

# Declaration for an ambitious EU Directive on corporate responsibility to respect human rights and the environment in global value chains

Plenary Assembly of 24 March 2022  
 (Adopted unanimously)

## SUMMARY.

The CNCDH welcomes the publication of a proposal for a Directive on corporate sustainability due diligence, the first European Union initiative to impose a cross-cutting and cross-sector due diligence obligation on companies with regard to human rights and the environment.

In order to achieve, at the end of the negotiations, the adoption of an ambitious Directive, commensurate with the stakes and effectively likely to contribute to a profound change in the behaviour of companies in favour of full respect for human rights and environmental protection, it formulates several recommendations aimed at improving the text.

In particular, the CNCDH recommends broadening the scope of the Directive, strengthening the due diligence obligations by bringing it more in line with the relevant international standards, providing for a better definition and involvement of stakeholders, and strengthening the monitoring arrangements in order to facilitate access to remedies and redress.

## Introduction.

1. The CNCDH welcomes the publication by the European Commission of a proposal for a Directive on corporate sustainability due diligence<sup>1</sup>. Announced in April

2020<sup>2</sup> and postponed several times, this proposal for a Directive is the first European Union (EU) initiative that aims to impose a cross-cutting and cross-sector due diligence obligation<sup>3</sup> on companies with regard to human rights and the environment<sup>4</sup>. The CNCDH has long recommended that due diligence be made a legal requirement for companies<sup>5</sup>. It thus welcomed France's adoption of Law No. 2017-399 of 27 March 2017 on the duty of vigilance of parent companies and instructing undertakings, which set the trend in this area<sup>6</sup>. From the outset, the adoption of this legislation was conceived as a first step, with a view to encouraging further work at European and international levels<sup>7</sup>, which are the most appropriate levels for ensuring harmonisation of the regulation of the activities of increasingly globalised companies.

2. This EU-wide legislative initiative is therefore welcome, especially as it is likely to have effects beyond the EU's borders (directly and through a knock-on effect). It aims to bridge the gaps in positive law (*soft* and *hard*)<sup>8</sup> and

2 The Directive was announced on 29 April 2020 by Commissioner Didier Reynders during a webinar on due diligence organised by the European Parliament's working group on responsible business conduct: <https://responsiblebusinessconduct.eu/wp/2020/04/30/speech-by-commissioner-reynders-in-rbc-webinar-on-due-diligence/>.

3 Current EU regulations only require companies to exercise human rights and/or environmental due diligence in specific sectors (timber and minerals; regulations on batteries and deforestation are also being developed).

4 The proposal for a Directive also imposes a duty of care on directors (Article 25).

5 CNCDH, *Business and Human Rights: opinion on the challenges of the application by France of the United Nations Guiding Principles*, Plenary Assembly of 24 October 2013, Official Journal of the French Republic no. 0266 of 16 November 2013, text no. 56, §§33 et seq.

6 CNCDH, Declaration on the adoption of a binding international instrument on business and human rights, Plenary Assembly of 5 October 2018, Official Journal of the French Republic no. 0238 of 14 October 2018, text no. 100.

7 In this sense, the CSR Platform (Plateforme RSE) recommended that France play "a leading role in the adoption of a common European framework on due diligence", in its opinion on the *Action Plan on implementing the UN Guiding Principles on Human Rights and Business* of September 2016, p. 24, available at [https://www.strategie.gouv.fr/sites/strategie.gouv.fr/files/atoms/files/avis\\_sur\\_le\\_pnedh\\_-\\_version\\_definitive\\_-\\_complet.pdf](https://www.strategie.gouv.fr/sites/strategie.gouv.fr/files/atoms/files/avis_sur_le_pnedh_-_version_definitive_-_complet.pdf).

8 These gaps, related in particular to the shortcomings of voluntary approaches, of sector-specific approaches and the need to strengthen access

1 Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, 23 February 2022, COM(2022) 71 final, available at [https://ec.europa.eu/info/sites/default/files/1\\_1\\_183885\\_prop\\_dir\\_susta\\_en.pdf](https://ec.europa.eu/info/sites/default/files/1_1_183885_prop_dir_susta_en.pdf). This proposal for a Directive is accompanied by an Annex, available at [https://ec.europa.eu/info/sites/default/files/1\\_2\\_183888\\_annex\\_dir\\_susta\\_en.pdf](https://ec.europa.eu/info/sites/default/files/1_2_183888_annex_dir_susta_en.pdf). At the same time, the Commission also presented a Communication on decent work worldwide for a global just transition and a sustainable recovery, 23 February 2022, COM(2022) 66 final.

to respond to the “urgency to act” for responsible value chains in terms of human rights and environment, in order to contribute to sustainable development, a concept that highlights the interdependence between development, environment and human rights<sup>9</sup>. Founded on the “values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights”<sup>10</sup>, as enshrined in the Charter of Fundamental Rights<sup>11</sup>, the European Union is also committed to a “high level of protection and improvement of the quality of the environment”<sup>12</sup>. This legislative initiative is thus in line with the Commission’s political priority of “an economy that works for people”<sup>13</sup> and the EU’s transition to a climate-neutral and green economy, in accordance with the Green Deal<sup>14</sup> and the Sustainable Development Goals<sup>15</sup>. It also aims to respond to the risk of fragmentation in the internal market<sup>16</sup>, in a context of increasing need for harmonisation of Member States’ legislation, in the face of the proliferation of divergent national rules on due diligence<sup>17</sup>, and intends to strengthen legal certainty and promote a level playing field<sup>18</sup>. The Commission’s proposal echoes the work of the European Parliament<sup>19</sup> and the calls of the Council of the EU<sup>20</sup>, as well as responds to the numerous requests expressed in particular during the public consultation organised within the framework of this legislative initiative by a variety of actors: civil society organisations, trade unions, national human rights institutions, European citizens, but also businesses and investors, although some business associations have expressed reservations.

to redress and remedy, have been identified in particular in the study of the Commission’s Directorate-General for Justice and Consumers (DG Just) on due diligence requirements through the supply chain and in the public consultation conducted in 2021 (European Commission, DG Just, TORRES-CORTES Francisca, SALINIER Camille, DERINGER Hanna et al, *Study on due diligence requirements through the supply chain: final report*, 2020, available at <https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en>). The summary of the public consultation is available at [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance/public-consultation\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance/public-consultation_en).

