Protecting Workers' Rights in Global Supply Chains: Will the EU's Corporate Sustainability Due Diligence Directive Make a Meaningful Difference?

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Introduction

The road to the adoption of the European Union's (EU) Corporate Sustainability Due Diligence Directive (CSDDD) was a long and winding one. Following years of work by EU institutions and continuous advocacy by civil society organizations, including trade unions, last-minute objections from some EU member states threatened to derail the process entirely.[1] After making several major concessions to those states, the European Council adopted the CSDDD on June 13, 2024.[2] Its adoption reflects an important *step* in the development of a legally-binding corporate accountability framework for human rights abuses. While including some improvements over the 2022 proposal of the European Commission (2022 Commission Proposal),[3] the CSDDD contains serious (and potentially fatal) flaws. These flaws reflect significant deviations from the United Nations Guiding Principles on Business and Human Rights (UNGPs) as they relate to Pillar II—the responsibility to "respect"

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1. *See* Philip Blenkinsop, *EU Stalls Supply Chain Law After German, Italian Objections*, Reuters (Feb. 9, 2024, 10:05 AM), https://www.reuters.com/markets/europe/eu-postpones-decision-proposed-supply-chain-due-diligince-law-2024-02-09/ [https://perma.cc/QL45-AYSH].

2. Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, 2024 O.J. (L 1760) (EU) *available at* https://eur-lex.europa.eu/eli/dir/2024/1760/ [https://perma.cc/DS3T-CBZV] [hereinafter CSDDD].

3. *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937*, Eur. Parl. Doc. (COM 2022) 71 (Feb. 24, 2022), *available at* https://data.consilium.europa.eu/doc/document/ST-6533-2022-INIT/en/pdf [https://perma.cc/RU94-MBF5]; *see* our previous analysis, Jeffrey Vogt et. al., *A Missed Opportunity to Improve Workers' Rights in Global Supply Chains*, Opinio Juris (Mar. 18, 2022), https://opiniojuris.org/2022/03/18/a-missed-opportunity-to-improve-workers-rights-in-global-supply-chains/ [https://perma.cc/S2CB-YZM5].

human rights.[4] Thus, we have doubts as to whether the CSDDD will make a meaningful difference for the world's workers and trade unions in practice.

This article will examine the CSDDD as it relates to the promotion and protection of fundamental labor rights in global supply chains, with a focus on those articles we believe are the most relevant for workers and trade unions. We take note of important differences between the 2022 Commission Proposal and the CSDDD and assess it in light of the UNGPs. Given that EU member states must still transpose the CSDDD into national law, we conclude with recommendations that could strengthen the obligations so that it might be a more effective tool to promote fundamental labor rights, one that is better aligned with the UNGPs. We start, however, with some initial observations about human rights due diligence (HRDD), the core of the UNGP's responsibility to respect, and whether it can be an effective tool for the promotion and protection of fundamental workers' rights, since it does not fundamentally address the power asymmetry between labor and unfettered global capital. These concerns inform our overall view of the CSDDD.

I. Initial Observations

HRDD, as framed under the UNGPs and in the national laws of a handful of countries, and as given effect in practice, has failed to adequately address the unequal power relations between multinational enterprises (MNEs) and workers and trade unions in global supply chains; this has given rise to continued human rights abuses and a lack of legal accountability.[5] Many HRDD plans remain superficial statements of corporate policy, do not meaningfully inform company practices, and are not implemented effectively.[6] Moreover, MNEs retain considerable discretion in how they identify and assess risks in their supply chains, and, in the vast majority of cases, fail to consult workers and representative worker organizations in identifying, assessing, and addressing those risks that impact workers.[7] Where actual harm has occurred, workers and trade unions still face considerable obstacles to access justice in foreign

4. Hum. Rts. Council Res. 17/4, U.N. Doc. A/HRC/17/31 (June 16, 2011), https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf [https://perma.cc/M6V5-A83A].

5. For a comprehensive analysis of the several shortcomings of the human rights due diligence approach from a labor governance perspective, *see* Ingrid Landau, Human Rights Due Diligence and Labour Governance (2023). *See also* Gabriel Quijano & Carlos Lopez, *Rise of Mandatory Human Rights Due Diligence: A Beacon of Hope or a Double-Edged Sword?,* 6 Bus. & Hum. Rts. J. 241–254 (2021).

6. A recent survey of the 2,000 of the "most influential companies" by World Benchmarking Alliance found that the vast majority of them simply are not conducting HRDD at all, finding that "80% of the 2,000 companies scored zero on the initial steps of HRDD implementation: identifying, assessing and taking action on their human rights risks and impacts". *See* World Benchmarking All. [WBA], 2024 Soc. Benchmark Report 18 (2024), *available at* https://assets.worldbenchmarkingalliance.org/app/uploads/2024/11/SB-2024-Insights-Report-7-August-2024.pdf [https://perma.cc/G9C4-BDA8].

7. Of those companies surveyed by the WBA that did undertake some HRDD, only 9% of companies communicate examples of how they engage with affected or potentially affected stakeholders—a crucial step in the identification and assessment of risk. *Id.* at 14.

jurisdictions against MNEs and to obtain an appropriate remedy that restores workers to the position they would have been in but for the human rights abuses.[8]

As just one example, the illegal profits generated by forced labor in the private sector now stand at about $236 billion a year, an *increase* of $64 billion since 2014.[9] This rise in private sector forced labor profits over the last ten years overlaps with the thirteen year period when UNGPs were promoted by governments and incorporated into corporate voluntary human rights due diligence plans, when some countries had modern slavery bills in legal force,[10] and when the G7 countries made a joint commitment to tackle forced labor in global supply chains.[11] If forced labor, a severe labor rights abuse, *increased significantly* during the HRDD era, it is clear that something about HRDD—either in concept, law, or application (or all of the above)—is not working. Furthermore, the failure of governments and business to focus on enabling rights, such as freedom of association and collective bargaining, doomed efforts to effectively address forced labor. Indeed, the ILO has recognized that freedom of association is an enabling right necessary to the enjoyment of other rights, including freedom from forced labor.[12]

In the countries that have adopted mandatory HRDD (mHRDD), including France[13] and Germany[14], there is still little to show for their effectiveness as labor rights accountability mechanisms. In France, for instance, one labor-related claim has been adjudicated under the *Loi de Vigilance* regarding the sufficiency of the MNEs' HRDD plan. In Sud PTT v La Poste,[15] the union

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8. *See* Ruggie & Nelson, *Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges*, Corp. Soc. Resp. Initiative Working Paper No. 66, 20 (2015), https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/workingpaper.66.oecd.pdf [https://perma.cc/44FL-5AEZ].

9. Press Release, Int'l Labor Org. [ILO], *Annual Profits From Forced Labour Amount to US $236 Billion, ILO Report Finds,* (Mar. 19, 2024) https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_920143/lang—en/index.htm [https://perma.cc/8KBU-ZD77].

10. *See* e.g. Modern Slavery Act 2015, 2015 c. 30 (UK) https://www.legislation.gov.uk/ukpga/2015/30/contents; Modern Slavery Act 2018, 2018 (Act No. 153) (Austl.), https://www.legislation.gov.au/C2018A00153/latest/text [https://perma.cc/MRL6-Q3LV].

11. *G7 Trade Ministers' Statement on Forced Labour* (Oct. 22, 2021), https://www.gov.uk/government/news/g7-trade-ministers-statement-on-forced-labour-annex-a [https://perma.cc/2M2C-EGMB].

12. Int'l Lab. Conf. 98th Sess., Rep. of the Comm. on the Application of Standards: Observations and Information Concerning Particular Countries, No. 16/Part Two, at II/53, (2009); Int'l Lab. Conf., 93rd Sess., Rep. of the Comm. on the Application of Standards: Observations and Information Concerning Particular Countries, No. 22/Part Two, at II/37, (2005).

13. Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, [Law 2017-399 of March 27, 2017 on the Duty of Vigilance of Parent and Ordering Companies], Journal officiel electronique authentifie (Official Online Gazette of France), Mar. 28, 2017, https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000034290626?r=r4oZB6BaoU [https://perma.cc/Y68Z-5YZM].

14. Regierungsentwurf [Cabinet Draft], Deutscher Bundestag: Drucksachen [BT] 19/30505 (Ger.), https://dserver.bundestag.de/btd/19/305/1930505.pdf [https://perma.cc/7BPD-BVN6].

