

## Beyond Business as Usual

# Asian Civil Society Response to the European Commission's Proposed Corporate Sustainability Due Diligence Directive

29 April 2022

## 1. Introduction

- 1.1. This open letter sets out the collective response of ten civil society groups and non-government organisations to the European Commission's proposed Directive on Corporate Sustainability Due Diligence (the **Directive**), announced on 23 February 2022.<sup>1</sup>
- 1.2. To date, no jurisdiction in Asia has introduced comprehensive corporate sustainability due diligence (**CSDD**) legislation.<sup>2</sup> The proposed Directive is therefore a highly welcomed and significant step towards introducing binding standards on CSDD that would directly and indirectly apply to businesses in Asia. Many of the features of the proposed Directive, including the expansive list of human and environmental rights covered by the Directive, the establishment of complaint pathways, and the establishment of civil liability for those in breach of the Directive are all highly welcomed in principle.
- 1.3. Given the broad scope of the proposed Directive, and its application to both EU and Third Country companies, the Directive is likely to have far-reaching implications for businesses across the globe – but especially in Asia. The EU has deep trading relationships with Asia, and has established trade agreements with Japan, Singapore, South Korea, and Viet Nam.<sup>3</sup> ASEAN is the EU's third-largest external trading partner, while Japan is the EU's second largest trade partner in Asia.<sup>4</sup>
- 1.4. Many EU businesses also have extensive supply chains in Asia. Asia is home to manufacturing hubs for key industries such as electronics, automotives, garments, textiles, seafood, and others, as well as primary industries such as agriculture, timber, and minerals. Changes to business and human rights regulations at the EU level – which would affect both EU companies with supply chains in Asia, and Asian businesses which generate substantial revenue in the EU – are thus likely to have substantial repercussions for businesses operating in this market.
- 1.5. Given the centrality of Asia to the value chains of many EU businesses, the Directive should be fit for purpose to meet the diverse realities on the ground and patterns of exploitation that exist across Asia. Only one in three countries in the Asia-Pacific region have ratified all of the ILO Fundamental Conventions.<sup>5</sup> Labour and human rights standards across Asia therefore vary significantly, and do

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<sup>1</sup> European Commission (23 February 2022) [Proposal for a Directive of the European Parliament and Council on Corporate Sustainability Due Diligence and amending Directive \(EU\) 2019/1937. 2022/0051 \(COD\)](#). Available at:

<sup>2</sup> Many jurisdictions in Asia, including [Thailand](#), [Malaysia](#), [Vietnam](#), [Indonesia](#), [Philippines](#), and the [Hong Kong SAR](#) require listed issuers to publish sustainability or ESG statements. However, most of these regulations do not impose requirements to proactively investigate, identify, and remediate adverse human rights and environmental impacts in a comprehensive manner similar to the Directive.

<sup>3</sup> See: European Commission, [EU Trade Relationships by Country/Region, Negotiations and Agreements](#).

<sup>4</sup> See: European Commission, EU Trade by Country/Region, [ASEAN](#), [Japan](#), and [South Korea](#).

<sup>5</sup> See: ILO, [Ratifications of Fundamental Conventions](#).

not always align with the normative expectations of the Directive. This can give rise to tensions between companies' obligations to comply with national laws in the countries in which they are headquartered, and those in which they operate overseas – particularly where legal protections and standards may be lower in jurisdictions where a company's supply chain is based, compared to standards in the company's home jurisdiction.

- 1.6. Many countries in Asia also have large populations of migrant workers. In 2020, over 40% of the world's international migrants were from Asia – over half of whom migrated within Asia.<sup>6</sup> Migrant workers are often at increased risk of exploitation due to, among other things, economic pressures, the high costs of migration (often inflated by recruitment fees), discrimination, and a lack of legal protections and access to justice in countries of destination.
- 1.7. Across Asia, workers and migrant workers often face structural barriers to access to justice. These include weak rule of law, corruption, limited resources for law enforcement and government officials to conduct inspections and enforce compliance with labour laws, restrictions on freedom of association and collective bargaining (especially for irregular or migrant workers, who are often barred from trade union participation), risks of reprisals, gender and racial inequality, caste and other social structures, and many others.<sup>7</sup> In this context, corporate grievance and remediation mechanisms such as those contemplated under the Directive can – where properly implemented – become key channels for workers to realise their rights and access remedies. It is therefore important that the Directive provides for robust provisions on corporate grievance and remediation mechanisms to ensure they can meet their potential.
- 1.8. The challenges faced by migrant workers in Asia have been compounded by the effects of the COVID-19 pandemic and associated restrictions. Over the course of the pandemic, workers in Asia have suffered job losses – often without compensation – due to sudden reductions or changes in orders placed by international brands with suppliers in Asia, leading to business closures. Some migrant workers overseas were unable to return home or were abandoned by employers in destination countries without support – driving some to take up irregular or informal employment to support themselves. Prospective migrant workers in countries of origin were also unable to travel to countries of destination, pushing many towards irregular migration channels. Economic downturns in countries of origin have also pushed new groups of workers into seeking employment opportunities abroad, or towards taking up more unstable and vulnerable forms of employment to supplement their incomes – leaving them more vulnerable to exploitation.<sup>8</sup> These inequalities and challenges should be addressed as part of a sustainable recovery from the pandemic.
- 1.9. It is therefore critical that the Commission listens to the views of stakeholders in Asia, where there will be significant numbers of workers, businesses, and civil society groups that will be directly and

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<sup>6</sup> IOM (2022) [World Migration Report 2022](#).

