluating the effectiveness of mitigation actions. Buyers, on the other side, have little visibility into key issues, especially root causes, as they are often overlooked by auditors or hidden by business partners to avoid commercial penalties.



Legal requirements such as contracts and codes of conduct can play an important role in meaningful due diligence processes by clearly setting out expectations; however, many interviewees spoke of **a lack of mutual or shared responsibilities in their current contracts**. The perception is that they frame the responsibility to manage impacts as one-sided and belonging to the non-EU partner. Importantly, there is also a perception that there is little space for dialogue, including when problems arise, and suppliers have little capacity to adjust the objectives and tools being used to mandate and measure their performance.

A company representative from the Garment sector in Bangladesh said that: *“It can’t be sustained if it’s all one way. It’s a buyers’ market, and suppliers have no influence. When buyers say ‘we’re a team,’ they must mean it.”*

Important work has been done through the American Bar Association’s (ABA) Model Contract Clauses initiative to develop an approach to supply chain contracts that takes into account both parties’ due diligence responsibilities, which now forms the basis of the work of the Responsible Contracting Project.<sup>6</sup> It is also informing a related legal initiative to adapt the ABA work to European commercial contracts.<sup>7</sup>

## LACK OF POSITIVE INCENTIVES TO DELIVER ON HUMAN RIGHTS EXPECTATIONS

**Many suppliers feel that the focus is on punishment for non-compliance** with different human rights and environmental expectations. A failed audit can have real consequences for business relationships. EU companies include disengagement clauses where severe impacts are found, in spite of the fact that many of these are very likely to be present in their value chains. This suggests that a pre-determined course of action be followed regardless of the context and the potential impacts on affected stakeholders of a decision to disengage (for example, where workers are then not paid for work already performed). Current contractual terms thus incentivize suppliers to obscure any human rights or environmental impacts in their operations, regardless of the actual conditions on the ground. They also implicitly incentivize these companies to pass the same approach on to their own local business partners in turn.

Moreover, **interviewees reported few positive incentives or innovative strategies** to encourage suppliers to tackle issues.

A company representative from the Agricultural sector in Kenya argued that: *“audits should be a place of learning. If you have many grievances, you are the worst company in the world, and companies hide their issues. It should be the other way around.”*

### PROMISING PRACTICE

A company in Thailand active in the seafood industry has been collaborating with CSOs, trade unions, multinational organizations and international buyers to improve human rights performance in its supply chain, specifically on forced labor. This collaborative strategy has resulted in:

- an independently managed grievance hotline for factory workers,
- a program to ensure migrant workers in key facilities understand their rights, accompanied by periodic training on child labor and human trafficking,
- development of mobile technology to improve connectivity with vessel workers while at sea, increasing traceability and safety for fishers.

<sup>6</sup> See: “Working with stakeholders to ensure human rights due diligence in business contracting,” American Bar Association, accessed April 12, 2023, [https://www.americanbar.org/groups/human\\_rights/business-human-rights-initiative/contractual-clauses-project/](https://www.americanbar.org/groups/human_rights/business-human-rights-initiative/contractual-clauses-project/); “The Mission,” Responsible Contracting Project, accessed April 12, 2023, <https://responsiblecontracting.org/>.

<sup>7</sup> See: Daniel Schönfelder, Bettina Braun and Martijn Scheltema, “Contracting for human rights: experiences from the US ABA MCC 2.0 and the European EMC projects,” NOVA, Business Human Rights and the Environment, accessed April 12 2023, <https://novabhre.novalaw.unl.pt/contracting-for-human-rights-experiences-from-the-us-aba-mcc-2-0-and-the-european-emc-projects/>.

Interviewees said that their companies dedicate time and resources to complying with activities required by buyers to prevent human rights risks, yet concrete outcomes for people are difficult to identify, especially in complex areas. Buyers continue to ask suppliers to focus on tracking quantitative data only, which often provides insufficient evidence of the effectiveness of measures to address human rights impacts.

For example, when asked about tackling discriminatory attitudes and gender-based violence against women in the workplace, company interviewees pointed to improvements in the ratio of women to men in management positions and the expectations set by their European business partners in this regard. However, there was little insight into whether or how this is actually changing underlying cultural and social attitudes that can contribute to discrimination and violence against women. One interviewee explained that this approach has, in fact, generated conflict in the private households of some female managers where they have started earning more than their male partners – an unintended consequence of an otherwise positive development. These circumstances that might call for a nuancing of the approach demanded by business partners cannot be captured by quantitative data alone.