15. Tribunal Judiciaire de Paris [TJ] [Judicial Court of Paris], soc., Dec. 5, 2023, RG 21/15827, https://www.ilawnetwork.com/wp-content/uploads/2023/12/sudptt_laposte_jugement_ddv_5_dec_2023.pdf [https://perma.cc/WD3Y-WUAH].

brought a claim against the company concerning the employment of undeclared and undocumented migrant workers by its subcontractors. The Paris tribunal ordered La Poste to supplement its vigilance plan with a risk map and warning mechanism following consultations with the trade unions.[16] However, the tribunal rejected the union's request for safeguard measures to prevent undeclared work by subcontractors, among other demands. La Poste also faced no fines. Another labor case was filed in March 2022 by a Turkish trade union against Yves Rocher for violation of the trade union rights of workers employed by its subsidiary, Kosan Kozmetik.[17] Yves Rocher has raised objections on admissibility, and the case remains in pre-trial.

The German mHRDD law has no explicit private right of action for a civil remedy,[18] and existing avenues under German civil law make it difficult for aggrieved parties to hold a company liable in German courts.[19] The supervisory authority for the due diligence law, the German Federal Office of Economics and Export Control (BAFA), did open an investigation into German companies linked to forced labor in the EU road transport sector after migrant workers from Eastern Europe and Central Asia went on strike in Gräfenhausen, Germany in 2023.[20] In May 2024, the United Auto Workers filed a complaint with BAFA alleging that Mercedes Benz unlawfully pressured workers in its auto plant in Alabama to reject the union, which did in fact lead to a loss for the UAW.[21] The complaint remains pending with no action taken as yet.

We acknowledge that mHRDD laws do have a less visible positive impact. It is likely that some companies take these legal obligations seriously, have developed adequate systems to identify and assess human rights risks, have taken the steps necessary to prevent labor abuses from occurring or stepped in quickly to intervene with subsidiaries or suppliers to end abuses when they have occurred and put in place mechanisms to prevent repetition. However, even in cases of a proactive MNE, the MNE remains the driver of the process, not the rights-holder.

As many scholars have observed, there is a fundamental tension in what HRDD is really meant to do. As Anne Trebilcock, former Legal Advisor to

16. Arnaud Dumourier, *La Poste condamnée à renforcer son devoir de vigilance, une première*, Le Monde du Droit (Dec. 6, 2023), https://www.lemondedudroit.fr/decryptages/90272-la-poste-condamnee-a-renforcer-son-devoir-de-vigilance-une-premiere.html [https://perma.cc/SMW7-2VJQ].

17. Press Release, Sherpa, Liberté syndicale et droit des travailleurs et travailleuses en Turquie : Yves Rocher assigné en justice (Mar. 23, 2022), https://www.asso-sherpa.org/liberte-syndicale-et-droit-des-travailleurs-et-travailleuses-en-turquie-yves-rocher-assigne-en-justice [https://perma.cc/VNS9-VQXW].

18. *See* e.g. Initiative Lieferkettengesetz, FAQs on Germany's Supply Chain Due Diligence Act 16 (2021), https://lieferkettengesetz.de/wp-content/uploads/2021/11/Initiative-Lieferkettengesetz_FAQ-English.pdf [https://perma.cc/62CT-W245].

19. Miriam Saage-Maass, *Against All Odds - Options for Workers' Transnational Litigation against Rights Violations in Global Value Chains*, 1 Glob. Lab. Rts. Rep. 18, 21–24 (2021).

20. Press Release, Eur. Transp. Workers Fed'n, Gräfenhausen Strikers Demonstrate That Supply Chain Accountability Is Possible Through Workers' Solidarity (Oct. 3, 2023), https://www.etf-europe.org/grafenhausen-strikers-demonstrate-that-supply-chain-accountability-is-possible-through-workers-solidarity/ [https://perma.cc/U5PR-NCFS].

21. Ian Kullgren, *US Unions Can Wield New Weapon as Europe Targets Labor Violators*, Bloomberg L., (June 20, 2024), https://news.bloomberglaw.com/daily-labor-report/us-unions-can-wield-new-weapon-as-europe-targets-labor-violators [https://perma.cc/8J3L-SGCV].

the ILO, observed, "there is an inherent tension in using a system that was devised essentially with the idea of avoiding liability and risk as one that is supposed to reinforce respect for human rights."[22] Others, like Jonathan Bonnitcha and Robert McCorquodale, have also noted the dual and contradictory aims of HRDD:

> Due diligence is normally understood to mean different things by human rights lawyers and by business people. . . [H]uman rights lawyers understand 'due diligence' as a standard of conduct required to discharge an obligation, whereas business people normally understand 'due diligence' as a process to manage business risks. The Guiding Principles invoke both understandings of the term at different points, without acknowledging that there are two quite different concepts operating and without seeming to explain how the two concepts relate to one another in the context of business and human rights.[23]

These inherent and unresolved tensions and ambiguities preserve space for contestation over what HRDD is actually meant to do—tensions which are on full display in the CSDDD. As explained below, the end result is a law reflecting both the "process" approach of HRDD and the standard of care approach.

In our view, the best way to protect workers' rights in global supply chains is to promote the right to freedom of association and to collectively bargain. Indeed, government, employer and worker representatives reached this conclusion in 1919[24] with the establishment of the ILO and restated this view 100 years later with the ILO Centenary Declaration for the Future of Work.[25] Workers in a union are best placed to identify and assess potential and adverse labor rights impacts. And, these issues can be addressed effectively through good faith collective bargaining, both nationally and cross-border.[26]

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22. Anne Trebilcock, *Due Diligence on Labour Issues – Opportunities and Limits of the UN Guiding Principles on Business and Human Rights, in* Research Handbook on Transnational Labour Law 93, 107 (Adelle Blackett & Anne Trebilcock eds., 2015).

23. Jonathan Bonnitcha & Robert McCorquodale, *The Concept of ‚Due Diligence' in the UN Guiding Principles on Business and Human Rights*, 28 Eur. J. Int'l L. 899, 900-01 (2017).

24. *See* ILO., Constitution of the ILO, Preamble (1919), ("And whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required, as, for example, by . . . recognition of the principle of freedom of association" and "Whereas also the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries"), *available at* https://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO [perma.cc/JKV3-4T2U].

25. *See* ILO., Centenary Declaration for the Future of Work 3, 5 (2019) (II.A.(xii) "In discharging its constitutional mandate, taking into account the profound transformations in the world of work, and further developing its human-centered approach to the future of work, the ILO must direct its efforts to: ensuring that diverse forms of work arrangements, production and business models, including in domestic and global supply chains, leverage opportunities for social and economic progress, provide for decent work and are conducive to full, productive and freely chosen employment"), https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_711674.pdf [https://perma.cc/BRN7-ADUP].

26. *See* e.g. ILO., *Cross-border social dialogue*, MECBSD/2019 (Feb. 12-15, 2019), https://www.ilo.org/sites/default/files/wcmsp5/groups/public/@ed_dialogue/@dialogue/documents/meetingdocument/wcms_663780.pdf [https://perma.cc/745V-PAS6].

To the extent that HRDD processes, including the CSDDD, can facilitate dialogue and ultimately lead to collective bargaining between MNEs and their workers, the workers of their subsidiaries or franchisees, or the workers employed by their suppliers and subcontractors, then there may be very real value to HRDD, and the CSDDD. However, in the more than ten years since the advent of the UNGPs, we have not seen a corresponding increase in union density and collective bargaining coverage.[27] We are hopeful that the new legal obligation to consult with trade unions in Article 13 of the CSDDD, discussed below, does in fact lead to greater meaningful trade union engagement across supply chains, a corresponding increase in collective bargaining coverage, and, as a result, a decrease in labor rights abuses, including those rights covered by the ILO fundamental principles and rights at work, among others.[28] Only time will tell.

II. An Analysis of the CSDDD from a Labor Perspective

We take as our fundamental point of reference the UNGPs.[29]

A. Subject Matter

Article 1(1)(a) of the Directive sets rules for companies regarding potential or actual "adverse human rights impacts" with respect to their own operations, the operations of their subsidiaries and the operations carried out by their "business partners" in the "chains of activities" of those companies.

The definition of "*adverse human rights impact*" at Article 3(c) removes reference to rights "*violations*," found in the 2022 Commission Proposal, and instead adopts the concept of human rights "*abuse*." This is a welcome change, as the term "abuse" in international human rights law refers to conduct by any actor, private or otherwise, whereas the term typically "violation" refers to conduct attributable to states.[30] However, the human rights covered by this definition, as set forth in the Annex, are too narrow in at least one important respect relevant to labor. The term covers the original eight ILO Fundamental Principles and Rights at Work, including explicitly the right to strike. However, it fails to refer to the relevant ILO instruments on occupational safety and health, namely Conventions 155 and 187, which became fundamental conventions in 2022.[31]

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27. ILO, Social Dialogue Report 2022: Collective bargaining for an inclusive, sustainable and resilient recovery 120-21 (2022) (finding that over the period of 2008 to 2019, including salaried, own account and retired workers, overall union density fell from 12.3 to 11.2 percent).