<sup>7</sup> The Remedy Project and The Freedom Fund (2021) [From Local to Global: Building a strategic litigation ecosystem to address modern slavery in supply chains](#); ILO (2017) [Access to justice for migrant workers in South-East Asia](#).

<sup>8</sup> ILO (2021) [Experiences of migrant workers during COVID-19 in ASEAN countries](#);

ILO (2021) [COVID-19 and the ASEAN labour market: Impact and policy response](#); Freedom Collaborative (2020)

[Dilemmas faced by migrant workers in Malaysia under the movement control order](#); ILO (May 2020) [COVID-19:](#)

[Impact on migrant workers and country response in Malaysia](#); International Labor Rights Forum (2020) [COVID-19](#)

[Impact on Migrant Workers in Thailand](#).

indirectly affected by the proposed Directive,<sup>9</sup> and where many of the contemplated CSDD activities under the Directive are likely to take place.

1.10. While the proposed Directive is highly welcomed in principle, there are certain aspects of the proposed Directive that the signatories wish to highlight as being of particular concern in the contexts of the jurisdictions in which they operate in Asia. We specifically wish to highlight the following areas for improvement.

**(a) CSDD obligations should not be limited to ‘established business relationships’. They should cover the entire value chain using a risk-based approach.**

In many cases, the most salient human rights risks arise where businesses have new, short-term, or temporary relationships with unfamiliar or less-established suppliers. The Directive should ensure that CSDD obligations extend across a business’ entire value chain, adopting a risk-based approach that is in line with the UNGPs.

**(b) The Directive lacks clear gender mainstreaming.**

Measures to address exploitation in global value chains should be gender responsive, as gender inequality is key driver of exploitation globally and in Asia. Gender affects patterns of recruitment and forms of exploitation, as well as the needs of people whose rights have been violated. Despite this, the Directive is nearly silent on the issue of gender. By contrast, the UNGPs provide that businesses should pay special attention to any particular human rights impacts on groups or populations that may be at heightened risks of vulnerability or marginalisation, and to bear in mind the different risks that may be faced by women and men.<sup>10</sup> Following the UNGPs, the Directive should clearly incorporate gender mainstreaming into its core provisions. Businesses should be required to demonstrate how their CSDD processes will identify and address the different risks faced by, and needs of, men and women. Companies should also incorporate gender responsive approaches into actions taken to prevent, mitigate, or remedy, adverse human rights and environmental impacts.

**(c) Migrant workers’ rights should be protected in the Directive.**

Migrant workers play a substantial role in the economies of many Asian countries, and form a large part of the work force in many corporate value chains. The list of human rights and human rights instruments in the Annex to the Directive (which defines the scope of human rights covered by CSDD) should include greater protections for the rights of migrant workers. Further, the Directive does not expressly require companies to conduct CSDD on their labour supply chains. The Directive should address this gap by clearly and expressly incorporating labour supply chains into its definition of ‘value chain’.

**(d) Grievance mechanisms should be robust, fair, transparent, accessible, provide for meaningful access to remedies, and be developed in partnership with stakeholders – including workers.**

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<sup>9</sup> As to the potential effects, see The Remedy Project (2022) [The European Corporate Sustainability Due Diligence Directive: Ready or not, here I come.](#)

<sup>10</sup> UNGPs, Principle 18, Commentary. See also, UNGPs, Principle 7(b).

The Directive fails to set clear standards for corporate grievance mechanisms. Nor does the Directive offer any rights, protections, and guarantees of procedural fairness for workers and others who raise grievances with companies. In so doing, the Directive allows companies to act as judge, jury, and executioner when responding to grievances. The Directive should set clear standards for what is required of corporate grievance mechanisms, which should be in line with the effectiveness criteria set out in the UNGPs. The Directive should further ensure that stakeholders, including workers, are engaged in the development and performance of grievance mechanisms.

**(e) Clear standards and accountability for third-party verification are needed, and the over-reliance on third-party audits as the primary means of verification should be reduced.**

The Directive relies heavily on independent third-party verification as a means of demonstrating compliance with CSDD obligations. Despite this, the Directive does not set clear standards for what constitutes effective and independent third-party verification. Auditors and other third-party verification providers should have clearly defined standards, responsibilities and accountability towards not only companies who engage them, but to affected persons. To further promote transparency, and hence accountability, of the verification process process, companies should be obliged to disclose details of any third-party verification conducted, and verification reports and findings should be accessible to affected persons and their representatives.

Further, the Directive essentially equates independent third-party verification with audits. However, audits should be just one of many complementary ways in which businesses may be able to demonstrate and verify compliance with CSDD obligations – including through direct and ongoing engagement and consultation with workers and affected persons and their representatives.