## LACK OF FINANCIAL AND CAPACITY-BUILDING SUPPORT TO SUPPLIERS

Many company interviewees said that they are expected to do the heavy lifting and **feel that they have to solve impacts with little support**. In their view, their European business partners continue to overlook their actual capacity to comply with human rights expectations and standards and assume that they will manage, but when it's time to act, few feel equipped to do so. Suppliers were actively interested in receiving guidance and tools to help them identify and prevent human rights impacts. Interestingly, those that do feel well-equipped to meet these expectations report that they have gotten there with support and investment from their parent companies or majority shareholders, but only after major impacts occurred.

*A company representative from the Garment sector in Bangladesh said that: “Buyers expect us to take full responsibility for second-tier suppliers. Brands will nominate which suppliers we might use but will not take responsibility for them.”*

*A company representative from the Agricultural sector in Tanzania said that: “Buyers will tell you that their only responsibility is to buy the product.”*

Many suppliers take responsibility only for what happens in their factories, plantations, or facilities and expect their own suppliers to do the same; in the meantime, impacts further upstream are left unattended. We heard that the human rights impacts that receive the most attention are not necessarily those that are the most severe from the perspective of affected stakeholders but those that correspond to EU business partners' priorities, which are often based on assumptions about country contexts, issues in the media spotlight, or trending topics in sustainability standards. Local business partners reported feeling reluctant to conduct their own identification and prioritization of human rights impacts as they fear that the results might not match their partners' expectations regarding the most salient impacts.

## PROMISING PRACTICE

A European retailer buying agricultural products encourages its suppliers to report on the challenges and issues found during production. Although the reports are not publicly available, they are used by the buyer to tailor online training sessions to develop suppliers' internal capacity to tackle identified issues in the future.

A European buyer in the garment sector runs a program to strengthen suppliers' capacity to respect human rights and the environment. It trains factory managers on topics such as management systems, worker communication and wages and benefits. Suppliers joining the program are required to have a certain level of maturity on their human rights due diligence process and can eventually move gradually to self-assessment. The company seeks to solve any problems through discussion.



Examples of European buyers investing in capacity-building for their partners remain fairly limited. Interviewees reported that local CSOs and EU development aid agencies are the actors most often playing that role. Additionally, there is **a lack of sector-wide collaborative initiatives in the sourcing and production markets we engaged with**. While participation in collaborative initiatives cannot replace an individual company's responsibility for its due diligence efforts, it can play an important role in supporting companies to identify and understand how to address salient risks in their sector efficiently.

In addition, we heard from those we interviewed that European partners **rarely provide financial incentives for better human rights performance**. While financial incentives are just one way that companies can use leverage to encourage improved performance, they can be an important one.

A company representative from the Garment sector in Bangladesh commented that: *"We take care of maternity – we give extra allowance and leave beyond the law. All buyers like this, but none say they will pay a better price because of it."*

## LOW LEVELS OF REFLECTION ON EU COMPANIES' POTENTIAL ROLE IN CONTRIBUTING TO IMPACTS

It is often easier to assume that problems rest primarily with another party's actions or omissions and not inside an organization's own practices. Operating under this assumption, companies can overlook how their own purchasing, research and development (R&D) or sales practices, and even their business model, might be inadvertently incentivizing or facilitating impacts in their value chains.

We heard numerous examples of how **some EU companies' purchasing practices can hinder the ability of their business partners to comply with human rights expectations**. Interviewees reported that many suppliers, especially small operators and farmers, do not have sufficient bargaining power to contest these practices. We heard that some EU companies in the garment sector require their suppliers to report excess overtime, but suppliers are not transparent unless they know that the excess will be authorized and that they will not lose the order as a result.

A company representative from the Garment sector in Bangladesh said: *"We are still being forced to push down prices and suppliers are undercutting each other; this is unhealthy."*

Research has consistently shown that purchasing practices can undermine supplier compliance with Codes of Conduct by putting pressure on suppliers in terms of prices, timelines, and delivery, heightening risks to the rights of workers in value chains. For example, the ILO has explored how specific purchasing practices – such as agreeing on prices that are below production costs, delaying the integration of changes in the local minimum wage into prices, and providing insufficient lead times and inaccurate technical specifications – can directly influence working conditions in global value chains.<sup>8</sup> The Better Buying initiative has identified seven key buyer purchasing practices that affect a supplier's ability to adhere to the terms of a contract and operate efficiently while providing a safe work environment.<sup>9</sup>

Some companies that are serious about aligning their approach with the international due diligence standards are tackling these tensions, including by being part of initiatives that require attention to purchasing practices as

<sup>8</sup> Daniel Vaughan-Whitehead and Luis Pinedo Caro, "Purchasing practices and working conditions in global supply chains: Global Survey results," International Labour Organization, June 09, 2017, [https://www.ilo.org/travail/info/fs/WCMS\\_556336/lang--en/index.htm](https://www.ilo.org/travail/info/fs/WCMS_556336/lang--en/index.htm).