9 On this subject, see: CNCDH, *Opinion on development, environment and human rights*, Plenary Assembly of 16 April 2015, Official Journal of the French Republic, no. 0119 of 24 May 2015, text no. 50, in particular pp. 12 et seq.

10 Article 2 of the Treaty on European Union (TEU).

11 *Charter of Fundamental Rights of the European Union*, 7 December 2000, 2000/C 364/01, available at [https://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](https://www.europarl.europa.eu/charter/pdf/text_en.pdf).

12 Article 3(3) TEU. See also Article 191 of the Treaty on the Functioning of the European Union, which details the objectives of the Union’s policy on the environment, and Article 37 of the Charter of Fundamental Rights.

13 Explanatory Memorandum of the Commission’s proposal for a Directive, *op. cit.*, p. 20.

14 Communication from the Commission, “The European Green Deal”, 11 December 2019, COM(2019) 640 final.

15 <https://www.un.org/sustainabledevelopment/sustainable-development-goals/>.

16 Explanatory Memorandum of the Commission’s proposal for a Directive, *op. cit.*, p. 21 in particular.

17 Many EU Member States have adopted, or are planning to adopt, legislation on corporate due diligence, such as France, Germany, Belgium, the Netherlands, Luxembourg and Sweden, but without providing for the same scope, content of the due diligence obligation or sanction mechanisms and extent of liability. The Commission anticipates an increase in the disparity of these national rules, which could lead to a “race to the bottom” (Explanatory Memorandum of the Commission’s proposal for a Directive, *op. cit.*, pp. 12 – 13).

18 Explanatory Memorandum of the Commission’s proposal for a Directive, *op. cit.*, p. 11 in particular.

19 European Parliament Resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)).

20 Council of the European Union, *Council Conclusions on Human Rights and Decent Work in Global Supply Chains*, 1 December 2020, ST 12945/20, available at <https://data.consilium.europa.eu/doc/document/ST-13512-2020-INI/en/pdf>.

3. The CNCDH welcomes the inclusion in the Commission’s proposal of various elements that have been the subject of debate: horizontal and cross-sectoral human rights and environmental due diligence obligation, which applies to EU companies but also to non-EU companies operating in the internal market, covers the entire value chain and proposes implementation modalities based on a combination of administrative sanctions and civil liability. However, it is concerned about the risks that the current text entails in terms of effectiveness, due to its limited scope; the wording of the content of the due diligence obligation (which should not be reduced to a compliance exercise, especially as the consultation of stakeholders is not satisfactory); and also the limits to the scope of civil liability, which raise broader questions about the ability of the current text to strengthen victims’ access to justice and remedy. Better alignment with relevant international standards<sup>21</sup>, such as the UN Guiding Principles<sup>22</sup>, the OECD Principles<sup>23</sup> or the ILO Tripartite Declaration<sup>24</sup>, would be a useful way of bridging these gaps. The CNCDH also regrets the weakness of the climate obligations, which are disconnected from the due diligence obligations, whereas the Directive should be an opportunity to respond to this social issue<sup>25</sup>. It hopes that an ambitious Directive will be adopted<sup>26</sup>, which is equal to the challenges for all stakeholders, humanity and the planet, and which is effectively likely to contribute to a profound change in corporate behaviour in favour of full respect for human rights and environmental protection. To this end, the CNCDH makes the following recommendations aimed at improving the text.

### Broaden the scope of the Directive.

Companies targeted.

4. The proposal for a Directive concerns firstly companies set up under the law of a Member State, distinguishing between two groups: on the one hand, companies with more than 500 employees and a net worldwide turnover of more than EUR 150 million (Group 1) and, on the other hand, other companies operating in three high-impact sectors which, without meeting the two thresholds of Group 1, employ more than 250 people and have a net worldwide turnover of more than EUR 40 million, of which at least 50%

21 In this sense, see the preliminary assessment of the UN Working Group on Business and Human Rights : UN Working Group on Business and Human Rights preliminary assessment of EU draft due diligence directive - Business & Human Rights Resource Centre ([business-humanrights.org](https://business-humanrights.org)).

22 Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, 21 March 2011, A/HRC/17/31, available at [https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr\\_en.pdf](https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf).

23 Organisation for Economic Co-operation and Development (OECD), *The OECD Guidelines for Multinational Enterprises*, 2011 edition, available at <https://www.oecd.org/daf/inv/mne/48004323.pdf>.

24 International Labour Organization (ILO), *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, March 2017, 5th edition, available at [https://www.ilo.org/wcmsp5/groups/public/-/ed\\_emp/-/emp\\_ent/-/multi/documents/publication/wcms\\_094386.pdf](https://www.ilo.org/wcmsp5/groups/public/-/ed_emp/-/emp_ent/-/multi/documents/publication/wcms_094386.pdf).

25 On the link between climate and human rights: CNCDH, *Opinion “Climate Emergency and Human Rights”*, Plenary Assembly of 27 May 2021, Official Journal of the French Republic no. 0130 of 6 June 2021, text no. 46, available in English on the CNCDH’s website <https://www.cncdh.fr>.

26 In this sense, see the European resolution aimed at including among the priorities of the French Presidency of the Council of the European Union the adoption of ambitious legislation on the duty of vigilance of multinationals, adopted by the National Assembly on 20 January 2022, available at [https://www.assemblee-nationale.fr/dyn/15/textes/15t0757\\_texte-adopte-seance#](https://www.assemblee-nationale.fr/dyn/15/textes/15t0757_texte-adopte-seance#).

is generated in one of the sectors referred to<sup>27</sup>. It also covers third-country companies with an EU turnover in line with that of groups 1 and 2<sup>28</sup>. Small and medium-sized enterprises (SMEs) are therefore not directly covered by its scope. The proposal for a Directive, on the other hand, covers the entire value chain by targeting the operations of companies, their subsidiaries and their value chains (direct and indirect business relationships)<sup>29</sup>.