**(f) Businesses should be encouraged to use their leverage to promote better standards among partners in their value chains, especially among small and medium-sized enterprises.**

Larger entities higher up in the value chain have substantial leverage over their suppliers and value chain partners, which can be applied to drive up standards for the protection of human rights and the environment in the downstream value chain. The Directive should go further to incentivise businesses to utilise this leverage to improve their suppliers' standards. Such steps may include, where appropriate, making necessary investments to support business partners to improve their own CSDD, grievance, and remediation mechanisms, or to established shared CSDD, grievance, and remediation infrastructure between suppliers and upstream businesses.

**(g) Business relationships should be terminated responsibly.**

We are encouraged to see that the Directive encourages businesses to take steps to address adverse human and environmental impacts before terminating business relationships. However, where the termination of a business relationship is justified, the Directive should do more to require responsible exits – rather than leaving businesses to 'cut and run'. Where the termination of a business relationship is justified, businesses should be required to

mitigate any adverse human rights or environmental impacts arising as a consequence of the termination of the business relationship.

**(h) The Directive should offer guidance on how CSDD obligations will apply in conflict-affected areas.**

Drawing on the UNGPs and other relevant international guidance, the Directive should clearly explain how Member States will support business respect for human rights in conflict-affected areas. This should include, among other things, provision for how businesses can manage a responsible withdrawal from conflict-affected areas – having regard to minimising adverse impacts for affected persons.

1.11. While this open letter is focused on the proposed Directive’s mechanisms for labour and human rights protections, we also share concerns of our peers raised in relation to the need for more robust provisions in the Directive to address the climate crisis and protect the environment.<sup>11</sup>

**2. CSDD obligations should not be limited to ‘established business relationships’. They should cover the entire value chain using a risk-based approach**

2.1. The concept of an ‘established business relationship’ defines the scope of companies’ CSDD obligations under the Directive. Under Article 6, businesses should conduct CSDD in relation to the actual and potential adverse human rights impacts and adverse environmental impacts (**HEIs**) arising from their own operations and those of their subsidiaries, as well as from their ‘established business relationships’ in their value chains.<sup>12</sup> The obligations to prevent potential adverse HEIs, and bring actual HEIs to an end, are both also tied to the primary due diligence obligation in Article 6.

2.2. An ‘established business relationship’ means 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.<sup>13</sup>

2.3. The confinement of CSDD obligations to established business relationships has the potential to narrow the scope of companies’ CSDD obligations by excluding short-term or one-off business partners. However, such relationships often carry the highest human rights and environmental risks.<sup>14</sup>

2.4. For example, the garment and textiles industry – a major source of exports from Asia to Europe – is characterised by low prices, short lead times, last-minute orders, narrow margins, small order

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<sup>11</sup> Environmental Justice Foundation (2022) [EU’s Due Diligence Law Needs Future-Proofing to Safeguard Environmental Justice](#).

<sup>12</sup> Directive, Article 6(1).

<sup>13</sup> Directive, Article 3(f).

<sup>14</sup> See, e.g., Human Rights Watch (2015) [Work Faster or Get Out: Labor Rights Abuses in Cambodia’s Garment Industry](#).

sizes, and limited bargaining power for downstream producers.<sup>15</sup> These practices encourage short-term, or even one-off, relationships between purchasers and suppliers. Similar patterns exist in other industries and geographies in Asia, where ‘just in time’ procurement practices, pricing pressures, complex and often opaque layers of sub-contracting, and frequently changing product lines mean that business relationships may be short – and often deliberately so.

- 2.5. Short term or one-off suppliers often fall outside of companies’ human rights and grievance processes. Some companies will not conduct in-depth onboarding for such suppliers, or not train them on compliance with the company’s supplier code or human rights policies. Such suppliers may also be excluded from a company’s grievance mechanisms or third-party audit processes. Even where business relationships are more established, first-tier suppliers will often subcontract all or part of an order to subcontractors (who may in turn further sub-sub-contract) to meet production demands. Some of these subcontracting arrangements may be authorised by purchasers, but many are not.<sup>16</sup> Subcontractors and further-removed suppliers often lack direct contractual relationships with purchasers, and often fall outside of purchasers’ monitoring and oversight mechanisms.
- 2.6. Further, in many jurisdictions in Asia, labour outsourcing arrangements – where an outsourcing agency has a legal employment relationship with workers, who are then supplied to work with *de facto* employers as required – are also common. For example, while reliable statistics are difficult to obtain, the ILO estimates that as many as 65% of formally employed workers in Indonesia were employed on a contracted or outsourced basis – including up to 85% of workers in the service industry, and 65% of workers in the garment, textile, and footwear industries.<sup>17</sup>
- 2.7. Such outsourcing practices carry significant human rights risks. Companies may make use of outsourcing arrangements to avoid legal obligations that they would otherwise owe towards directly employed workers, such as the payment of wages, provision of benefits, the payment of compensation for workplace injury, health insurance, or termination payments. In many cases, businesses actively disavow responsibility for outsourced or subcontracted workers in their supply chains whose rights have been violated on the grounds that they are not direct employees.<sup>18</sup> The use of outsourcing agencies also gives rise to the risk of job substitution, as the outsourcing agent can supply the worker to different *de facto* employers from time to time, and provides opportunities for wage manipulation.<sup>19</sup>
- 2.8. Given the increased human rights risks that are often associated with temporary, informal, or one-off business relationships, companies should be required to conduct CSDD in such circumstances, rather than avoid CSDD altogether. Indeed, one unintended consequence of limiting the scope of