<sup>9</sup> See: <https://betterbuying.org/>. The initiative enables suppliers to rate 160 different buyers currently on these practices without risking the business relationship.

a condition of participation.<sup>10</sup> The EU has also passed legislation that outlaws a list of unfair trading practices in the agricultural and food supply chain, including late payments, short notice cancellation and unilateral contract changes by the buyer, but it is still in the initial phases of implementation.<sup>11</sup>

## ENGAGEMENT WITH AFFECTED STAKEHOLDERS IS LOW

The effectiveness and credibility of sustainability due diligence depends on meaningful engagement with ‘affected stakeholders.’ This refers to four groups of stakeholders that any company should pay attention to: workers in its own operations; workers in its value chain; local communities affected by its operations or those of its value chain partners; and people affected by the use of its products or services. It also includes legitimate representatives of those stakeholders, such as trade unions.

Most companies we spoke to **did not readily see the benefits of engaging with affected stakeholders and understanding their perspectives.** For example, suppliers do not seek to consult affected stakeholders when making decisions about what impacts to prioritize – or to assess the effectiveness of measures to address impacts – and buyers do not seem to incentivize these engagements. In addition, because of the dynamic described above, whereby discovery of an impact can create cause for a buyer to terminate a contract, **many suppliers see affected stakeholders as a potential business risk.** Their grievances or feedback may provide evidence of problems in a company’s operations, potentially threatening the company’s business relationships with its European partners. This is a significant problem given the centrality of engagement with affected stakeholders to meaningful human rights due diligence.

A Trade Union representative from Bangladesh mentioned that: *“When impacts occur and we reach out directly to brands based on their Code of Conduct, manufacturers complain, and we are labeled as troublemakers.”*

Many suppliers only engage with affected stakeholders and set up operational grievance mechanisms after human rights impacts have materialized or after litigation involving their own operations has occurred. Very few seemed to understand the potential value of operational-level grievance mechanisms in building better relationships with affected stakeholders and as a key source of information for their ongoing due diligence process.

In one case, buyers were quick to cut ties with a company after it faced allegations of human rights violations. However, one EU buyer took a different approach, conducting their own investigation into the allegations and engaging directly with the local company to better understand the situation on the ground. The local company developed a comprehensive operational-level grievance mechanism to facilitate access to remedy for affected stakeholders and to build better quality relationships with its stakeholders, which it claims is already helping to prevent new impacts. Now the EU buyer encourages its other business partners to use this as a model to develop and implement effective grievance mechanisms.

### A LESSON LEARNED

One company shared its experience developing a comprehensive grievance mechanism. The mechanism has two tiers: the first is an internal mechanism to address typical workplace or community grievances associated with the company’s daily operations; the second features independent investigation, adjudication, and monitoring functions to address human rights grievances. To date, the mechanism has received over a thousand grievances. Where cases have been dismissed after assessment against the relevant criteria, the independent adjudicator has consistently used this as an opportunity to channel the community’s broader concerns back to company. The company reports that it has acted on many of the issues identified as part of its ongoing due diligence – demonstrating how grievance mechanisms can provide important feedback loops, helping to strengthen the company’s relationships with its stakeholders beyond what is possible in addressing individual grievances.

<sup>10</sup> See, for example, the [Fair Labor Association](#) and the [Ethical Trading Initiative](#).

<sup>11</sup> European Union, “Directive (EU) 2019/633 on Unfair Trading Practices in Business-To-Business Relationships in the Agricultural and Food Supply Chain” (2019).