28. ILAW Network & Equal Rights Trust, A Promise Not Realised: The Right to Non-Discrimination in Work and Employment (2024), https://www.ilawnetwork.com/wp-content/uploads/2024/03/ISSUE-BRIEF-A-Promise-Not-Realized.pdf [https://perma.cc/GBN2-8ULS].

29. *See also* Int'l Trade Union Confederation [ITUC], Towards Mandatory Due Diligence in Global Supply Chains (2020) (reflecting a broadly shared trade union view on effective human rights due diligence), https://www.ituc-csi.org/IMG/pdf/duediligence_global_supplychains_en.pdf [https://perma.cc/YT9P-QNF2].

30. *But see* Andrew Clapham, *Protection of civilians under international human rights law, in* Protection of Civilians 146 (H. Willmot, R. Mamiya, S. Sheeran, M. Weller eds,, 2016).

31. Press Release, ILO., International Labour Conference adds safety and health to

Article 32 of the precis explains that the "Commission should be empowered to adopt delegated acts in order to amend Annex I by adding the reference to ILO Occupational Safety and Health Convention, 1981 (No. 155), and the ILO Promotional Framework for Occupational Safety and Health, 2006 (No. 187), once all member states have ratified it."[32] However, all ILO member states have an immediate obligation to "respect, promote and realize" the principles of those two conventions, regardless of ratification.[33] Given the high risk of occupational injuries and diseases in global supply chains, it is problematic to defer the inclusion of this fundamental right until an uncertain future date.[34] The absence of the newest ILO convention, ILO Convention 190 on Violence and Harassment in the World of Work, is also disappointing.[35] On the positive side, the Annex includes an "adequate living wage for employed workers and an adequate living income for self-employed workers and smallholders" in the context of the right to enjoy just and favorable conditions of work. This no doubt corresponds to a recent decision by the ILO to adopt a definition of the term "living wage."[36]

The term "business partner" is defined in Article 3(f) as an entity "with whom the company has a commercial agreement related to the operations, products or services of the company or to whom the company provides services," or "which is not a direct business partner, but which performs business operations related to the operations, products or services." This is an improvement over Article 3 of the 2022 Commission Proposal, which referred to an "established business relationship," defined as "a business relationship, whether direct or indirect, which is, or which is expected to be lasting, in view of its intensity or duration and which does not represent a negligible or merely ancillary part of the value chain." This new definition broadens the scope beyond those entities with whom the company has been engaged in a long-term relationship under the Commission Proposal, which would likely have only covered some Tier 1 suppliers.

The term "chain of activities" is also a new concept in the CSDDD and refers to the activities of business partners upstream (towards the producer)

Fundamental Principles and Rights at Work, (June 10, 2022), https://www.ilo.org/resource/news/ilc/110/international-labour-conference-adds-safety-and-health-fundamental [https://perma.cc/GR7P-5NCU].

32. Directive 2024, *supra* note 2, at precis Art. 32.

33. ILO., Declaration on Fundamental Principles and Rights at Work Art. 2 (1998) (as amended in 2022), https://www.ilo.org/ilo-declaration-fundamental-principles-and-rights-work/about-declaration/text-declaration-and-its-follow [https://perma.cc/S5WJ-DVHD].

34. Indeed, the 2013 Rana Plaza building collapse in Savar, Bangladesh, which killed over 1,100 workers and injured twice as many, gave urgency to the application of the UNGPs and hastened the adoption of legislation such as the French Duty of Vigilance Law.

35. ILO Violence and Harassment Convention (No. 190), June 21, 2019, 3444 U.N.T.S. 3, *available at* https://normlex.ilo.org/dyn/nrmlx_en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C190 [https://perma.cc/N73N-CEAQ]. Human rights instruments that broadly prohibit discrimination were not included in the Annex, as they have not been ratified by all member states, including the Convention on the Elimination of all forms of Discrimination Against Women and the Convention on the Elimination of all forms of Racial Discrimination; however, discrimination in occupation and employment on the basis of sex and/or race is prohibited under ILO Convention 111.

36. *ILO reaches agreement on the issue of living wages,* ILO, (Mar. 15, 2024), https://www.ilo.org/resource/news/ilo-reaches-agreement-issue-living-wages [https://perma.cc/8TBS-K7LR].

and downstream (towards the consumer). While broad, the concept does not necessarily cover all relevant activities in global supply chains. Excluded from the definition are some downstream activities where labor rights could be abused, such as product use and product disposal (e.g., shipbreaking), or the delivery of goods through a third party. Also excluded in the list of downstream activities is the distribution, transport and storage of weapons, munitions, and war materials. This is particularly problematic, given the high risk for adverse human rights impacts related to the sale of weapons.[37]

Additionally, we are uncertain of the extent to which workers in the informal economy, over 60 percent of the total global workforce, or 2 billion people,[38] fall within the scope of the CSDDD. While certainly many of those working in the informal economy are producing goods or delivering services for local markets only, many are also integrated into global supply chains.[39] They may be, for example, home based workers manufacturing inputs for formal manufacturing processes or agricultural laborers harvesting crops which may be processed before being exported. While such workers are arguably part of the operations carried out by business partners within the chain of activities, clarification on this point is needed. The precis makes no mention whatsoever of workers in the informal economy.

Furthermore, paragraphs 26, 51, and 61 of the precis stipulate that financial undertakings are only required to conduct HRDD in their own and *upstream* operations, thereby exempting these institutions from obligations relating to their downstream operations. Crucially, these downstream operations include investment and lending activities. The UNGPs do not create an exception for the finance industry and apply equally to institutional investors, which are required to undertake HRDD to identify adverse human rights risks and impacts in their portfolios.[40] The CSDDD's built-in review mechanism does require the European Commission to prepare a report on the need for additional due diligence requirements for regulated financial undertakings within a two-year period. Such a review will be an important moment to align the CSDDD with the UNGPs as it relates to the finance industry.

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37. *See, e.g.*, UN Working Grp. on Bus. and Hum. Rts., Responsible business conduct in the arms sector: Ensuring business practice in line with the UN Guiding Principles on Business and Human Rights, p. 7 (2022) (recommending that states "Introduce mandatory HRDD legislation with enhanced HRDD obligations for the arms sector."), https://www.ohchr.org/sites/default/files/2022-08/BHR-Arms-sector-info-note.pdf [https://perma.cc/K5B6-UBDZ].

38. Int'l Labour Off., Women and Men in the Informal Economy: A Statistical Picture 1 (3d ed. 2018), *available at* https://www.ilo.org/sites/default/files/2024-04/Women_men_informal_economy_statistical_picture.pdf [https://perma.cc/S2XC-W6MJ].

39. *See* ILO, Working from Home: From Invisibility to Decent Work (Geneva, 2021), *available at* https://www.ilo.org/wcmsp5/groups/public/—ed_protect/—-protrav/—-travail/documents/publication/wcms_765806.pdf [https://perma.cc/S649-KDEG]; Jenna Harvey, *Homeworkers in Global Supply Chains: A Review of Literature*, WIEGO Resource Document No. 11 (2019).

40. *See*, Shannon Osaka, *Earth breached a feared level of warming over the past year. Are we doomed?* Wash. Post, (Feb 8, 2024) (reporting that "For the past 12 months, the Earth was 1.5 degrees Celsius higher than in preindustrial times. . . crossing a critical barrier into temperatures never experienced by human civilizations").

Article 1(1)(b) requires member states to lay down rules for liability for adverse human rights impacts and Article 1(1)(c), which is new, includes an obligation for companies to "adopt and put into effect a transition plan for climate change mitigation that aims to ensure, through best efforts, compatibility of the business model and strategy of the company with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C." This is an important inclusion, despite the fact that the 1.5°C target was already surpassed in 2024.[41] However, the CSDDD missed an important opportunity to embed the globally accepted concept of a *just transition* into the text.[42] This concept, which originated in the labor movement,[43] would require companies to bargain collectively with unions and other representative worker organizations over the companies' practices and strategies to mitigate and adapt to global warming.[44]

Importantly, Articles 1(2) and 1(3) provide that the CSDDD should not negatively affect, unintentionally or otherwise, existing employment rights and collective agreements.