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<sup>15</sup> European Parliament (2014) [Workers’ conditions in the textile and clothing sector: just an Asian affair? Issues at stake after the Rana Plaza tragedy.](#)

<sup>16</sup> See, e.g., Human Rights Watch (2015) [Work Faster or Get Out: Labor Rights Abuses in Cambodia’s Garment Industry.](#)

<sup>17</sup> ILO (2018) [Multi-party work relationships; concepts, definitions and statistics.](#)

<sup>18</sup> See, e.g., South China Morning Post (2018) [Uniqlo exploited us, now it ignores us, Indonesian factory workers claim.](#)

<sup>19</sup> ILO (2018) [Situation and gap analysis on Malaysian legislation, policies, and programmes and the ILO Forced Labour Convention and Protocol](#); Modern Slavery & Human Rights Policy & Evidence Centre (2021) [Forced Labour in the Malaysia Medical Gloves Supply Chain before and during the COVID-19 Pandemic: Evidence, Scale, and Solutions](#); Malaysian Bar Association (2019) [Access to Justice for Migrant Workers in Malaysia.](#)

CSDD to ‘established business relationships’ may be that companies increasingly rely on informal or short-term business relationships to avoid CSDD obligations. This would directly undermine the objectives of the Directive.

- 2.9. The UNGPs envisage that due diligence obligations will extend to all business relationships. The UNGPs do not define the scope of companies’ due diligence obligations based on the nature of their commercial relationships. Instead, the UNGPs instead adopt a risk-based approach which requires companies to prioritise their due diligence efforts taking into account the size of the business enterprise, the risk and severity of its human rights impacts, and the nature and context of the business’ operations.<sup>20</sup>
- 2.10. While recognising that there needs to be a workable basis for defining the scope of CSDD obligations, we consider a risk-based approach in line with the UNGPs, rather than a relationship-based approach, is the most suitable basis to do so. The UNGPs’ risk-based approach is conceptually similar to how many anti-money laundering or anti-bribery regulations are structured. Most businesses (especially larger enterprises which would be subject to the Directive) will therefore be familiar with identifying and prioritising areas for due diligence using a risk-based approach.<sup>21</sup>

#### **Recommendations:**

- (a) The CSDD obligations in the Directive should apply to all business relationships, and not only ‘established’ business relationships.**
- (b) Companies should be required to prioritise their CSDD efforts using a risk-based approach in line with the UNGPs.**

### **3. The Directive lacks clear gender mainstreaming**

- 3.1. Measures to address exploitation in global value chains should be gender responsive, as gender inequality is key driver of exploitation both globally and in Asia. Gender affects patterns of recruitment and forms of exploitation, as well as the needs of people whose rights have been violated.
- 3.2. Women and girls are disproportionately affected by exploitation, trafficking in persons, and forced labour, both globally and in Asia. The ILO estimates that 71% of persons living in conditions of ‘modern slavery’ worldwide, and 59% of victims of forced labour, are women and girls.<sup>22</sup> Within Asia, UNODC estimates that 65% of victims of human trafficking in South Asia, and 68% of victims of human trafficking in East Asia and the Pacific, are women and girls.<sup>23</sup> There is also growing evidence that LGBTQI persons are at risk of trafficking and exploitation due to their increased marginalisation, stigmatisation, and ostracization in many societies.<sup>24</sup>

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<sup>20</sup> UNGPs, Principles 17(a) and (b) and Commentary.

<sup>21</sup> See, e.g., Directive (EU) 2015/859 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, which adopts a risk-based approach to determine when customers should undergo simplified or enhanced due diligence measures.

<sup>22</sup> ILO (2017) [Global Estimates of Modern Slavery](#).

<sup>23</sup> UNODC (2020) [Global Report on Trafficking in Persons 2020](#).

<sup>24</sup> Ibid.

- 3.3. Discrimination, inequality, and gender-based violence are all also pervasive in many jurisdictions in Asia. Across Asia, women earn up to 65% less than men in some countries and industries.<sup>25</sup> Some countries in Asia also continue to enforce discriminatory employment and immigration laws – including, for example, laws which prohibit women migrant workers from becoming pregnant, require migrant workers to provide negative pregnancy tests to obtain work visas,<sup>26</sup> or which deny same-couples the right to obtain dependent visas.
- 3.4. While protections against unequal treatment and discrimination in employment, as well as the Convention on the Elimination of All forms of Discrimination Against Women are mentioned in the Annex to the Directive, the Directive itself is silent on the issue of gender. The word ‘gender’ does not appear in the Directive, nor does the Directive offer any guidance as to how CSDD measures should address the different risks and needs of people of different genders. By contrast, the UNGPs provide that businesses should pay special attention to any particular human rights impacts on groups or populations that may be at heightened risks of vulnerability or marginalisation, and to bear in mind the different risks that may be faced by women and men. The UNGPs also refer to a heightened need to consider risks of gender-based violence in situations of conflict.<sup>27</sup>