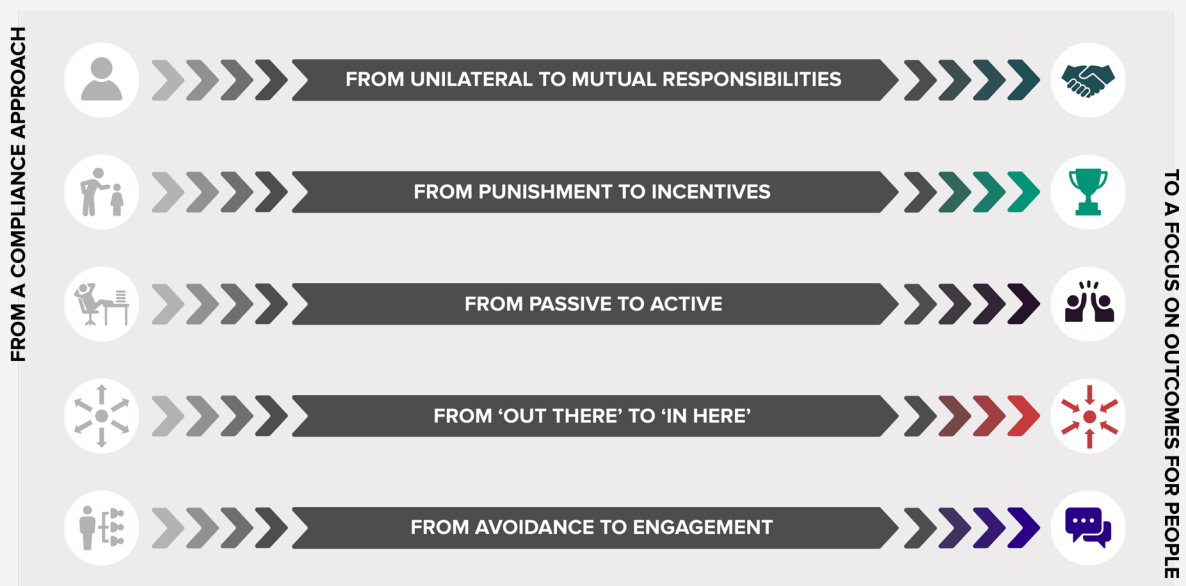
## C. WHAT IS DIFFERENT ABOUT THE INTERNATIONAL STANDARDS, AND WHAT IS THE OPPORTUNITY IN THE DRAFT DIRECTIVE?

The purpose of sustainability due diligence under the international standards is to drive better outcomes for people and planet. Due diligence is a standard of conduct – meaning a level of behavior companies are expected to meet, to the specific sustainability risks connected to their operations and value chain relationships. In other words, meaningful sustainability due diligence is not simply a set of mechanical compliance processes disconnected from actual results or outcomes.<sup>12</sup>

In this section, we explore what it looks like to move away from the kinds of approaches outlined above that outsource responsibility for the management of sustainability risks through contracts and police compliance through audits towards an approach grounded in mutual responsibilities that is more likely to deliver better outcomes in practice.<sup>13</sup> We also highlight the opportunity in the draft Directive to drive this evolution in practice, with a particular focus on the core Articles setting out the expectations of companies to identify risks and impacts and to act on them in Arts 6, 7, and 8. We focus on management of human rights risks and impacts, although many of the points would also be applicable to environmental risk management as well.

On the following pages we set out examples of company practices that are more closely aligned with the expectation of meaningful due diligence in the international standards in five key areas:

1. **From unilateral to mutual responsibilities:** moving from one-way contracts to agreements based on mutual due diligence responsibilities to manage human rights;
2. **From punishment to incentives:** moving from punishing poor performance on human rights to incentivizing continuous improvement;
3. **From passive to active:** moving from passively expecting partners to deliver results to actively supporting better practices that deliver outcomes for people;
4. **From ‘out there’ to ‘in here’:** moving from assuming others are the problem to reflecting on one’s own potential contribution to human rights impacts;
5. **From avoidance to engagement:** moving from seeing stakeholders as a problem to be managed to championing meaningful engagement.



12 Rachel Davis, “Legislating for Human Rights Due Diligence: How Outcomes for People Connect to the Standard of Conduct,” Shift, August 2021, <https://shiftproject.org/hrdd-outcomes-standard/>.

13 “Signals of Seriousness for Human Rights Due Diligence”, Shift, February 05, 2021, <https://shiftproject.org/resource/signals-draft1/>.