5. Its scope, while broader than that of French Law<sup>30</sup>, is therefore limited and, by the Commission's own admission, would exclude around 99% of companies domiciled within an EU Member State<sup>31</sup>. This would directly affect fewer than 13,000 EU companies and about 4,000 non-EU companies<sup>32</sup>.

6. The exclusion of many companies from the outset risks undermining the effectiveness of a Directive that is intended to level the playing field. It also departs from the UN Guiding Principles on Business and Human Rights, which apply to all companies regardless of their size, sector, ownership, structure, etc.<sup>33</sup> Moreover, the scope of application chosen does not help to promote and generalise existing good practices in this area. This restriction and the "trickle down" approach alone runs counter to the growing movement aimed at encouraging and supporting SMEs to implement due diligence themselves. The CNCDH also questions the criteria used to determine the high-impact sectors (textiles, agriculture, extraction of mineral resources, etc.)<sup>34</sup>. It recommends that the Directive should cover all companies in a non-discriminatory way, while providing for adaptation for SMEs<sup>35</sup>.

7. The proposal for a Directive provides that (Group 2) companies operating in high-impact sectors will only have to carry out due diligence in respect of severe adverse impacts relating to the sector concerned<sup>36</sup> and will benefit from a longer transition period<sup>37</sup>. On the contrary, the CNCDH

recommends that the obligations imposed in the context of activities identified as high risk should not be weakened, but rather reinforced<sup>38</sup>, and should not be postponed. Furthermore, it questions the ability of these companies to identify the most severe adverse impacts<sup>39</sup> in the absence of a general risk analysis. It recommends that all companies conduct, as a minimum, a mapping of the salient risks in accordance with the Guiding Principles.

8. Similarly, the CNCDH regrets that due diligence obligations are limited for companies in the financial sector. These companies, when providing credit, loan or other financial services, are only required to identify actual or potential adverse human rights and environmental impacts prior to providing that service<sup>40</sup>. This approach departs from the UN Guiding Principles and is inconsistent with other EU initiatives, which aim to further engage the financial sector in sustainable development<sup>41</sup>. It thus weakens their role and responsibility in this area, and limits the positive impact that companies in this sector can have and the possible catalytic effect on other sectors.

#### Rights covered.

9. The proposal for a Directive aims to strengthen the promotion and protection of human rights and the environment by imposing due diligence obligations on the above-mentioned companies with regard to their actual and potential human rights and environmental adverse impacts. These adverse impacts are defined as those resulting from the violation of one of the rights and prohibitions as enshrined in the international conventions as listed in the Annex<sup>42</sup>.

10. Twenty-two international human rights conventions and declarations are listed in the Annex to the proposal for a Directive. The CNCDH notes that important references are missing, such as the United Nations Declaration on Human Rights Defenders<sup>43</sup>, and

27 Article 2(1) of the proposal for a Directive, *op. cit.*

28 Article 2(2) of the proposal for a Directive, *op. cit.*

29 Article 1(a) of the proposal for a Directive, *op. cit.*

30 The French duty of vigilance Law applies to any company that employs, at the end of two consecutive financial years, at least five thousand employees itself and in its direct or indirect subsidiaries, whose registered office is located in France, or at least ten thousand employees itself and in its direct or indirect subsidiaries, whose registered office is located in France or abroad (Article L.225-102-4 of the French Commercial Code (*code de commerce*)). The proposal for a Directive uses two cumulative criteria for European companies (number of employees and turnover), whereas the French Law uses only the number of employees. The difficulties of being subject to this criterion alone were highlighted in the information report on the evaluation of the Law of 27 March 2017 on the duty of vigilance of parent companies and instructing undertakings, presented by the MPs Coralie DUBOST and Dominique POTIER on 24 February 2022, pp. 52 et seq., available at [https://www.assemblee-nationale.fr/dyn/15/rapports/cion\\_lois/15b5124\\_rapport-information.pdf](https://www.assemblee-nationale.fr/dyn/15/rapports/cion_lois/15b5124_rapport-information.pdf).

31 Explanatory Memorandum of the Commission's proposal for a Directive, *op. cit.*, p. 14.

32 The Commission estimates that only 9,400 Group 1 EU companies, 3,400 Group 2 EU companies, 2,600 Group 1 non-EU companies and 1,400 Group 2 non-EU companies would be affected (see information available at [https://ec.europa.eu/info/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence\\_en](https://ec.europa.eu/info/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence_en)).

33 UN Guiding Principles on Business and Human Rights, *op. cit.*

34 The sectors were determined on the basis of the existing sector-specific OECD guidance on due diligence, excluding however the financial sector, which is covered by an OECD guide (recital 22 of the proposal for a Directive, *op. cit.*).

35 In the same vein, the CNCDH welcomed the extension of the scope of the draft legally binding instrument on business and human rights to all companies (CNCDH, *Draft Business and Human Rights Treaty: Declaration for a substantial involvement of France and the European Union in the negotiations*, Plenary Assembly of 28 October 2021, Official Journal of the French Republic no. 0260 of 7 November 2021, text no. 67).

36 Article 6(2) of the proposal for a Directive, *op. cit.*

37 For these companies, the Directive will only start to apply four years after

its entry into force, i.e. two years later than for Group 1 companies (Article 30(1)(b)).

38 In this sense, the CNCDH already recommended, in 2013, the introduction of a requirement of reinforced diligence with regard to the State and companies concerning high-risk areas or products (CNCDH, *Business and Human Rights: opinion on the challenges of the application by France of the United Nations Guiding Principles*, Plenary Assembly of 24 October 2013, *op. cit.*, §42).

39 Severe adverse impacts are defined by the proposal for a Directive as adverse environmental impacts and adverse human rights impacts that are especially significant by their nature, or affect a large number of persons or a large area of the environment, or which are irreversible, or are particularly difficult to remedy (Article 3 (l)).