**Recommendation:**

**In line with the UNGPs, the Directive should clearly incorporate gender mainstreaming into its core provisions. Companies should be required to demonstrate how their CSDD processes will identify and address the different risks faced by, and needs of, men and women, and incorporate gender responsive approaches into actions taken to prevent, mitigate, or remedy, adverse human rights and environmental impacts.**

#### **4. Migrant workers’ rights should be clearly protected in the directive**

- 4.1. Migrant workers are significant drivers of many Asian economies. The ILO estimates that over 40% of the world’s international migrants in 2020 were from Asia – over half of whom migrated internally within Asia.<sup>28</sup>
- 4.2. In many cases, migrant workers face greater risks of exploitation due to, among other things, economic pressures, the high costs of migration (often inflated by recruitment fees), discrimination, irresponsible and exploitative recruitment practices, and a lack of legal protections and access to justice in countries of destination. For example, a 2020 ILO survey of migrant workers in Thailand found that less than one out of four migrant workers had been paid the minimum wage, three out of four had not received written employment contracts, and two out of three had not been allowed by their employers to keep their identity documents.<sup>29</sup>

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<sup>25</sup> ILO (2016) [Assessing the gender pay gap in Asia’s garment sector](#).

<sup>26</sup> Fair Labor Association (2018) [Triple Discrimination: Woman, Pregnant, and Migrant. Preventing Pregnancy Discrimination among Temporary Migrant Workers: Lessons from Malaysia, Taiwan, and Thailand](#).

<sup>27</sup> UNGPs, Principle 18, Commentary. See also: UNGPs, Principle 7(b).

<sup>28</sup> IOM (2022) [World Migration Report 2022](#).

<sup>29</sup> ILO (2020) [Recruitment fees and related costs: What migrant workers from Cambodia, the Lao People’s Democratic Republic and Myanmar pay to work in Thailand](#).



- 4.3. Despite the clear risks and structural inequalities faced by many migrant workers in global value chains, the Directive does not specifically include migrant workers' rights among the various rights which fall within the scope of the Directive.
- 4.4. Further, it is not clear whether the concept of a 'value chain',<sup>30</sup> as defined in the Directive, specifically encompasses a company's labour supply chain. If not, this potentially risks excluding a company's labour supply chain and recruitment process from the scope of CSDD obligations. Given the risks of exploitation, trafficking in persons, and other human rights violations in the recruitment of many migrant workers in Asia, it is important that comprehensive oversight of the labour supply chain and recruitment processes are fully integrated into CSDD obligations. The absence of the labour supply chain from the scope of CSDD obligations would thus represent a significant lacuna in the Directive.

**Recommendations:**

- (a) **The list of human rights and human rights and fundamental freedoms conventions in the Annex to the Directive should more clearly and expressly recognise the rights of migrant workers.**
- (b) **The definition of "value chain" should expressly include a company's labour supply chain.**

**5. The Directive should require companies to establish grievance and remediation mechanisms and not simply 'complaints' channels. Grievance mechanisms need to be robust, fair, transparent, accessible, provide for meaningful access to remedies, and be developed in partnership with stakeholders – including workers**

- 5.1. The proposed Directive requires companies to establish complaints procedures accessible to persons affected by HEIs as well as trade unions, worker representatives, and civil society organisations.<sup>31</sup> While this proposal is highly welcomed, complaints channels are only one small part of the identification and remediation of worker grievances. Complaints channels should be meaningfully integrated into comprehensive grievance and remediation mechanisms which seek to provide remedies for affected persons, and which support companies' CSDD efforts by providing companies with information about human rights violations in their value chains.
- 5.2. A effective grievance mechanisms should not be a 'black box' into which complaints disappear without further action. Nor should grievance mechanisms be purely reactive in nature. For this reason, the Directive's focus on 'complaints' is misconceived. The Directive should instead require companies to establish grievance and remediation mechanisms. A focus on grievance and

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<sup>30</sup> Defined in the Directive as "activities related to the production of goods or the provision of services by a company, including the development of the product or the service and the use and disposal of the product as well as the related activities of upstream and downstream established business relationships of the company...". See Article 3(g).

<sup>31</sup> Directive, Article 9.

remediation – rather than complaints – encourages businesses to take a more proactive approach towards addressing worker grievances, rather than reactive response to individual complaints.