<p>WHAT IS THE PROBLEM?</p>	<p><b>A unilateral approach is characterized by a one-sided legal relationship in which:</b></p> <ul style="list-style-type: none"> <li>• Contracts or supplier Codes of Conduct are developed and applied in a top-down manner.</li> <li>• Contracts refer to relevant sustainability standards but lack mutual obligations or responsibilities for achieving outcomes.</li> </ul>
<p>WHAT WOULD AN APPROACH BASED ON GREATER PARTNERSHIP LOOK LIKE?</p>	<p><b>A partner in a meaningful due diligence process is more likely to adopt practices that:</b></p> <ul style="list-style-type: none"> <li>• Include responsibilities for both parties in contracts that are tailored to the realities of the relationship.</li> <li>• Engage in open conversations with business partners about the cost implications of human rights performance and expected outcomes.</li> <li>• Move from a focus on providing contractual remedies to a counterparty when harm (i.e., a contractual breach) occurs to enabling remedy for those affected.</li> <li>• Require the contracting parties to participate in remediation for affected stakeholders in proportion to their contribution to the impact.</li> <li>• Are capable of addressing contractual non-performance or under-performance by suppliers in cases where performance would have breached human rights expectations (for example, by engaging in undeclared outsourcing to meet a deadline).</li> <li>• Include provisions for exiting the contract that consider and mitigate any human rights impacts of the decision to disengage.</li> <li>• Give more agency to business partners where there is a reasonable basis for it, for example, by requiring self-assessment for suppliers with demonstrated low to moderate human rights risks.</li> </ul> <hr/> <p><b>Further reading:</b></p> <ul style="list-style-type: none"> <li>• <a href="#">No need to reinvent wheels: Drafting meaningful human rights due diligence to model suggested supply chain contract clauses</a> by John F. Sherman III, Shift, May 2021.</li> <li>• <a href="#">Getting Contractual Provisions on Human Rights Right</a>, by John F. Sherman III and Rachel Davis, Shift, August 2021.</li> <li>• <a href="#">From Audit to Innovation; Advancing Human Rights in Global Supply Chains</a>, Shift, August 2013.</li> </ul>
<p>WHAT IS THE OPPORTUNITY IN THE DRAFT DIRECTIVE?</p>	<p>Articles 7 and 8 <b>should be clear that contracts are an essential foundation for leverage – where they set the right terms.</b> These should <b>reflect the mutual due diligence responsibilities</b> of the parties, including when remedy is required.</p> <p>To be effective, even the best contract requires an <b>assessment of a business partner’s capacity and willingness</b> to meet its expectations, especially where compliance will involve some costs. It is part of a company’s responsibility to form this kind of assessment to determine what commercial and/or capacity-building measures will be needed.</p>



WHAT IS THE PROBLEM?

**A punitive approach:**

- Mainly uses audits and third-party certification to police business partners for non-compliance.
- Relies on terminating or suspending contracts or other types of penalties to deter bad practices.
- Measures progress on human rights based on quantitative data alone, which may not tell the full story of a business partner’s efforts to tackle risks.

WHAT WOULD AN APPROACH BASED ON GREATER PARTNERSHIP LOOK LIKE?

**A partner in a meaningful due diligence approach is more likely to adopt practices that:**

- Reward good practices by business partners, for example, by providing commercial incentives (such as premiums, extended contract duration, or preferential contracting) to suppliers that achieve agreed targets on sustainability performance; or by supporting or compensating for the investment costs needed to make essential improvements in working conditions or in environmental performance.
- Support business partners to continuously improve, measuring progress against outcomes for people, not just the number of activities conducted (e.g., numbers of trainings or audits).
- Use audit results or grievances raised by stakeholders as an opportunity to engage in joint learning.
- Avoid immediately suspending or terminating a relationship when problems are found and invest time in understanding why it arose, what the root causes are, and what would be needed to improve the outcome for affected stakeholders.
- Consider how any decision to suspend or disengage from the relationship would affect outcomes for stakeholders and how the company plans to mitigate any additional adverse impacts from the decision itself.

**Further reading:**

- [Business Model Red Flags](#), Shift, February 2021.
- [Indicator design tool](#), Shift, May 2021.
- [Using Leverage in Business Relationships to Reduce Human Rights Risks](#), Shift, November 2013.

WHAT IS THE OPPORTUNITY IN THE DRAFT DIRECTIVE?

Articles 7 and 8 should **incentivize the use of a range of forms of leverage beyond traditional commercial leverage alone**. They should **encourage greater consideration by covered companies of support and capacity-building** for partners.

The Directive should require companies to put in place **robust internal processes for deciding to suspend or withdraw from a relationship** that requires the company to consider the severity of the impacts involved and whether there could be additional harm from a decision to disengage. However, it is **risky to prescribe the results of such processes in all cases**. It is problematic to suggest that there is always a clear answer to whether greater harm will be caused by staying or going. The best solution is to **require meaningful engagement with affected stakeholders** (or their credible proxies where that is not possible) to inform a company’s decision, taking into account all the specificities of the situation.