40 Article 6(3) of the proposal for a Directive, *op. cit.* Furthermore, the "value chain" of these undertakings, within the meaning of the proposal for a Directive, is limited to the activities of the clients benefiting from these financial services and of other companies belonging to the same group whose activities are linked to the contract in question (Article 3 (g)).

41 See in particular the Action Plan on Financing Sustainable Growth (Commission Communication of 8 March 2018, COM(2018) 97 final) and Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector (known as the SFDR Regulation).

42 Article 3 (b) and (c) of the proposal for a Directive, *op. cit.* and Parts I and II of the Annex respectively. For a comparison between the rights covered by the proposal for a Directive, the French duty of vigilance Law and the German Law (*Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten*, 16 July 2021, available at <https://bit.ly/3xrHesE>), see: BRABANT Stéphane, BRIGHT Claire, NEITZELN Noah, SCHÖNFELDER Daniel, "Due Diligence Around the World: The Draft Directive on Corporate Sustainability Due Diligence (Part 1)", *Verfassungsblog*, 15 March 2022, available at <https://verfassungsblog.de/due-diligence-around-the-world/>.

43 Declaration on the right and responsibility of individuals, groups and organs of society to promote and protect universally recognized human rights and fundamental freedoms, adopted by Resolution A/RES/53/144 of

that European human rights protection instruments, in particular the Charter of Fundamental Rights of the European Union, the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the European Social Charter, are omitted.

11. The CNCDH also questions the approach of listing certain rights and prohibitions as enshrined in these conventions and declarations, especially when the definition of adverse human rights impacts is linked to their violation. This selective approach is hardly compatible with the indivisibility and interdependence of human rights and risks privileging some over others. However, the Commission claims to be concerned with ensuring “*comprehensive coverage of human rights*”<sup>44</sup>. To this end, it provides that a violation of a prohibition or right not specifically listed which directly impairs a legal interest protected in those conventions, should also form part of the adverse human rights impact covered by the proposal for a Directive. However, this is provided that the company could have reasonably established the risk of such impairment and any appropriate measures to be taken in order to comply with its due diligence obligations<sup>45</sup>. The CNCDH recommends that the references in the Annex to the proposal for a Directive be completed and that no arbitrary selection be made, by adopting a truly systemic conception of human rights, based on their universality, indivisibility and interdependence.

12. The Annex also refers to several international conventions on environmental protection, listing the violation of “*internationally recognised objectives*” and prohibitions included in them. Here again, key references for the European Green Deal and the achievement of the Sustainable Development Goals are missing, such as the Paris Agreement. Furthermore, the narrow definition of adverse environmental impacts only through the violation<sup>46</sup> of exhaustively listed international conventions may lead to significant gaps<sup>47</sup>.

13. The CNCDH regrets that adverse climate-related impacts are not directly included in the due diligence obligations of companies. The largest (Group 1) companies are required to adopt a plan to ensure that their business model and strategy are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C in line with the Paris Agreement<sup>48</sup>. If they identify climate change as a principal risk for, or a principal impact of, their operations, they should include emissions reduction objectives in their “*climate plan*”<sup>49</sup>. However, the due diligence obligations relating to prevention, mitigation, complaints procedures or civil liability provided for in the proposal for a Directive do not apply to them. The CNCDH

recommends strengthening the consequences of non-compliance by companies with this provision, in particular by inserting a reference to the Paris Agreement in the Annex.

### Strengthen the due diligence obligation.

14. The CNCDH welcomes the fact that the due diligence process encompasses the six steps set out in the OECD’s Due Diligence Guidance<sup>50</sup>. The process foreseen aims indeed at integrating due diligence into the company’s policies (Article 5), identifying actual or potential adverse impacts (Article 6), preventing and mitigating adverse impacts (Articles 7 and 8), setting up and operating a complaints procedure (Article 9), monitoring the implementation of due diligence (Article 10) and communicating on how the company is fulfilling its due diligence obligation (Article 11).

15. However, a detailed reading of the provisions reveals that the implementation modalities of the due diligence obligation is problematic in several respects. It is largely based on the contractual guarantees that the company must obtain from its business partners in order to ensure that they comply with its code of conduct on due diligence, compliance with which can be verified within the framework of industry initiatives or by means of independent third-party audits. While the use of contractual clauses, codes of conduct and private audits are among the useful instruments for exercising due diligence, these forms of voluntary commitments carry the risk of adopting a superficial and formalistic approach to due diligence obligations, corresponding to a mere compliance approach.

16. Furthermore, through contractual clauses, companies risk “*subcontracting*” their obligations to Tier 1 companies, which are very often small and medium-sized enterprises. The proposal for a Directive is therefore ambiguous in that it formally excludes the latter from its scope, while at the same time setting up an architecture that is likely to have a major impact on them. It provides for accompanying measures and facilities to help and support SMEs<sup>51</sup>. However, they are excluded from liability by virtue of the current text. They are thus unable to benefit directly, particularly in terms of reputation or costs, from the exercise of due diligence they are likely to carry out in this context. SMEs may also find themselves without this “*leverage*” in their relationship with the parent company<sup>52</sup>.

17. To overcome these drawbacks, the due diligence process should be refocused on the key elements recalled in Articles 7(1) and 8(1) of the proposal for a Directive relating

the General Assembly of 9 December 1998.

44 Recital 25 of the proposed Directive, *op. cit.* (“a comprehensive coverage of human rights”).

45 The Annex states that all relevant circumstances of the company’s operations, such as the sector and operational context, should be taken into account (Annex, Part I, §21).

46 Several environmental organisations advocate a list of adverse environmental impacts rather than a list of selected convention violations.

47 The Annex does not include a paragraph similar to paragraph 21 on human rights in relation to the violation of prohibitions or obligations not expressly listed but contained in the instruments cited.

48 Article 15 of the proposal for a Directive, *op. cit.* In particular, the plan should identify, based on information reasonably available to the company, the extent to which climate change is a risk for, or an impact of, its operations.