- 5.3. Moreover, the Directive fails to offer clear guidance for the operation of complaints mechanisms. This is a departure from the UNGPs, which set out criteria for effective grievance mechanisms.<sup>32</sup> The Directive’s lack of standards enables companies to act as judge, jury, and executioner in their own complaint mechanisms. It is up to companies to determine whether, in their opinion, a complaint is “well-founded”. If so, the appropriate remedy is again left to be determined by the company in accordance with Article 8 of the Directive.<sup>33</sup> The Directive does not require complaint mechanisms to be developed in consultation with stakeholders – including workers – contrary to the UNGPs.<sup>34</sup> Nor does the Directive require stakeholder engagement when developing and determining appropriate remedies for those who raise grievances. The Directive’s approach therefore perpetuates top-down approaches to complaints and grievance mechanisms which fail to take into account the needs of workers. In turn, this may result in grievance mechanisms being created that are not trusted by workers or do not meet workers’ needs and expectations.
- 5.4. Further, complainants and their representatives are provided scant rights under the Directive. Complainants are only entitled to request a follow-up on complaints submitted and to a meeting with company representatives of an “appropriate level”.<sup>35</sup> The Directive offers no guarantees of procedural fairness, transparency, or accountability.
- 5.5. Nor does the Directive offer protection against reprisals for those raising grievances. In many jurisdictions in Asia, workers – especially migrant workers – face structural inequalities and barriers to access to justice that prevent them from raising grievances. These include threats, intimidation, and violence against workers and worker representatives, retaliatory dismissals, the termination of visas and deportation of migrant workers, as well as civil and criminal defamation suits.<sup>36</sup> Further, workers who are non-EU citizens, are not directly employed by EU enterprises, and who are not specifically reporting a breach of EU law (e.g., a violation of local employment laws in a non-EU country) are unlikely to be protected by the EU Whistleblower Directive.<sup>37</sup> It is therefore critical that worker protections are incorporated into grievance mechanisms established under the Directive.
- 5.6. Further, in jurisdictions characterised by weak rule of law and corruption, or where migrant workers are prohibited from trade union participation, corporate grievance mechanisms may become important channels through which workers can seek meaningful redress. In light of this, the Directive should go much further in setting clear standards for corporate grievance mechanisms which take into account the severe inequalities and asymmetries of power between companies and workers, workers’ barriers to access to justice, and should provide meaningful remedies for affected persons.

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<sup>32</sup> UNGPs, Principle 31.

<sup>33</sup> Directive, Article 9(3).

<sup>34</sup> UNGPs, Principle 31, Principle 31, commentary, paragraph (h).

<sup>35</sup> Article 9(4).

<sup>36</sup> The Remedy Project and The Freedom Fund (2021) [From Local to Global: Building a strategic litigation ecosystem to address modern slavery in supply chains](#).

<sup>37</sup> Directive 2019/1937.

### **Recommendations:**

- (a) Complaints mechanisms under Article 9 should be rephrased as grievance and remediation mechanisms, with a clearly stated focus on securing remedies for affected persons.**
- (b) Companies should be required to consult with stakeholders – including workers – in the design and performance of grievance mechanisms, and in determining appropriate remedies.<sup>38</sup>**
- (c) Grievance mechanisms established under Article 9 should be underpinned by fundamental principles of procedural fairness and natural justice, and be informed by the UNGPs and international standards. At a minimum, grievance mechanisms should comply with the UNGPs’ effectiveness criteria for non-judicial grievance mechanisms, and should include:**
  - (i) worker engagement in the design and operation of grievance mechanisms, and the resolution of grievances;**
  - (ii) guarantees of confidentiality and anonymity for all affected persons;**
  - (iii) no requirement for complainants to waive any rights to access other remedies and redress mechanisms as a prerequisite to receiving remedies (including under state-based mechanisms);**
  - (iv) access to legal support and representation for complainants throughout the complaints process; and**
  - (v) guarantees of non-discrimination towards all complainants regardless of gender, age, nationality, religion, or other status, in the investigation of complaints and in the provision of remedies.<sup>39</sup>**
- (d) Grievance mechanisms established by companies should clearly incorporate binding guarantees of non-retaliation against workers, their families, and representatives. Further, all complainants who submit claims under grievance mechanisms established under Article 9 should be entitled to equal protection as persons within the scope of the Whistleblower Directive.**
- (e) Companies should be required to make grievance mechanisms genuinely accessible (including being practically and financially accessible) to all workers across their value chains, and in a language which workers understand. This may require, among other things, companies to ensure that their suppliers’ employees have direct access to the company’s grievance mechanism, or that companies make investments to support their suppliers to establish their own grievance mechanisms.**
- (f) Corporate disclosures under Article 11 should include, among other things, a description of the complaints/grievance mechanisms operated by the company, statistics of the number**

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<sup>38</sup> UNGPs, Principle 31 commentary, paragraph (h).

<sup>39</sup> IOM and The Remedy Project (2020) [Operational Guidelines for Businesses on Remediation of Migrant-Worker Grievances](#).

and nature of complaints submitted, and details of the resolution/remedies offered in those cases.