B. Scope

Article 2(1)(a) establishes a minimum threshold of 1,000 employees on average and a global net turnover of over 450 million Euros to fall within the scope of the Directive. Under Article 2(2), the CSDDD also applies the monetary minimum criteria to MNEs based outside of the EU, 450 million Euros, regardless of whether that amount was generated in the EU or by the ultimate parent of a group of groups that meets the threshold on a consolidated basis. This is a significant regression compared to the 2022 Commission Proposal, which set a minimum threshold of 500 employees on average and a global net turnover of over 150 million Euros—a doubling of the number of employees and a trebling of the net turnover. This increase was one of the major concessions made in early 2024 to win over holdout EU member states.[45] According to the European Coalition for Corporate Justice (ECCJ), the higher thresholds mean that less than 0.05% of EU-based companies will be covered by this Directive.[46]

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41. Intergovernmental Panel on Climate Change, *Summary for Policymakers, in* Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change pp.1-34 at B.1.1 (H. Lee & J. Romero eds., 2023].

42. ILO, Guidelines for a just transition towards environmentally sustainable economies and societies for all (Geneva, 2015), online at https://www.ilo.org/publications/guidelines-just-transition-towards-environmentally-sustainable-economies [https://perma.cc/BW4M-W74R].

43. . Todd Vachon, *Just Transition Frames in the Context of the American Labor Movement*, *in* Handbook of Environmental-Labour Studies 107 (Nora Räthzel, Dimitris Stevis, & David Uzzell eds., 2021).

44. ILO, *supra* note 42.

45. Jack Shickler, *Belgium triples corporate due diligence thresholds in bid for last-ditch deal,* Euronews, (March 14, 2024), https://www.euronews.com/green/2024/03/14/exclusive-belgium-triples-corporate-due-diligence-thresholds-in-bid-for-last-ditch-deal [https://perma.cc/HCD4-M7QV].

46. Press Release, European Coalition for Corporate Justice, REACTION CSDDD endorsement brings us 0.05% closer to corporate justice (March 15, 2024), https://

The lower threshold of 250 employees and 40 million Euros in global net turnover for companies in higher-risk sectors, including apparel and footwear, agricultural, forestry and fisheries, and mining, which was in the 2022 Commission Proposal, has been abandoned entirely in the CSDDD. As we previously explained,[47] the high-risk sector concept was problematic in that the three listed sectors were not the only ones that presented a high risk for adverse human rights impacts in global value chains. Further, companies in those three sectors were only required to identify and assess severe potential and actual adverse human rights impacts. Unfortunately, as explained below, the CSDDD marks a shift towards limiting certain obligations to severe impacts for *all* companies within the scope of the Directive.

One positive is the inclusion, at Article 2(1)(c), of companies which have entered into franchise or licensing agreements where the franchise arrangement ensures a common identity, common business concept, and uniform business methods and where such companies take in more than 22.5 million Euros in royalties and more than 80 million Euros in global turnover. The inclusion of companies in franchise arrangements is a meaningful inclusion, especially considering the severe labor rights abuses in highly franchised sectors like the hospitality industry.[48] However, it is unclear how the monetary thresholds were set and how many companies will be now covered as a result.

Further, the CSDDD has included several new carve-outs and clarifications. Article 2(3) provides guidance on how to count employees for the purposes of reaching the minimum threshold. As before, part-time employees are calculated on a full-time equivalent basis. Article 2(4) of the CSDDD has added language that provides for the inclusion of temporary agency workers, seasonal workers, and workers in non-standard forms of employment, though *only so long as they are determined to be workers under the test set out by the Court of Justice of the European Union*. This clause does raise some concerns. In the most recent CJEU case on this issue, *B v Yodel Delivery Network Ltd.*, Case C-692/19 (April 22, 2020), the Court's order raises questions as to whether the term "worker" applies to those engaged through digital platforms, particularly where the contract affords the worker discretion to use subcontractors or substitutes to carry out the work. As such, the addition of this clause may exclude workers who should properly be counted as such.

C. Human Rights Due Diligence

Article 5 establishes the procedural framework by which companies must conduct human rights due diligence, which is further developed over the course of Articles 6 through 12.

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corporatejustice.org/news/reaction-csddd-endorsement-brings-us-0-05-closer-to-corporate-justice/ [https://perma.cc/PN4U-EPTL].

47. Vogt et. al., *supra* note 3.

48. Press Release, European Federation of Food, Agriculture, and Tourism Trade Unions Political deal on Due Diligence sets a new era in the fight against corporate impunity, (Dec. 18, 2023), *available at* https://effat.org/in-the-spotlight/political-deal-on-due-diligence-sets-a-new-era-in-the-fight-against-corporate-impunity/ [https://perma.cc/C4Y3-8MXH].

1. Identifying and Assessing Actual and Potential Adverse Impacts

Article 5(1)(b) provides that companies conduct risk-based human rights and environmental due diligence by "identifying and assessing actual or potential adverse impacts in accordance with Article 8 and, where necessary, prioritizing actual and potential adverse impacts in accordance with Article 9."

Article 8(1) states that companies shall take the "appropriate measures" to identify and assess actual and potential adverse impacts arising from their own operations or those of their subsidiaries and, when related to their "chain of activities," those of their "business partners." Of concern is the addition of Article 8(2), which at (2)(a) provides that companies should map their operations and those of their subsidiaries and business partners "in order to identify general areas where adverse impacts are ***most likely to occur and to be most severe***." Based on that mapping, the company is supposed to undertake its in-depth assessment, pursuant to (2)(b) "in the areas where adverse impacts were identified to be most likely to occur and most severe." This text picks up on the language in Article 6(2) of the 2022 Commission draft, which was meant for high-risk sectors only and now applies generally. There is no foundation in the UNGPs to limit the duty of companies to only identify and assess potential and actual adverse impacts which are most likely and severe. While MNEs can prioritize how to *address* potential and actual human rights impacts based on the degree of severity, it is a mistake to permit MNEs to solely identify and assess risks based on severity. As such, MNEs will either miss or be able to ignore many human rights risks.

A related concern is how the term "severe adverse impact" will be interpreted and by whom. The definition provided at Article 3(l) builds on the definition of the 2022 Commission Proposal, which was generally consistent with the definition of severe human rights impacts under the UNGPs,[49] which focuses on scale, scope, and irremediability. The CSDDD adds the clause "such as an impact that entails harm to human life, health, and liberty." While it does not limit the concept to those three categories, it nevertheless sets a high bar for interpreting the term "severe" per the principle of *ejusdem generis*.

As explained in our analysis of the 2022 Commission Proposal, a common human rights abuse suffered by workers is anti-union discrimination. It is often the case that the dismissal of union activists will chill efforts to form and join a union, not only by those dismissed but any other worker who has knowledge of the retaliation. It is unclear whether an MNE will deem the risk of anti-union dismissal a "severe" adverse impact, as it does not directly impact life, health, and liberty (though such harms can arise if workers are deprived of collective voice at work). As such, it remains to be seen whether an MNE will consider potential and actual violations of the right to freedom of association and to collectively bargain as "severe." Relatedly, it is unclear whether a national authority or court would find the failure to identify and assess those risks constitutes a violation of the CSDDD.

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49. *See Glossary*, U.N. Hum, Rts. Rep. Framework, https://www.ungpreporting.org/glossary/severe-human-rights-impact/ [https://perma.cc/YDC8-MZ66] (last visited Jan. 2, 2025).

Article 8(3) retains the 2022 Commission Proposal, whereby companies are entitled to use information to identify and assess adverse impacts through reference to independent reports and company-level complaints mechanisms. It deletes reference to stakeholder consultations, now in a standalone article, and instead refers, at Article 8(4), to prioritizing information directly from business partners where adverse impacts are most likely to occur.

Article 9 is a new article which builds on the approach taken by Article 8, calling on companies, when they cannot prevent, mitigate, bring to an end, or minimize all identified adverse impacts, to prioritize action based on the severity and likelihood of adverse impacts. Only after these have been addressed should a company address less severe and less likely impacts.

2. Preventing Potential Adverse Impacts

Article 10(1) provides that companies shall take appropriate measures to prevent or minimize adverse human rights impacts that should have been identified under Article 8 and in accordance with Article 9. The CSDDD adds to the 2022 Commission Proposal three factors to consider in taking appropriate measures, which include 1(a) whether the potential adverse impact may be caused only by the company; caused jointly by the company and its subsidiary or business partner, or whether it may be caused only by the company's business partner in the chain of activities; 1(b) whether the potential adverse impact may occur in the operations of the subsidiary, direct business partner or indirect business partner; and 1(c) the ability of the company to influence the business partner that may cause or jointly cause the potential adverse impact.