49 Article 15 of the proposal for a Directive also links the “*climate plan*” to the setting of directors’ variable remuneration, but only for companies that have put in place a system linking the calculation of this remuneration to their environmental performance.

50 OECD, *OECD Due Diligence Guidance for Responsible Business Conduct*, 2018, available at <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>.

51 See for example, as regards the support provided by the companies themselves: Article 7(2)(d) and (4) and Article 8(3)(e) and (5); and as regards accompanying measures by States: Article 14(1) and (2).

52 A recent survey conducted on CSR in relations between customers and suppliers since the entry into force of the French duty of vigilance Law indicates that 35% of CSR demands from customers to suppliers involve the signing of one or more contractual CSR clauses, but that 66% of suppliers feel that there is a dissonance between customers’ CSR requirements when it comes to purchasing and their own CSR practices. In 72% of cases, this dissonance is expressed on the fairness of commercial practices (pressure on prices and unbalanced contractual clauses). Furthermore, although more than 70% of the suppliers surveyed are regularly asked by their customers about CSR issues, only 17% of these requests concern proof of implementation of concrete actions (Bpifrance, PwC and ORSE, Résultats de l’enquête “RSE: La parole aux fournisseurs !”, January 2020, available at <https://www.pwc.fr/fr/assets/files/pdf/2020/01/fr-france-pwc-ad-enquete-bpi-france-orse-rse-2019.pdf>).

to the preventive measures that the company must adopt, the measures to mitigate negative impacts, as well as the measures to put an end to them, usefully building upon the United Nations Guiding Principles. In line with the latter, the CNCNDH recommends that the articulation between Articles 7 and 8 be improved, by clearly separating the due diligence measures that States must impose on companies in order to identify risks, from those aimed at preventing human rights violations<sup>53</sup>.

18. The proposal for a Directive also retains the concept of established business relationships, inspired by French Law, the uncertainties of which have just been pointed out in a recent report<sup>54</sup>. The definition of this concept in the proposal for a Directive certainly seems to go further than the current French approach<sup>55</sup>, by expressly covering both direct and indirect relationships<sup>56</sup>. But it departs from the terminology of the relevant international standards<sup>57</sup>, which refer to business relationships (OECD Principles<sup>58</sup>, UN Guiding Principles, ILO Tripartite Declaration)<sup>59</sup> or the sphere of influence (standard ISO 26000)<sup>60</sup>. The UN Guiding Principles, for example, while allowing for prioritisation according to the severity of risks<sup>61</sup>, require that due diligence be exercised throughout the value chain, not just with those entities with which the company has an established business relationship<sup>62</sup>. The addition of the qualifier “established”

53 In this sense, see the recommendation made by the CNCNDH on the draft treaty: CNCNDH, *Follow-up opinion on the draft binding treaty on transnational corporations and other business enterprises and human rights*, Plenary Assembly of 15 October 2020, Official Journal of the French Republic no. 0260 of 25 October 2020, text no. 64, recommendation no. 8, available in English on the CNCNDH's website <https://www.cncndh.fr>.

54 Information report on the evaluation of the Law of 27 March 2017 (...), *op. cit.* pp. 38 et seq.

55 *Ibid.*, which highlights the divergent interpretations of the notion of “established business relationship” in France. The rapporteurs point out that this notion, defined in case law by its regularity, significant nature and stability, does however concern cases of sudden termination of such a relationship and is intended to protect the supplier or subcontractor. They indicate that this notion could be understood differently in the context of the duty of vigilance Law, which aims to protect third parties, employees or the environment (pp. 39 et seq.). See also: BRABANT Stéphane, BRIGHT Claire, NEITZELN Noah, SCHÖNFELDER Daniel, “Due Diligence Around the World: The Draft Directive on Corporate Sustainability Due Diligence (Part 1)”, *Verfassungsblog*, 15 March 2022, p. 5, available at <https://verfassungsblog.de/due-diligence-around-the-world/>, who point out that the proposed Directive goes further than the German Law, which only covers upstream value chain relationships and first-tier suppliers (with some exceptions), and the French Law, which appears to only cover upstream suppliers and subcontractors.

56 Article 3(f) defines the established business relationship as a direct or indirect business relationship which is, or 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.

57 It also departs from that adopted in Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.

58 OECD, *The OECD Guidelines for Multinational Enterprises*, *op. cit.*

59 ILO, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, *op. cit.*

60 The International Organization for Standardization's standard ISO 26000 on social responsibility is available at <https://www.iso.org/iso-26000-social-responsibility.html>. The CNCNDH notes that the third revised draft of the legally binding instrument on business and human rights also uses the term “business relationship” (it had made a recommendation to this effect: CNCNDH, *Follow-up opinion on the draft legally binding instrument...*, 15 October 2020, *op. cit.*, recommendation no. 3).

61 Principles 13 and 24 of the aforementioned UN Guiding Principles. The proposal for a Directive also refers to prioritisation of action in its definition of “appropriate measures” as those capable of achieving the objectives of due diligence, commensurate with the degree of severity and the likelihood of the adverse impact, and reasonably available to the company (Article 3(q)).

62 Principle 13 states that the responsibility to respect human rights covers not only the adverse impacts that companies cause or contribute to through their own activities, but also those “directly linked to their operations, products or services by their business relationships, even if they have not

could also result in companies regularly changing suppliers in order to avoid legal liability. This would run counter to the objective of contributing to a profound change in the practices of companies and entities along the entire value chain and would be likely to undermine in particular the realisation of economic, social and cultural rights.