## **6. Clear standards and accountability for third-party verification are needed, and the over-reliance on third-party audits as the primary means of verification should be reduced**

- 6.1. The Directive relies heavily on independent third-party verification as a means of demonstrating compliance with CSDD obligations.<sup>40</sup>
- 6.2. However, the Directive's conception of independent third-party verification is limited in several respects. Firstly, the Directive essentially equates independent third-party verification with auditing.<sup>41</sup> While audits have a role to play in the ecosystem of CSDD, an over-reliance on auditors as the sole source of third-party verification excludes other actors such as workers, trade unions, and civil society, who can and do play a critical role in identifying human rights abuses in supply chains – often where auditors do not. While the Directive does not exclude such parties from playing a role in CSDD, only 'independent third-party verification' (i.e., an audit) can be used to demonstrate compliance with the Directive.<sup>42</sup> Businesses are therefore likely to be heavily incentivised to prioritise audits as their primary means of verification.
- 6.3. Secondly, the Directive fails to set clear standards for third party audits or auditors. The Directive provides that independent third-party verification should be conducted by an auditor, who is independent from the company, free from any conflicts of interest, has experience and competence, and is accountable for the reliability and quality of the audit.<sup>43</sup> However, the Directive offers no guidance on what constitutes a 'reliable' or 'quality' audit.
- 6.4. The Directive's lack of clear standards for audits and auditors is of concern as the quality and standards of third-party sustainability audits vary significantly. There have been several well-documented instances in which third-party audits have allegedly failed to identify serious human rights and environmental abuses in corporate supply chains in Asia.<sup>44</sup>
  - In 2016, the European Center for Constitutional and Human Rights, together with affected persons, filed a complaint with the OECD National Contact Point for Germany against certification firm TÜV Rhineland over its allegedly inadequate audit of the Rana Plaza factory complex in Bangladesh – which collapsed in 2013 killing 1,130 people, including at least 39 children.<sup>45</sup>

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<sup>40</sup> Directive, Articles 7(4) and 8(5).

<sup>41</sup> Directive, Article 3(h).

<sup>42</sup> Directive, Articles 7(4) and 8(5).

<sup>43</sup> Directive, Article 3(h).

<sup>44</sup> Business and Human Rights Resource Centre (2021) [Social audit liability: Hard law strategies to redress weak social assurances](#).

<sup>45</sup> ECHR (2016) [OECD complaint against TÜV Rhienland](#).

- In 2019, the Clean Clothes Campaign filed an OECD complaint against Italian audit firm RINA over its allegedly inadequate audit of the Ali Enterprises factory in Pakistan – which caught fire in 2012 resulting in over 205 deaths.<sup>46</sup>
- In 2021, United States Customs and Border Protection concluded that there was information that reasonably indicated that forced labour was being used by Malaysian glove manufacturer Brightway Holdings – identifying 10 of the 11 ILO indicators of forced labour during its investigation.<sup>47</sup> However, according to press reports, audits of Brightway’s facilities conducted in 2019 and 2020 allegedly concluded that there was no evidence of forced labour.<sup>48</sup>

6.5. There are also practical limitations to the effectiveness of third-party audits. In jurisdictions where human rights abuses may be particularly pervasive, it may simply be impossible to conduct effective or safe third-party audits. Further, third-party audits are not necessarily well-placed to capture the broad range of human and environmental rights covered by the Directive. As auditing firm ELEVATE has stated: *“social audits are not designed to capture sensitive labour and human rights violations such as forced labour and harassment.”*<sup>49</sup>

6.6. Thirdly, the Directive does not establish a clear framework for third-party auditors to be held accountable to their clients, workers, or regulators for the quality of their work. In practice, auditors are rarely held accountable by their clients or affected persons for the quality of their audit work. This is because, among other things, social or sustainability audit reports – unlike financial audits – are not disclosed to the public.

#### **Recommendations:**

- (a) The Directive should make clear that the use of third-party audits and independent verification does not absolve businesses of their obligations under the Directive.**
- (b) Third-party audits should be one of many means of seeking ‘independent third-party verification’ under the Directive, which should also include engagement with a broader range of stakeholders beyond auditors – including workers, trade unions, and civil society.**
- (c) The Directive should specify how, and in what ways, third-party auditors engaged to conduct CSDD verification will be legally accountable to audited companies for the quality and reliability of their work.**
- (d) Corporate sustainability disclosures under Article 11 of the Directive should include, among other things, details of all third-party audits conducted during the relevant period – including the name of the auditor.**

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<sup>46</sup> Clean Clothes Campaign (2019)

[Complaint filed against Italian auditor for ignoring fatal flaws in garment factory.](#)

<sup>47</sup> U.S. Customs and Border Protection (2021) [CBP issues Withhold Release Order on Brightway Group.](#)

<sup>48</sup> Reuters (19 May 2021) [‘Slavery’ found at a Malaysian glove factory. Why didn’t the auditor see it?](#)

<sup>49</sup> ELEVATE (30 September 2019) [ELEVATE Response to Clean Clothes Campaign report, “Fig Leaf for Fashion: How social auditing protects brands and fails workers”.](#)

- (e) **The Directive should provide for each Member State to designate a competent authority to supervise and regulate the conduct of third-party corporate sustainability auditors in their jurisdiction. The competent authority should, among other things, be empowered to receive and investigate complaints from third-parties (including directly affected persons) and impose appropriate penalties on supervised audit firms.**
- (f) **Pursuant to Article 13 of the Directive, the Commission should develop guidelines for third-party auditors, which will inform the development of regulations for the supervision of third-party auditors by each Member States' competent authorities. In due course, the Commission should seek to introduce a harmonised Directive on corporate sustainability auditing to harmonise standards at the EU level.**