Article 10(2)(a) lists appropriate measures, which shall be taken where relevant. Article 10(2)(a) provides for the elaboration of prevention action plans for complex cases with reasonable and clearly defined timelines. New to the CSDDD is a provision that companies may develop these action plans in cooperation with industry or multi-stakeholder initiatives (MSIs). However, there is a very wide range in the quality of industry initiatives and MSIs in the business and human rights space with a number of them having no or limited trade union representation.[50] We have serious reservations about MNE reliance on MSIs to develop prevention action plans for workers and unions. Article 20(4) attempts to address this concern by requiring companies to assess the appropriateness and monitor the effectiveness of measures developed with MSIs. It further explains that the European Commission and Member States

50. *See Not Fit-for-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance* at p.4, MSI Integrity, (July 2020), https://www.msi-integrity.org/not-fit-for-purpose/ [https://perma.cc/G384-SQBM] (finding "MSIs are not effective tools for holding corporations accountable for abuses, protecting rights holders against human rights violations, or providing survivors and victims with access to remedy. While MSIs can be important and necessary venues for learning, dialogue, and trust-building between corporations and other stakeholders—which can sometimes lead to positive rights outcomes— they should not be relied upon for the protection of human rights. They are simply not fit for this purpose."). MSI Integrity noted two fundamental flaws: 1) MSIs are not rights-holder centric and 2) MSIs have not fundamentally restricted corporate power or addressed the power imbalances that drive abuse.

shall issue guidance setting out fitness criteria and a methodology to assess the fitness of industry or MSI initiatives. Unfortunately, the CSDDD sets no date for the publication of such guidance, and it is unclear what the content of such guidance might be. Furthermore, it remains unclear how rigorous national oversight bodies or courts will be in evaluating the fitness of industry initiatives and MSI, the measures taken as a result, or the reasonableness of MNE reliance on those measures. As to potential labor rights impacts, trade unions, whether at the national, regional, or international level, not industry initiatives or MSIs, are best placed to provide insights on the formulation of an appropriate plan.[51]

Article 10(2)(b) requires that companies seek contractual assurances from a direct business partner that it will comply with the company's code of conduct and, where necessary, a prevention action plan. Article 10(4) allows the company to seek contractual assurances from an indirect business partner where potential adverse impacts could not be adequately mitigated by the measures described in Article 10(2) dealing with direct business partners. Presumably this provision was written with a view to shortening the value chain, Per Article 10(5), the contractual assurances, whether under 10(2) or 10(4), shall be accompanied by the appropriate measures to verify compliance. Such contractual assurances may be verified by an "independent third-party verification, including through industry or multi-stakeholder initiatives." Again, in light of the voluminous evidence that many such initiatives are not fit for purpose and often fail to identify potential adverse labor rights impacts, we have serious concerns about MNEs outsourcing their responsibilities to a third-party auditor or MSI.[52]

There are important and positive additions to Article 10 that deserve mention. Perhaps the most meaningful addition is the inclusion of 10(2)(d), which requires companies, where relevant, to make necessary modifications of, or improvements to, the company's own business plan, overall strategies, and operations—including purchasing practices, design, and distribution practices. Purchasing practices can be a major contributor to the labor abuses ultimately committed by a business partner in a global supply chain.[53] If this provision is effectively transposed into national law, this could have a meaningful impact on labor rights compliance. It will be important to ensure that this is not merely hortatory, but that companies actually change their business models so that suppliers are not so squeezed that they are essentially forced to abuse

51. *See, e.g.*, *ITF Maritime Human Rights Due Diligence Guidance*, Int'l Transport Workers' Fed'n, (July 2023), https://www.itfglobal.org/sites/default/files/node/resources/files/ITF-HRDD_Guidance.pdf [https://perma.cc/3UTJ-WKV6] (offering a worker-centered approach to HRDD in the industry),

52. *See, e.g.*, Obsessed *with Audit Tools, Missing the Goal: Why Social Audits Can't Fix Labor Rights Abuses in Global Supply Chains*, Hum. Rts. Watch, (Nov. 2022), https://www.hrw.org/report/2022/11/15/obsessed-audit-tools-missing-goal/why-social-audits-cant-fix-labor-rights-abuses [https://perma.cc/G8HH-8RP2].

53. *See, e.g.*, *Paying for a Bus Ticket and Expecting to Fly: How Apparel Brand Purchasing Practices Drive Labor Abuses,* Hum. Rts. Watch (April 2019), https://www.hrw.org/report/2019/04/23/paying-bus-ticket-and-expecting-fly/how-apparel-brand-purchasing-practices-drive [https://perma.cc/HA9G-FXGQ].

labor rights or to subcontract out the work, where the risk of labor abuses is even higher.[54]

Article 10(5) includes additional language as it pertains to contractual assurances with an SME, namely that the terms are to be fair, reasonable, and non-discriminatory, though the regulation provides no guidance as to what these terms mean. The company is also required to assess whether, in addition to contractual assurances, the company should support the SME with capacity building, training, or upgrading of management systems, and to supply financial support if compliance with a plan would threaten the viability of the SME.

Finally, Article 10(6) provides that where potential adverse impacts cannot be prevented or adequately mitigated by the measures above, then the company, *as a last resort*, shall refrain from entering into new or extending existing relations with a business partner in or in connection with the chain of activities. Further, the company shall, if the governing law permits it, and *as a last resort*, "adopt and implement an enhanced prevention action plan for the specific adverse impact without delay." The company is to use the temporary suspension of business as leverage to obtain such an enhanced plan, which shall include specific and appropriate timelines. However, if there is no reasonable expectation that these efforts would succeed, or if the implementation of the plan failed, then the company shall terminate the business relationship *if the potential adverse impact is severe*. If the adverse impact is not deemed severe, the text provides no guidance. It will be critical that companies be able to terminate their business relationships in the face of labor abuses, whether deemed severe or not, if other efforts have failed to result in ending the adverse impacts and that disengagement would not cause more harm than good. We argue that this should be determined by the workers affected. Curiously, the Article provides that a company may decide not to suspend or terminate the business relationship, though the previous paragraph states that a company shall do so as a last resort. In such a case, the company is free to continue doing business and monitor the situation.

3. Bringing Actual Adverse Impacts to an End

Article 11(1) requires companies to take appropriate measures to bring actual adverse impacts to an end, citing the three factors set out in Article 10(1). However, Article 11(2) provides an exception, stating that if it is not possible to bring an end to the adverse impact immediately, companies can "minimize" the extent of the impact. Of concern is that it does not state that a company "minimize to the maximum extent possible." As such, it contemplates that a company may continue a business relationship with ongoing adverse human rights impacts to some unspecified degree.

Like Article 10, Article 11 lists several actions that the company shall take, where relevant. Article 11(3)(a), which provides that the company "neutralise the adverse impact or minimise its extent." It removes the text from the 2022

54. *See, e.g.*, Mark Anner, *Squeezing workers' rights in global supply chains: purchasing practices in the Bangladesh garment export sector in comparative perspective,* 27 Rev of Int'l Political Econ 320, (2020).

Commission Proposal, which provided "including by the payment of damages to the affected persons and of financial compensation to the affected communities." This is positive in that it indicates that the concept of remedy is far broader than the payment of damages and other monetary compensation. The second sentence is also reformulated slightly, replacing the concept of "significance and scale" with "severity" and the concept of "contribution" with "implication in." It is unclear whether there is any difference between "implication in" and "contribution."

Article 11(3)(b) raises the same questions and concerns as with the corresponding sections of Article 10, namely the possibility of reliance on industry initiatives or MSIs to develop and implement corrective action plans. Again, while there is nothing wrong with a company seeking guidance in areas where it may have little expertise, there are vast differences in the qualities of MSIs. In the labor context, such corrective action plans should be developed with the affected workers or elected worker representatives. They are best placed to know what the harms are, why they happened, and how they might be addressed. Similarly, 8(3)(c) of the CSDDD allows companies to obtain contractual assurances, which can be monitored by third party auditors under Article 8(5).

Article 11(6) also raises the same concerns with regard to Article 10(5), with the substitution of potential adverse impacts in Article 7 for actual adverse impacts in Article 8.

Article 12 provides that the company shall provide remediation for actual adverse impacts. We read the term broadly to provide for a complete remedy which goes beyond mere monetary compensation.[55] Importantly, the requirement is limited to those harms to which the company causes or contributes to ("jointly caused"). It will be important that the concept of joint causation be read broadly so that it might reach contractual business relationships. Many scholars have argued that irresponsible purchasing practices are a significant driver of labor abuses in supply chains.[56] If such practices are deemed to have jointly caused the harm (e.g. anti-union discrimination in an effort to avoid potentially higher labor costs), then our concerns may be addressed. If not, companies will have little obligation to provide a remedy in most cases that do not involve directly caused harms. Indeed, under Article 12(2), companies will have no obligation to provide remediation if the harm is caused only by the company's business partner; through the article does not prohibit voluntary remedies or using its influence to encourage the business partner to provide the remedy.