19. The proposal for a Directive provides for the possibility of temporary suspension or even termination of business relationships if the measures adopted to prevent or mitigate adverse impacts have not had the desired effect<sup>63</sup>. If a company suspends these relationships, it is encouraged to continue its prevention and mitigation efforts in parallel, if it can reasonably expect these efforts to be successful in the short term<sup>64</sup>. Termination is encouraged if the adverse impact is considered severe<sup>65</sup>. However, it is only in the recitals that the proposal for a Directive refers to consideration of the interests of stakeholders in this decision-making and the fact that disengagement should only be a last-resort action<sup>66</sup>. The CNCNDH recommends that it should be more clearly stated that the risks to stakeholders should be central to the decision whether or not to suspend or terminate a business relationship, which in turn may have adverse impacts. To this end, it recommends that the consultation of stakeholders be expressly provided for prior to the decision being taken.

20. Strengthening the due diligence obligation should be achieved through more effective stakeholder involvement and a better definition of stakeholders, explicitly targeting trade unions and workers' representatives, as well as human rights defenders<sup>67</sup>. The proposal for a Directive contains several references to stakeholder consultation<sup>68</sup>. However, these references are insufficient. The CNCNDH recommends that consultations should not be left to the discretion of the company, but should be an integral part of all stages of due diligence. The inclusion of a specific provision on stakeholder consultation, in particular with affected individuals and communities, trade unions, workers' representatives and human rights defenders, as proposed by the European Parliament<sup>69</sup>, would emphasise their key role in the due diligence process. The CNCNDH recommends that the Directive, in line with the UN Guiding Principles, should provide for mandatory consultations at the different stages of project design, implementation and monitoring, and at different levels of the value chain. Stakeholder involvement is essential from the stage of identifying risks and potential

contributed to those impacts”. Business relationships include “relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services” (commentary on Principle 13 of the Guiding Principles, *op. cit.*).

63 Article 7(5) and Article 8(6) of the proposal for a Directive. It also provides that companies shall refrain from creating new or expanding business relationships under these conditions.

64 Article 7(5)(a) and Article 8(6)(a).

65 Article 7(5)(b) and Article 8(6)(b).

66 Recitals 32 and 36 of the proposal for a Directive.

67 Article 3(n) of the proposal for a Directive defines stakeholders as the company's employees or the employees of its subsidiaries and then refers only generically to “other individuals, groups, communities or entities whose rights or interests are or could be affected (...)”. In order to ensure a real involvement of trade union organisations and workers' representatives, the proposal for a Directive should also refer to the obligations resulting from Directives 2001/86/EC, 2002/14/EC and 2009/38/EC on the involvement of employees, the informing and consulting of employees and the European Works Council. It should also make explicit reference to collective agreements.

68 Article 7(2)(a), for example, requires that the prevention action plan that companies must adopt, “where necessary”, due to the nature or complexity of the preventive measures required, must be developed in consultation with the affected stakeholders.

69 European Parliament resolution of 10 March 2021, *op. cit.*, Article 5.

impacts and cannot be solely discretionary<sup>70</sup>. While the current text is silent on this point, it is equally important to consult rights holders in the design of remedy measures<sup>71</sup>. The proposal for a Directive also makes no mention of stakeholder consultation when it comes to monitoring the mitigation measures adopted by the company<sup>72</sup>. In addition, the Directive should include an explicit reference to the obligation to respect the free, prior and informed consent and rights of indigenous peoples.

21. Implementation of the due diligence obligation also involves communicating information about the process, its results and its objectives<sup>73</sup>. However, the proposal for a Directive takes a restrictive approach to communication. It does not require the publication of information specifically relating to due diligence obligations. It provides only for companies not subject to reporting obligations under EU law<sup>74</sup>, for the annual publication of an online statement, without clarifying at this stage the content of this statement<sup>75</sup>. The publication of sufficiently detailed information, within the limits permitted by confidentiality or competition issues, for all relevant stakeholders, including investors, should however be an integral part of the due diligence process. It builds confidence<sup>76</sup> and can be useful in demonstrating that appropriate measures have been taken<sup>77</sup>. The CNCNDH recommends that transparency obligations be strengthened accordingly.

22. The proposal for a Directive also requires companies to establish a complaints procedure. The CNCNDH welcomes the fact that the mechanism allows affected persons, as well as trade unions and other workers' representatives representing individuals working in the value chain, to raise "legitimate concerns" about adverse human rights and environmental impacts<sup>78</sup>. Civil society organisations "active in the areas related to the value chain concerned" can also raise such concerns<sup>79</sup>. Human rights defenders should also be able to use this mechanism, as well as representatives of those affected or potentially affected.

23. The CNCNDH welcomes the fact that the new mechanism involves the revision of Directive (EU) 2019/1937 on whistleblowers<sup>80</sup>, in order to make it applicable to persons reporting violations of due diligence obligations<sup>81</sup>. It regrets, however, that there is no specific provision on the protection of victims and the risk of reprisals to which individuals, groups and organisations promoting and

defending human rights and the environment are exposed, expressly including members of trade unions<sup>82</sup>. The CNCNDH recommends that a prohibition on companies retaliating against them be included and that they be required to adopt measures to prevent the risks they face as a result of their activities.

24. The proposal for a Directive provides that Member States shall adopt measures to support companies and the partners with whom they have established business relationships, in particular SMEs, in the implementation of due diligence requirements<sup>83</sup>. The CNCNDH recommends that this approach be complemented by measures to inform and support rights holders, in order to facilitate access to remedies and redress<sup>84</sup>.

### Strengthening monitoring arrangements and access to redress and remedy.

25. The monitoring and control arrangements are crucial to help ensure the effective implementation of the obligations that Member States are required to impose on companies under the future Directive. The text published by the Commission is based on two pillars: administrative supervision by national authorities and judicial control through civil liability. It is essential that the architecture based on supervision by national administrative authorities does not exclude the possibility of liability of a company, but is complementary to judicial review.

26. The proposal for a Directive requires Member States to designate one or more national authorities to supervise compliance with the obligations imposed by the Directive<sup>85</sup>. They should be given a wide range of powers: the power to request information, the power of investigation, the power of inspection<sup>86</sup>, but also the power to order the cessation of violations or their non-repetition, or even remedial action<sup>87</sup>. Interim measures may also be imposed to avoid the risk of severe and irreparable harm<sup>88</sup>. The CNCNDH also considers it important that sanctions can be imposed, including financial ones, based on the turnover of the company concerned<sup>89</sup>, within the framework of the proper

70 Article 6(4) requires companies to consult with stakeholders, "where relevant", to gather information about adverse impacts.