<p>WHAT IS THE PROBLEM?</p>	<p><b>A passive approach involves:</b></p> <ul style="list-style-type: none"> <li>• Setting contractual requirements and expecting business partners to do the rest.</li> <li>• Assuming business partners are able and willing to identify and address sustainability impacts.</li> <li>• Pre-determining sustainability topics for business partners to focus on, disconnected from their context (for example, based on the partner’s own priorities, crises, or general global trends).</li> <li>• Relying primarily on third-party initiatives to manage risks.</li> </ul>
<p>WHAT WOULD AN APPROACH BASED ON GREATER PARTNERSHIP LOOK LIKE?</p>	<p><b>A partner in a meaningful due diligence approach is more likely to adopt practices that:</b></p> <ul style="list-style-type: none"> <li>• Assess their business partners’ ability and willingness to identify and address sustainability impacts at an early stage – and factor the results of this assessment into the terms of the relationship.</li> <li>• Do not require business partners purely to focus on pre-determined human rights impacts but instead support their process of principled prioritization of risks based on severity and likelihood.</li> <li>• Encourage collaboration and joint problem-solving with business partners on identified priorities, as well as cross-learning on mitigation approaches.</li> <li>• Encourage business partners to flag issues, dilemmas, and challenges that affect the assessment of existing risks or involve new ones.</li> <li>• Use innovative forms of collaborative leverage to influence the behaviors and practices of business partners, including by:             <ul style="list-style-type: none"> <li>• Engaging in transparent and accountable collaborative efforts with industry peers, NGOs, and trade unions.<sup>14</sup></li> <li>• Participating in collective agreements with trade unions that address some of the most severe impacts on workers in relevant value chains.<sup>15</sup></li> </ul> </li> </ul> <p><b>Further reading:</b></p> <ul style="list-style-type: none"> <li>• <u>Signals of Seriousness For Human Rights Due Diligence</u>, Shift, February 2021.</li> <li>• <u>From Audit to Innovation; Advancing Human Rights in Global Supply Chains</u>, Shift August 2013.</li> </ul>
<p>WHAT IS THE OPPORTUNITY IN THE DRAFT DIRECTIVE?</p>	<p>Article 6 should require companies to <b>carry out risk identification across the value chain and across the different ways a company may be involved with an impact</b> – either because it causes an impact, or because it contributes to an impact (either in parallel with other parties or by incentivizing or facilitating other parties to contribute to an impact), or because its operations, products or services are linked to an impact through a business relationship.</p> <p>The Directive should emphasize that <b>leverage is not relevant to prioritization</b>. In a true ‘risk-based approach,’ prioritization is allowed, provided it focuses on the <b>most severe and most likely risks</b> and not on pre-defined or arbitrary thresholds (such as ‘established business relationships,’ ‘tier 1 relationships,’ or the upstream supply chain only). For human rights risks, severity will always be the dominant factor.</p> <p><b>Collaborative initiatives can support aspects of a company’s due diligence</b>, help build capacity, and help coordinate the use of joint leverage in specific situations or contexts. However, they <b>cannot replace an individual company’s responsibility</b> for the quality of its due diligence. The Directive could include high-level quality criteria for initiatives with regard to their transparency, the participation of affected stakeholders in their governance structures, and accountability. This could be supported by further guidance from the Commission. However, the Directive should not shield companies that participate in aligned initiatives from administrative sanctions or civil liability.</p>

<sup>14</sup> Examples of multi-stakeholder or sectoral collaborations that involve stakeholders in their governance and/or in assessing their effectiveness include: the Global Network Initiative, the Fair Labor Association, and the “International RBC agreements” concluded across a range of sectors in the Netherlands with the support of the government.