55. Working Group on the issue of human rights and transnational corporations and other business enterprises, Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms, 18 July 2017 (referring to a "bouquet of remedies"), ¶¶ 38-54, https://documents.un.org/doc/undoc/gen/n17/218/65/pdf/n1721865.pdf [https://perma.cc/V99Q-ABEC].

56. *See, e.g.*, Mark Anner, *supra* note 56.

D. Role of Trade Unions

A key problem with the implementation of HRDD under the UNGPs has been the failure of companies to engage meaningfully with trade unions in identifying, assessing, and addressing labor rights risks—instead usually relying on consultants or business-oriented multi-stakeholder initiatives that may be poorly-informed or have conflicts of interest.[57] Article 13 is perhaps one of the most significant additions to the CSDDD. Where the 2022 Commission Proposal encouraged companies to engage with stakeholders "where relevant," as the companies determined, Article 13 makes clear that MNEs must undertake effective engagement with stakeholders at all steps of the human rights due diligence process. Furthermore, Article 13(2) mandates that companies provide relevant and comprehensive information for the purpose of consultation.

We would also underscore here the importance of engagement with legitimate worker representatives. Many MNEs have knowingly engaged with worker committees or "yellow" (non-independent) unions that do not represent workers' interests.[58] To the contrary, they are set up by management to thwart efforts by workers to form a legitimate union. Engagement with legitimate worker representatives is the only way an MNE can accurately identify and assess risks, including to the abuse of the rights to freedom of association and to collectively bargain.

However, Article 13(4) provides that when it is not reasonably possible to carry out effective engagement with stakeholders, the company may instead consult with experts. There may be some cases where it is effectively impossible to engage directly with affected workers, for example, the situation of Uyghur workers in China, and engagement with outside experts would have to suffice. However, it will be important that merely difficult not be conflated with "not reasonable," which could obviate the need to engage directly with workers or trade unions. Moreover, even where direct engagement may be "unreasonable" in certain workplaces or even countries, companies could nevertheless engage with relevant global trade union federations. As such, there are few scenarios in which a relevant worker representative at some level will not be able to provide relevant insights.

Similarly, Article 13(6) would appear to allow a company to circumvent the effective engagement requirements of the preceding clauses by engaging with an industry initiative or MSI (except when dealing with the company's own employees). This clause could significantly undermine the utility of this Article, as direct engagement with workers and worker representatives will be far more effective in identifying and assessing labor rights risks and addressing actual impacts. Furthermore, if the aim of engagement with workers and their

57. *See* Business & Human Rights Centre, Just for show: Worker representation in Asia's garment sector & the role of fashion brands & employers 8 (June 2024), *available at* https://media.business-humanrights.org/media/documents/2024_FoA_report.pdf [https://perma.cc/F4SF-HZTB] (finding that "Less than a quarter (22%) of companies disclosed engaging with local or global unions to improve freedom of association in their supply chains" and "Only 12% of companies disclose even partial information on the percentage of their supply chains covered by collective bargaining agreements (CBAs)").

58. *Id.* at 4.

representatives is collective bargaining, engagement with MSIs will not further that goal.

E. Notification Mechanism and Complaints Procedures

Article 14(1) requires companies to enable aggrieved parties to submit complaints concerning actual or potential adverse impacts with respect to the companies' own operations, the operations of their subsidiaries, or the operations of their business partners in the companies' *chains of activities*. Significantly, Article 14(2)(b) clarifies that trade unions representing workers in a company's *chain of activities* can file complaints. Paragraph 59 makes it clear that the requirement for complaints processes to be 'fair, publicly available, accessible, predictable and transparent' under Article 14(3) should be understood in line with Principle 31 of the UNGPs, which lists the effectiveness criteria for non-judicial grievance mechanisms. Crucially, Article 14(3) also states that workers and their representatives should also be protected from retaliation.

Article 14(6) also refers to "collaborative complaints' procedures and notification mechanisms," including those established through "global framework agreements." We would underscore the importance that any non-judicial remediation efforts should be without prejudice to encouraging collective bargaining and recognition of trade unions and should by no means undermine the role of legitimate trade unions or workers' representatives in addressing labor-related disputes.

While the original 2022 Commission Proposal did not require companies to provide a human rights-compatible outcome if the grievance is sustained, the CSDDD takes a small step forward by providing that complainants are entitled to request appropriate follow up from the company, including on *potential remediation in accordance with Article 12*. However, such follow-up meetings are only required where the potential or actual impact is *severe* (as determined by the company). This still raises significant concerns as the process may result in no tangible outcome for those abused.

F. Combating Climate Change

While companies are required to adopt and put into effect climate transition plans, the elements of such plans, listed in Article 22(1), do not mention a *just transition for workers*. This is a major missed opportunity. At a minimum, the EU should have required companies to engage in social dialogue on climate mitigation and adaptation measures and to prioritize upskilling of workers, as set forth in the *ILO Guidelines*.[59] Furthermore, Article 22 is completely unenforceable, as it is excluded from review by the supervisory authorities and cannot be enforced through the civil liability provisions.

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59. The core elements of a just transition, including social dialogue, are already well rooted in international human rights law. *See, e.g.* Ruwan Subasinghe and Jeffrey Vogt, *It's time to start talking about a human right to a just transition*, Equal Times, Oct 14, 2021, https://www.equaltimes.org/it-s-time-to-start-talking-about-a?lang=en [https://perma.cc/N54L-HP9C].

G. Supervisory Authorities

As most recently evidenced by the enforcement action under the German due diligence law, a well-resourced and empowered supervisory authority can provide rights-holders with a rapid and less onerous route to a remedy than civil litigation. As noted above, BAFA opened an inquiry into German companies using Polish transport companies in their supply chain following a major wildcat truck driver strike over large-scale labor exploitation.[60] Additionally, BAFA organized two emergency summits[61] to discuss wider issues concerning road transport and human rights with full participation of the social partners. Also, in May 2024, following a complaint filed by the US union United Auto Workers (UAW), BAFA opened an investigation into alleged violations of workers' rights to freedom of association at Mercedes-Benz's Alabama plant, operated by the company's US subsidiary.[62]

Article 24 of the CSDDD also calls for the establishment of national-level supervisory bodies within two years of the Directive entering into force to ensure that companies within each signatory's jurisdiction comply with their HRDD obligations. Article 25 also requires member states to ensure that supervisory authorities have adequate powers and resources, including to compel the production of information and to carry out investigations — whether on their own initiative or in response to a substantiated communication from the public pursuant to Article 26.

If a company fails to comply with national law implementing the CSDDD, the supervisory authority shall grant the company concerned an appropriate period of time to take remedial action. Articles 27(3)(a) and 27(4) of the CSDDD stipulate that the relevant supervisory authority shall have powers to impose pecuniary penalties of up to 5% of net worldwide turnover. While this is an improvement on the Commission Proposal, the CSDDD still gives broad discretion to member states, which, depending on transposition, could still provide insufficient disincentives to poor corporate behavior. Further, we remain concerned with the lack of any formal trade union involvement in the establishment or operation of the supervisory authority and the failure to give this supervisory authority oversight over social auditors and MSIs to ensure that they are held to the highest standards of accountability.

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60. *See* Uwe Gerritz, *Lkw-Fahrer an Raststätte Gräfenhausen beenden Hungerstreik*, Hessenchau, (Sept. 25, 2023), https://www.hessenschau.de/wirtschaft/lkw-fahrer-an-a5-raststaette-bei-weiterstadt-beenden-hungerstreik-v4,streik-lkw-fahrer-graefenhausen-100.html [https://perma.cc/L5TC-TL4G] .

61. Press release, BAFA, Zweiter Transportgipfel in Borna: Austausch für mehr Menschenrechtsschutz im Transportsektor, *available at* https://www.bafa.de/SharedDocs/Pressemitteilungen/DE/Lieferketten/2024_03_transportgipfel_borna.html [https://perma.cc/YF94-JUR7].

62. Press Release, United Auto Workers, *Mercedes-Benz under investigation by German government for illegally violating workers' rights at Alabama plant,* (May 16, 2024), *available at* https://uaw.org/mercedes-benz-under-investigation-by-german-government-for-illegally-violating-workers-rights-at-alabama-plant/#:~:text=The%20UAW%20complaint%20details%20how,supporter%20with%20Stage%204%20cancer [https://perma.cc/9JXS-PJ7X].