71 Article 8(3)(a). In this sense, see: ENNHRI Statement on the European Commission's proposal on Corporate Sustainability Due Diligence, March 2022, available at <https://ennhri.org/wp-content/uploads/2022/03/Statement-on-the-European-Commissions-proposal-on-Corporate-Sustainability-Due-Diligence.pdf>.

72 Article 10. In this sense, see the aforementioned ENNHRI statement.

73 In this sense, see the OECD Guide, *op. cit.*, p. 22.

74 Article 11 of the proposal for a Directive refers to Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings.

75 The Commission would be empowered to adopt delegated acts on this point (Article 11).

76 OECD Guide, *op. cit.*, p. 22.

77 In this sense, see for example BRABANT Stéphane, BRIGHT Claire et al, "Due Diligence Around the World: The Draft Directive on Corporate Sustainability Due Diligence (Part 1)", *op. cit.*, p. 4.

78 Article 9.

79 *Ibid.*

80 Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law.

81 Articles 23 and 27.

82 The need for protection against reprisals is, however, mentioned in the aforementioned European Parliament resolution of 10 March 2021 (points 25 and 26). Furthermore, the UN Special Rapporteur on the situation of human rights defenders regrets the absence of specific clauses for the protection and empowerment of defenders, even though it is an EU priority, they are among the key stakeholders with whom companies must engage as part of the due diligence process and they will play a key role in ensuring that the Directive is effective in practice (Press Release, "EU Proposal on Corporate Due Diligence a Welcome Step Forward but Forgets Human Rights Defenders, says UN Special Rapporteur", 23 February 2022, available at <https://srdefenders.org/information/eu-proposal-on-corporate-due-diligence-a-welcome-step-forward-but-forgets-human-rights-defenders-says-un-special-rapporteur/>).

83 Article 14.

84 For example, the websites, platforms or portals that Member States are required to set up to inform and support companies and their business partners (Article 14(1)) should also aim to inform and support rights holders.

85 Article 17.

86 Inspections, conducted in accordance with the national laws of the Member States, must however be carried out after prior warning (Article 18(3)). Although the proposal for a Directive provides for an exception, where such prior notification hinders the effectiveness of the inspection, like others, the CNCNDH struggles to see in what circumstances this would not be the case (BRABANT Stéphane, BRIGHT Claire, NEITZELN Noah, SCHÖNFELDER Daniel, "Enforcing Due Diligence Obligations: The Draft Directive on Corporate Sustainability Due Diligence (Part 2)", *Verfassungsblog*, 16 March 2022, p. 2, available at <https://verfassungsblog.de/enforcing-due-diligence-obligations/>).

87 Article 18(5)(a).

88 Article 18(5)(c).

89 Article 18(5)(b) and Article 20, which specifies that sanctions must be

administration of justice.

27. The national supervisory authority can act on its own initiative, but can also be seized by any natural or legal person with “*substantiated concerns*” that a company does not appropriately comply with its due diligence obligations<sup>90</sup>. Those with a legitimate interest in the matter should be able to challenge the legality of the national supervisory authority’s decisions, actions or omissions before a court or other independent and impartial public body, and any natural or legal person should have the right to an effective judicial remedy against decisions taken against them<sup>91</sup>. In order to facilitate cooperation and coordination between national supervisory authorities and the alignment of practices, the proposal for a Directive provides for the establishment of a European Network of Supervisory Authorities<sup>92</sup>. Such a network is essential to ensure the coherence of the system, which is crucial for both businesses and rights holders. In addition, the criteria relating to the independence of national supervisory authorities, which must be independent (legally and operationally) of the companies subject to the due diligence obligations or other market interests, and whose staff must be free from conflicts of interest, subject to confidentiality requirements and exercise their functions impartially<sup>93</sup>, are also essential.

28. The CNCDH welcomes the inclusion in the proposal for a Directive of the possibility of civil liability for companies subject to due diligence. This avenue before the courts of the Member States is an essential component for victims’ access to effective redress and for the Directive to contribute to a fundamental change in practice. However, access to the judge is only provided for in the event of damage. The judge cannot be called upon to verify, upstream, the existence of a due diligence plan and to check the prevention obligations, contrary to what French Law provides. The supervision of preventive obligations, apart from the existence of damage, is entrusted only to the national supervisory authority. In France, the possibility for the judge to enjoin, if necessary under penalty, the company in default to respect its due diligence obligations<sup>94</sup>, as well as the recent recognition of the jurisdiction of the Paris judicial court to hear actions relating to due diligence<sup>95</sup>, are nevertheless an undeniable asset to contribute to the effective implementation of the Law. The CNCDH thus recommends that the Directive also provide for the possibility of referring the matter to the judge to order the company concerned to comply with its due diligence obligations. In any case, it recommends that the Directive should at least preserve the freedom of the Member States to provide for the possibility of recourse to the courts to enforce these obligations, which are preventive in nature. As it stands, French legislation is better than the Directive. The CNCDH considers that this advance must be maintained.

29. As in French law, the civil liability provided for by the proposal for a Directive is based on three conditions being satisfied: the existence of damage, a failure to comply

with due diligence requirements and a causal link between the two<sup>96</sup>. The CNCDH regrets that the proposal for a Directive provides for the exclusion in principle of the liability of companies for damage resulting from the activities of their indirect business partners. Indeed, the company’s liability in these circumstances depends on whether it would be unreasonable to assume that the contractual safeguards and monitoring thereof would be capable of preventing, mitigating or bringing an end to the adverse impact of the activities at issue<sup>97</sup>. However, the Directive’s contribution is to provide for the possibility of repairing damage caused right up to the end of the value chain. The ability to rely on contractual clauses to escape liability creates dangerous loopholes that could undermine the effectiveness of the Directive<sup>98</sup>.