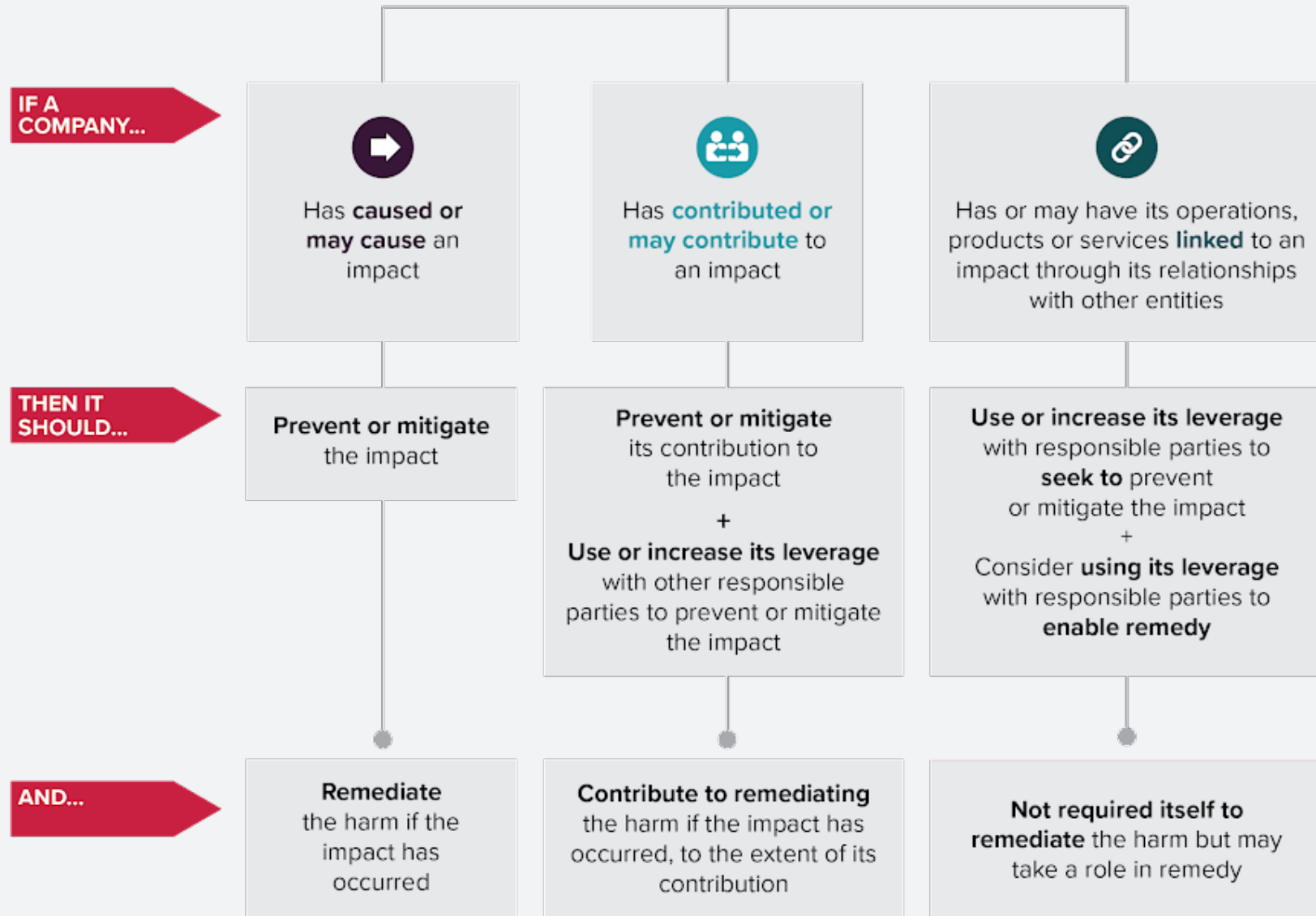
<sup>15</sup> In particular, see the International Accord for Health and Safety in the Textile and Garment Industry which is exploring other priority countries for expansion of the Bangladesh Accord model, beginning with the recently established Pakistan Accord: <https://internationalaccord.org/countries/other-countries/>.





<p>WHAT IS THE PROBLEM?</p>	<p><b>Viewing others as the problem:</b></p> <ul style="list-style-type: none"> <li>• Assumes that the issues are always with another entity that the company does not control.</li> <li>• Assumes that the company’s operations, products, or services are linked to impacts in its value chain without inquiring further.</li> <li>• Fails to consider how the company’s own practices may potentially be contributing to severe impacts across the value chain.</li> <li>• Does not account for any connections between the company’s own business model and salient impacts in the value chain.</li> </ul>
<p>WHAT WOULD AN APPROACH BASED ON GREATER PARTNERSHIP LOOK LIKE?</p>	<p><b>A partner in a meaningful due diligence approach is more likely to adopt practices that:</b></p> <ul style="list-style-type: none"> <li>• Consider salient impacts occurring across its value chain and review whether the company’s own activities may be heightening risks, for example, through its purchasing practices, R&amp;D, or sales and distribution processes.</li> <li>• Consider ways in which risks may be rooted in how the company creates and delivers value or drives profit through its business model – for example, because it involves lowest cost goods or services, relies on gig workers or other precarious labor, or on commodities priced independently from farmers’ incomes – and take appropriate action to mitigate those risks.</li> <li>• Invest in setting clear expectations and training for staff in key business functions that may be subject to competing business pressures (for example, those in procurement and sales) to enable them to prioritize human rights.</li> <li>• Seek honest feedback from business partners on the effect of its practices.</li> </ul> <p><b>Further reading:</b></p> <ul style="list-style-type: none"> <li>• <a href="#">Business Model Red Flags</a>, Shift, February 2021.</li> <li>• <a href="#">Indicator design tool</a>, Shift, May 2021</li> <li>• <a href="#">Better buying reports</a>.</li> </ul>
<p>WHAT IS THE OPPORTUNITY IN THE DRAFT DIRECTIVE?</p>	<p>The due diligence duty should be <b>grounded in the involvement framework in the international standards</b> (i.e., the concepts of cause, contribution, and linkage) and the expectations of differentiated action that they entail. See Figure 1 on the next page for a summary of these expectations.</p> <p>Article 6 should require companies to consider <b>risks that could be heightened by the company’s own activities</b> (such as its own purchasing or sales practices) as well as any risks <b>that are inherent in its business model</b> in assessing whether there is the potential for it to be contributing to harms.</p> <p>Articles 7 and 8 should focus on <b>a company’s own conduct</b> and the steps it should take to adapt its own practices as much as on how it can reasonably influence the behavior of other entities in its value chain.</p>