H. Civil Liability

While the civil liability section of the CSDDD, Article 29, claims that it provides civil liability to companies and the right to full compensation, it is more limited in its reach than the 2022 Commission Proposal. Article 29(1) provides that a company can only be held liable for damage caused if "(a) the company *intentionally or negligently* failed to comply with the obligations laid down in Articles 10 and 11, when the right, prohibition or obligation listed in [Annex I] is aimed to protect the natural or legal person," and "(b) as a result of that failure referred to in point (a), damage to the natural or legal person's legal interest protected under *national law* was caused." The Article adds a proviso that the company cannot be held liable if the damage was caused only by its business partners in its chain of activities.

There is a lot to unpack in this relatively short text. First, Article 29(1)(a) refers to the two standards for liability in tort (at least in common law systems.)[63] The 2022 Commission Proposal did not indicate any particular standard, only that the company failed to comply with its obligations under what are now articles 10 and 11 and that a harm that should have been prevented resulted. As such, the CSDDD may impose a higher threshold for liability than the 2022 Commission Proposal. In the case of negligence, one would typically need to show the existence of a duty, the breach of that duty, that the negligent act was the actual and proximate cause of the harm, and that it caused damage. It may be that a court would have imported a negligence approach had the text of the Commission Proposal remained. And, since neither the Commission Proposal nor the final CSDDD endorse strict liability, it is unclear if this amendment will make any difference.

Article 29(1)(a) further provides that companies can be held civilly liable if they fail to take appropriate measures to prevent potential adverse impacts under Article 10 or end actual adverse impacts as set forth in Articles 11 and that, as a result, damage to the natural or legal person's legal interests that are protected under national law. While this may sound correct, recall that Articles 10 and 11 may be satisfied by entering into contracts with business partners to respect a code of conduct or prevention plan developed by an industry initiative or MSI, and that the code or plan can be verified by a third-party auditor. Thus, it might be difficult to hold a company liable if it entered into such an arrangement unless the injured party were able to prove that these assurances or prevention plans were not appropriate measures and that the company was at least negligent in relying on those initiatives of MSIs. We do note Article 29(4), which states that reliance on an industry initiative or an MSI is not a defense to liability. However, it will nevertheless be difficult for a claimant to prevail unless the fact of the harm is itself evidence of the measures not being appropriate and the company is at least negligent.

63. One could assume that recklessness, a higher standard than negligence, would also implicitly be covered in this formulation.

Another perplexing clause is in 29(1)(b), which refers to a legal interest protected under national law. Paragraph 79 of the precis provides little help here, explaining,

> "In order to ensure that victims of adverse impacts have effective access to justice and compensation, Member States should be required to lay down rules governing the civil liability of companies for damage caused to a natural or legal person, on condition that the company intentionally or negligently failed to prevent or mitigate potential adverse impacts or to bring actual impacts to an end or minimise their extent and, as a result of such a failure, damage was caused to the natural or legal person. *Damage caused to a person's protected legal interests should be understood in accordance with national law, for example death, physical or psychological injury, deprivation of personal liberty, loss of human dignity, or damage to a person's property."* (emphasis added).

There are at least two possible interpretations. First, that the legal interest of the claimant is defined by the national law of the member state which is home to the company being sued. That could potentially lead to different results depending on which interests are protected and to what extent across the EU member states. Second, it could be the national law of the country in which the harm occurred. In a common labor situation, say, the dismissal of a union leader for protected trade union activity, is the substantive legal interest, freedom of association, determined by the law of, for example, Italy or Cambodia? If the legal interest is not protected in the country in which the harm occurred, it is unclear what exactly is to be done.

Finally, 29(1) ends by explaining that a company cannot be held liable if the damage was caused only by its business partners in the chain of activities.[64] This suggests that a company could be liable if it, for example, contributed to the harm ultimately under a theory of joint liability, which is contemplated at 29(5). It will be important that courts recognize, for example, common situations, such as unreasonable reliance on audit reports or unsustainable purchasing practices, as sufficient for joint and several liability. Otherwise, EU-based companies will almost never be held responsible for human rights abuses in global supply chains, where most of the human rights abuses actually occur (and for which there is rarely a juridical forum adequate to provide a remedy).

Article 29(2) refers to compensation to be awarded for human rights abuses in accordance with national law, again causing confusion as to which law is referred to. Further, it opens up the possibility of wide variations in available damages based on the rules of the home country of the company or

64. This goes further than the 2022 Commission Proposal, which provided at article 21(2) that companies could avoid liability for an adverse impact arising as a result of the activities of an indirect partner with whom it has an established business relationship unless it was unreasonable in the circumstances of the case to expect that the actions actually taken, including in respect of verifying compliance, would be adequate to prevent, minimize, bring to an end to, or mitigate the adverse impact. It goes on to add that in assessing the existence and extent of liability, due account must be taken of the company's efforts regarding actions relating to the damage in question to comply with any remedial action required of them by a supervisory authority, any investments made and collaboration with other entities to address adverse impacts in its value chains, and any targeted support provided pursuant to articles 7 and 8.

the home country of the complainant. In the labor context, compensatory damages alone may be insufficient. For example, where an effort to form a union is thwarted by violating the workers' right to freedom of association, how does one assess compensatory damages in such a case? In any case, the compensatory damages could be quite small, making it unlikely that workers would initiate costly transnational litigation to recover such damages, and even if recovered, they would be too small to provide a disincentive to the company. The availability of injunctive relief under 29(3)(c) is certainly helpful where the company itself is causing the harm but is of course unavailable in the context of a business relationship.

We do note the important addition of 29(3), which seeks to address some of the issues that make bringing a claim difficult for injured parties, including workers and unions in global supply chains. For example, (a) provides a clear minimum statute of limitations, five years, as well as factors for tolling the moment at which the limitation period starts. Further, (b) requires states to ensure that the costs of pursuing justice are not "prohibitively expensive," though there is not meaningful guidance as to what this could mean in practice. One reason why a claimant does not pursue a claim is the cost and length of transnational litigation. More could have been done, including capping the costs at a reasonable level and/or to set up a fund to support claimants who otherwise would not have the resources to pursue their human rights claims.

The inclusion of (d), which allows for trade unions to bring claims on behalf of claimants, e.g., workers or unions affected in a third country, is important, as is (e), which provides claimants an enforceable right to obtain the discovery of documents and other information in the possession of the company being sued. Lack of access to such information has been a significant barrier to past litigation.[65] However, the CSDDD is silent on the burden of proof, and thus it is likely to fall on the under-resourced plaintiff to collect sufficient evidence as to the MNE's intent or negligence to make at least a *prima facie* case.

I. Transposition

While the CSDDD calls on states to adopt and publish regulations to comply with the directive within two years, it directs member states to apply those provisions in a staggered implementation schedule. Companies within the scope of the directive will have between 3-5 years from the CSDDD entering into force before they will have to comply. Companies with over 5,000 employees and a turnover exceeding 1.5 billion will be expected to comply within three years. Companies with more than 3,000 employees and a turnover over 900 million will have four years. And those companies with more than 1,000 employees and a turnover of 450 million or more will have five years to comply. While recognizing some time is necessary to adapt to new regulations,

65. Skinner, Gwynne, Robert McCorquodale, and Olivier De Schutter. The third pillar: access to judicial remedies for human rights violations by transnational business 8 (2013) (finding "Barriers to effective remedy are also created by the burden the victims carry to prove their case. This is exacerbated by the difficulty of obtaining evidence and by rules of discovery or disclosure of information.").

companies that come within the scope of the CSDDD are very large. Most of them should have already adopted HRDD in their corporate practices to comply with their responsibilities under the OECD Guidelines and the UNGPs, as well as their obligations under the French or German mHRDD laws, where applicable. This excessive implementation period is simply unnecessary.

Conclusions and Recommendations

As the intense backroom negotiating in the final months of the legislative process demonstrated, the CSDDD was always going to be a compromise between ambition and political expediency. Nevertheless, as a transnational *experiment* in regulating decent work in global supply chains, the CSDDD represents a partial re-alignment of the normative asymmetry that has for decades favored corporate interests over human rights.

EU Member States could address some of the concerns outlined above at the national level when the CSDDD is transposed into domestic legislation. Member states may adopt more stringent regulation than provided for in the Directive for many of its provisions.[66] Of course, the same political pressures that led to the compromises in the text of the CSDDD are likely to be replicated at the national level. Also, the CSDDD has a built-in review mechanism, which could facilitate its amendment at a future date if there is sufficient political agreement to address the concerns below. But, in the absence of significant improvements at the EU level and/or stricter regulation at the national level, we fear that the CSDDD could be of limited utility in promoting and protecting workers' rights in global supply chains.

Below, we outline some areas where EU member states could adopt more stringent regulation that could compensate for the flaws in the CSDDD.