30. Furthermore, the CNCDH considers it appropriate, in order to facilitate access to justice, to provide that the national provisions transposing the Directive should prevail in cases where the applicable law is not that of one of the EU Member States<sup>99</sup>. On the other hand, it regrets that, on the whole, the proposal for a Directive does not sufficiently address the obstacles concerning victims’ access to justice (access to information, time limits for appeals, high costs, burden of proof, etc.)<sup>100</sup>. For example, the burden of proof, which lies with the claimant, is one of the major obstacles faced by victims<sup>101</sup>. However, the proposal for a Directive leaves this issue entirely to the discretion of the Member States<sup>102</sup>. The CNCDH recommends that the Directive provide for the possibility of a reversal of the burden of proof<sup>103</sup>, as

<sup>96</sup> Article 22(1).

<sup>97</sup> Article 22(2).

<sup>98</sup> In this sense, see the aforementioned ENNHRI statement.

<sup>99</sup> Article 22(5). An ECCJ report highlights that in most cases of litigation brought before the courts of EU Member States to hold companies liable for alleged human rights violations or environmental damage in third countries, the rules of private international law require the law of the place where the damage occurred to apply. However, it is rare that the law provides for the possibility of holding a parent company liable (for acts committed by one of its subsidiaries or subcontractors), which is a major obstacle to obtaining a favourable decision (European Coalition for Corporate Justice (ECCJ), *Suing Goliath. An analysis of civil proceedings brought against EU companies for human rights abuses and environmental harm in their global operations and value chains, and key recommendations to improve access to judicial remedy*, September 2021, available at <https://corporatejustice.org/wp-content/uploads/2021/09/Suing-Goliath-FINAL.pdf>).

<sup>100</sup> These obstacles have, for example, been highlighted by the EU Agency for Fundamental Rights (FRA): FRA, *Business and Human Rights – Access to remedy*, October 2020, available at [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2020-business-human-rights\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-business-human-rights_en.pdf). See also, among others: European Law Institute, *Business and Human Rights: Access to Justice and Effective Remedies (with input from the European Union Agency for Fundamental Rights)*, FRA, 2022, available at [https://www.europeanlawinstitute.eu/fileadmin/user\\_upload/p\\_eli/Publications/ELI\\_Report\\_on\\_Business\\_and\\_Human\\_Rights.pdf](https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Report_on_Business_and_Human_Rights.pdf).

<sup>101</sup> See on this point, in relation to the French duty of vigilance Law: BRIGHT Claire, “Mapping human rights due diligence regulations and evaluating their contribution in upholding labour standards in global supply chains”, in DELAUTRE Guillaume, ECHEVERRIA MANRIQUE Elizabeth and FENWICK Colin, *Decent work in a globalized economy: lessons from public and private initiatives*, ILO, 2021, pp. 75 - 108 (p. 91 in particular), available at [https://novabhre.novalaw.unl.pt/wp-content/uploads/2021/02/DecentWorkGlobalizedEconomy\\_ClaireBright.pdf](https://novabhre.novalaw.unl.pt/wp-content/uploads/2021/02/DecentWorkGlobalizedEconomy_ClaireBright.pdf). See also the reports of non-governmental organisations cited in the Parliamentary Information Report, *op. cit.*

<sup>102</sup> Proposal for a Directive, *op. cit.*, recital 58.

<sup>103</sup> In this sense, see the recommendation made by the CNCDH concerning the draft treaty (CNCDH, *Follow-up opinion on the draft legally binding instrument on transnational corporations and other business enterprises and human rights*, *op. cit.*, pp. 12 – 13 and recommendation no. 15). A certain degree of reversal of the burden of proof already exists under the equal treatment directives (see the examples cited in the FRA report, *Business and Human Rights – Access to remedy*, October 2020, *op. cit.*, which recommends reversal of the burden of proof to balance the relationship between the parties, especially as the information needed to prove claims is in the hands

effective, proportionate and dissuasive.

<sup>90</sup> Articles 18(2) and 19(1).

<sup>91</sup> Articles 19(5) and 18(7).

<sup>92</sup> Article 21.

<sup>93</sup> Article 17(8). See also recital 53 in this regard.

<sup>94</sup> Article L.225-102-4 paragraph II of the French Commercial Code (code de commerce).

<sup>95</sup> Article L.211-21 of the French Judicial Organisation Code (code de l’organisation judiciaire), introduced since Law No. 2021-1729 of 22 December 2021 on confidence in the judiciary.

proposed by the European Parliament<sup>104</sup>.

31. In conclusion, the CNCDH welcomes the opportunity afforded by the proposal for a Directive to adopt, at the end of the negotiations, an ambitious Directive, which consolidates the *acquis* and learns from the first few years of application of existing national legislation<sup>105</sup>. The aim is to help create a virtuous circle, avoid a race to the bottom and address human rights and environmental issues in global value chains.

32. The European Directive must be exemplary because of the economic and commercial weight of the European Union and its commitments to human rights and the environment. This implies an effort to improve the current text, taking into account the recommendations made by the CNCDH. This is all the more important in the context of the negotiations for a legally binding instrument negotiated within the United Nations. In this respect, the CNCDH reiterates the need for an active contribution from the European Union to the elaboration of this instrument, which is the only way to achieve harmonisation on a global scale, in the service of respect for human rights and environmental protection.

---

of the defendants (pp. 6-7).

<sup>104</sup> European Parliament resolution of 10 March 2021, cited above, recital 53, Article 19(3).

<sup>105</sup> For reports evaluating implementation of the French Law, see in particular the report by the Conseil Général de l'Économie, *Evaluation of the implementation of Law No. 2017-399 of 27 March 2017 on the duty of vigilance of parent companies and instructing undertakings*, January 2020, available at [https://www.economie.gouv.fr/files/files/directions\\_services/cge/devoirs-vigilances-entreprises.pdf](https://www.economie.gouv.fr/files/files/directions_services/cge/devoirs-vigilances-entreprises.pdf), as well as the information report presented by Coralie DUBOST and Dominique POTIER mentioned above.