FIGURE 1: SUMMARY OF THE INVOLVEMENT FRAMEWORK IN THE UNGPS





<p>WHAT IS THE PROBLEM?</p>	<p><b>Seeing affected stakeholders as a problem means:</b></p> <ul style="list-style-type: none"> <li>• Their perspectives are not integrated at key moments in due diligence, leading to poorer quality processes.</li> <li>• A company is less likely to benefit from early warning about problems that would enable it to tackle them before they escalate or relationships deteriorate.</li> <li>• A company does not promote the value of engagement with affected stakeholders with its business partners.</li> </ul>
<p>WHAT WOULD AN APPROACH BASED ON GREATER PARTNERSHIP LOOK LIKE?</p>	<p><b>A partner in a meaningful due diligence approach is more likely to adopt practices that:</b></p> <ul style="list-style-type: none"> <li>• Invest time in building better quality relationships with potentially affected stakeholders or their legitimate representatives (such as trade unions) in order to hear, understand and act on what it learns.</li> <li>• Seek insight into the perspectives of affected stakeholders when direct engagement is not feasible for the company, or safe for stakeholders, through credible proxies for their views (such as NGOs).</li> <li>• Engage with affected stakeholders throughout due diligence – but especially when the company has to prioritize what impacts it should address first and when assessing the effectiveness of the measures it is taking to address impacts.</li> <li>• Encourage its business partners to take stakeholders’ concerns seriously, including engaging with affected stakeholders together with the local partner to achieve this.</li> <li>• Draw on information from grievance mechanisms to inform the early identification and mitigation of risks and to continuously improve its due diligence processes.</li> <li>• Use the company’s leverage to support the development and implementation of effective grievance mechanisms throughout its value chain.</li> <li>• Consider what forms of remedy can best address the harms to affected stakeholders when remediating impacts, taking into account their perspectives and/or encouraging business partners to do so.</li> </ul> <p><b>Further reading:</b></p> <ul style="list-style-type: none"> <li>• <a href="#">Assessing the Quality of Relationships</a>, Shift, May 2021.</li> <li>• <a href="#">“Signals of Seriousness” For Human Rights Due Diligence</a>, Shift, February 2021.</li> </ul>
<p>WHAT IS THE OPPORTUNITY IN THE DRAFT DIRECTIVE?</p>	<p>The Directive should clearly <b>define affected stakeholders</b> as the workers in a company’s own operations or value chain, the local communities affected by a company’s operations or those of entities in its value chain, and people who may be impacted by a company’s products or services, as well as their legitimate representatives. It should distinguish them from other stakeholders that companies may be used to paying attention to (often because they are influential) and make clear that <b>meaningful engagement with affected stakeholders is central to credible sustainability due diligence</b>.</p> <p>At a minimum Article 6 should require companies to <b>carry out meaningful engagement with affected stakeholders to inform their risk identification and prioritization approaches</b>. This is essential to ensuring companies focus on the most severe risks from the perspective of potentially affected stakeholders when it comes to prioritizing human rights risks. Article 10 should similarly require such <b>engagement as part of monitoring a company’s efforts</b>.</p>



## ***From Policing to Partnership: Designing an EU Due Diligence Duty that Delivers Better Outcomes***

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### **ABOUT SHIFT**

Shift is the leading center of expertise on the UN Guiding Principles on Business and Human Rights. Shift's global team of experts works across all continents and sectors to challenge assumptions, push boundaries and redefine corporate practice in order to build a world where business gets done with respect for people's dignity. We are a non-profit, mission-driven organization headquartered in New York City.



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For more about Shift's work on mandatory due diligence legislation in Europe please see [here](#).