Subject Matter:

- The CSDDD defines subject matter in a way that is generally in conformity with the UNGPs. Upon transposition to national law, member states could further expand the concept of "chain of activities" to include *all* downstream activities. The revised OECD Guidelines for Multinational Enterprises on Responsible Business Conduct also call on companies to conduct HRDD over downstream business relationships, including "entities in the supply chain that receive, license, buy or use products or services from the enterprise."[67] Therefore, it is evident that the CSDDD falls short of the widely accepted *voluntary* standard for downstream HRDD.
- With respect to the limited HRDD obligations on financial undertakings, the UN Working Group on Business and Human Rights has made it abundantly clear[68] that under the UNGPs, all financial institutions, of every type,

66. *See* CSDDD, *supra* note 3, at Article 4(2). However, member states *cannot* introduce more stringent measures as they relate to Articles 8(1), 8(2), 10(1) and 11(1), the key provisions regarding identifying, preventing, and addressing adverse human rights impacts.

67. Marian Ingrams, *Updated OECD Guidelines reconfirm downstream application of due diligence*, OECD Watch (June 13, 2023), https://www.oecdwatch.org/updated-oecd-guidelines-reconfirm-downstream-application-of-due-diligence/ [https://perma.cc/Y9BG-RTX2].

68. U.N. Working Grp. on Bus. and Hum. Rts., Statement on Financial Sector and the European Union Corporate Sustainability Due Diligence Directive (July 12, 2023),

have the same responsibility to respect human rights. Creating exemptions for a sector that has such a woeful track record on respect for human rights[69] is not only inconsistent with the UNGPs but also shields banks and investment firms from accountability.

- We would also urge EU member states that have ratified ILO Conventions 155 and 187 to include them within the scope of "adverse human rights impacts" when transposing the Directive at the national level. Further, Austria, Bulgaria, Estonia, France, Germany, Greece, Lithuania, Malta, and Romania should prioritize the ratification of Convention 155, and Romania should prioritize the ratification of Convention 187.

Scope:

- Principle 11 of the UNGPs provides that "The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate." Further, Principle 14 provides that "the responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure." Thus, there is *no* basis under the UNGPs to have excluded 99.95% of companies from the obligation to conduct due diligence. The scope goes well beyond merely carving out SMEs, as many large enterprises were also excluded.[70] To be consistent with the UNGPs, the law should cover all enterprises while acknowledging that the way in which SMEs address potential and actual impacts may take on different forms given their size and resources. When transposed, national law could at least set a lower employee and turnover threshold. Ideally, national law would abandon the established thresholds, instead giving SMEs greater latitude as permitted throughout the UNGPs.

Due Diligence:
Identifying and Assessing Actual and Potential Adverse Impacts

- There is no rationale nor foundation in the UNGPs to limit the duty of companies to only identify and assess (those?) potential and actual adverse impacts which are most likely and most severe. While HRDD may vary with the risk of severe human rights impacts (UNGPs 17 and 19), it is fundamentally a consideration in determining whether it is necessary to take more immediate or serious action, not whether to take action at all. To be consistent with the UNGPs and to ensure more uniform implementation of HRDD, severity should not be considered when identifying and assessing human rights impacts but rather when prioritizing actions to address human rights impacts.[71] Unfortunately, Article 4(2) prohibits member states from introducing "more stringent provisions" with regard to Article 8(2), and as such, a member state could not simply remove the adjective "severe." One way to address this could be for member states to simply

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https://www.ohchr.org/sites/default/files/documents/issues/business/workinggroupbusiness/Statement-Financial-Sector-WG-business-12July2023.pdf [https://perma.cc/N9C9-ULJY].

69. *See, e.g.*, Paul Hidgson, *Banks failing on human rights, says Banktrack*, Cap. Monitor (Oct 30, 2023), https://capitalmonitor.ai/institution/banks/banks-failing-on-human-rights-says-banktrack/ [https://perma.cc/6PJH-SQBX].

70. The UNGPs recognize that even SMEs can have severe human rights impacts.

71. *See* UN Hum. Rts. Council, Guiding Principles on Business and Human Rights, HR/PUB/11/04, no. 24 (2011) ("*Where it is necessary to prioritize actions to address actual and potential adverse human rights impacts, business enterprises should first seek to prevent and mitigate those that are most severe or where delayed response would make them irremediable*.")

redefine "severe" to include the five ILO fundamental labor rights. Of note, Article 4(2) allows member states to introduce provisions that are "more specific in terms of the objective or the field covered to achieve a different level of protection." This clause does not exclude Article 8(2). As such, it may be possible to apply a higher standard to ILO fundamental labor rights specifically by stipulating that risks related to those rights must be identified or assessed regardless of severity.

Preventing Potential Adverse Impacts

- It will be critical that there are strict guidelines developed regarding the fitness of MSIs and industry initiatives. In our view, the best way to prevent potential adverse human rights impacts is to recognize a union and to bargain collectively. Further, there is no foundation in the UNGPs to limit the possibility of disengagement to only severe adverse impacts—especially where common labor rights abuses may not be deemed severe. While we do agree that disengagement is a last resort, it cannot be impossible.

Bringing Actual Adverse Impacts to an End

- If an MNE is unable to end an adverse impact, legislators should require them to minimize the impact to the maximum extent possible.
- With regard to labor rights harms, legislators should make clear that corrective action plans should be developed with and monitored by the affected workers or elected worker representatives wherever possible.
- As with civil liability below, it will be important that acts such as unsustainable purchasing practices be a contribution to a harm sufficient to show joint causation and thus creating an obligation for the MNE to provide a remedy. Furthermore, legislators should consider incentivizing MNEs to provide voluntary remedies in situations where they are merely linked to the actual harm.

Role of Trade Unions

- It is important that legislators prioritize engagement with legitimate, representative worker organizations. Namely, democratic trade unions. Legislators could ensure that recourse to experts or other bodies, such as MSIs, should only be possible if efforts to engage with relevant trade unions have been exhausted or are simply not possible.

Notification Mechanism and Complaints Procedures

- Legislators could improve the text by guaranteeing a rights-compatible outcome through the grievance process, as well as providing complainants the right to follow up in all cases, not only those that are deemed severe.

Combatting Climate Change

- Despite the precis mentioning the Paris Agreement, which explicitly refers to just transition in the preamble, the CSDDD is silent on the issue. At the national level, legislators should give effect to the ILO Just Transition Guidelines, which center social dialogue, including collective bargaining, as necessary elements of a strategy to meet the Paris climate goals. Furthermore, this obligation should be legally enforceable.

Civil Liability

- Given the ambiguity as to which "national law" applies with regard to a claimant's legal interest, legislators will need to clarify which law applies.

- Legislators will need to provide further guidance on the issue of joint liability—the "contribute to" prong of the UNGPs liability regime—as much of the harm in global supply chains is caused directly by a supplier, not directly by the company. Here, unsustainable purchasing practices, unreasonable reliance on third-party audits, and other similar actions or omissions, should be sufficient in order to show contributory negligence.
- Legislators need to address the cost of transnational human rights litigation. There could be many approaches to do so, from small measures, such as the waving of fees, to more important ones, such as creating legal aid funds for claims brought under the directive.
- Finally, legislators could reverse the burden of proof in claims brought under the directive or at least ensure that the burden shifts to the defendant once the claimant has made a prima facie case.

Transposition

- Legislators should significantly limit the time companies have to comply with the national laws transposing the CSDDD. Given that the CSDDD only covers the largest corporations, which should already be familiar with HRDD, a one-year grace period for all companies should ideally be the maximum time allowed.

Missing Elements

Finally, we take note of important articles of the 2022 Commission Draft that were simply abandoned in the CSDDD. For example, Article 25 on the Directors' duty of care, along with companion Article 26 on setting up and overseeing due diligence were abandoned in the CSDDD along with specific, legally enforceable duties. Legislators should consider adding these elements in their national legislation. Additionally, despite the EU having adopted a directive in 2024 to ensure the protection of human rights defenders from unfounded and abusive legal practices,[72] the CSDDD fails to address the use of strategic lawsuits against public participation (SLAPPs) by MNEs. The inclusion of anti-SLAPP provisions in national law would be an important step to protect human rights defenders, including trade unionists, from vexatious claims by corporations.

72. Council of the European Union Press Release, Anti-SLAPP: Final green light for EU law protecting journalists and human rights defenders (March 19, 2024), https://www.consilium.europa.eu/en/press/press-releases/2024/03/19/anti-slapp-final-green-light-for-eu-law-protecting-journalists-and-human-rights-defenders/ [https://perma.cc/68FV-8YDV].