## **7. Businesses should be encouraged to use their leverage to promote better standards among their partners in their value chains, especially among small and medium-sized enterprises**

- 7.1. Larger entities higher up in the value chain have substantial economic leverage over their suppliers and business partners. This leverage can be applied to drive up standards for the protection of human rights and the environment in the downstream value chain.
- 7.2. There are several promising examples of businesses utilizing their leverage to drive-up standards in their downstream value chain. Many large international companies have established supplier codes or supplier standards that need to be met by their suppliers and partners. Businesses may offer improved terms or promise higher order volumes to supply chain partners who meet certain human rights performance indicators or, conversely, impose commercial penalties on those who do not. Financial services companies have also begun to offer financial products with variable interest rates tied to ESG scorecards/metrics.
- 7.3. However, the Directive provides very little incentive for businesses to proactively work with partners in these ways to improve standards in their value chains (apart from requiring companies to pay for the cost of independent third-party verification where the company enters into a contract with a small or medium-sized enterprise).<sup>50</sup> Instead, the Directive focuses on responsive and reactive measures such as corrective action plans, contractual assurances, and third-party verification.
- 7.4. The Directive should go further to incentivise businesses to take proactive steps to improve their suppliers' standards over the course of their commercial relationships.

### **Recommendations:**

#### **Corporate due diligence policies established under Article 5 of the Directive should:**

- (a) **contain a supplier code of conduct to be followed by the company's value chain partners with whom it has business relationships – not only the company's employees and subsidiaries; and**

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<sup>50</sup> Directive, Article 7(4), 8(5).

- (b) contain a description of the processes put in place to ensure that the company’s value partners with whom it has business relationships have the capacity to comply with the supplier code of conduct and support the company’s CSDD efforts – including steps taken to support partners to meet requisite standards.**

## **8. Business relationships should be terminated responsibly**

- 8.1. The Directive provides that businesses shall terminate business relationships with relevant partners where potential adverse HRIs arising from those relationships cannot be adequately prevented or mitigated and that potential impact is severe.<sup>51</sup> Business shall also terminate business relationships with relevant partners where actual adverse HRIs arising from those relationships cannot be brought to an end or their impact minimised, and those adverse impacts are severe.<sup>52</sup>
- 8.2. We recognise that it is important for businesses to have the flexibility to terminate business relationships where adverse HRIs cannot be adequately prevented, mitigated, or brought to an end. However, the threat of terminating or suspending business relationships can be a powerful commercial incentive for partners to comply with human rights and environmental standards. Such leverage can be particularly important in jurisdictions where formal mechanisms for access to justice may be impaired by the weak rule of law, corruption, restrictions on freedom of association and trade union activity, retaliation against whistleblowers – including through criminal defamation proceedings of SLAPP lawsuits – and other structural barriers to access to justice that prevent workers and migrant workers from being able to access their rights. In these contexts, commercial pressure from larger businesses may be one of the main drivers of change in downstream companies, who may otherwise be immune from other forms of pressure (e.g., through collective action or formal legal justice mechanisms). Such commercial pressure is recognised as central to the UNGPs.<sup>53</sup>
- 8.3. Given the significant opportunities for businesses to apply their leverage to improve standards in their supply chains, the Directive should take care not to encourage businesses to simply ‘cut and run’ whenever actual or potential adverse HRIs are identified. However, where a termination is justified, the termination of business relationships must also be handled responsibly. As the UNGPs acknowledge, the termination of a business relationship can itself have adverse human rights impacts.<sup>54</sup> The sudden termination of business relationships may result in workers losing their livelihoods or being unable to access remedy or compensation for rights violations.<sup>55</sup> In these circumstances, businesses retain a responsibility towards workers to minimise the effects of their actions, and to ensure that they are not denied access to remedies.<sup>56</sup> The Directive should therefore

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<sup>51</sup> Directive, Article 7(5)(b).

<sup>52</sup> Directive, Article 8(6)(b).

<sup>53</sup> UNGPs, Principle 19, Commentary.

<sup>54</sup> UNGPs, Principle 19, Commentary.

<sup>55</sup> See, Human Rights Watch (2015) [Work Faster or Get Out: Labor Rights Abuses in Cambodia’s Garment Industry](#).

<sup>56</sup> See, e.g., the decision by electronics manufacturer Dyson to terminate its relationship with a supplier in Malaysia over allegations of forced labour in the supplier’s facilities. Reuters (25 November 2021) [Dyson dumps Malaysian supplier ATA over labour concerns](#).

go further in clearly setting standards for managing the responsible termination of business relationships, where justified.

- 8.4. In contrast to the UNGPs, the Directive affords special treatment to financial services companies in the context of terminating business relationships. Under the Directive, financial services companies are not required to terminate credit, loan, or other financial services contracts where this can be reasonably expected to cause ‘substantial prejudice’ to the entity to whom that service is being provided.<sup>57</sup> It is not clear why such a carve-out is justified. Where financial services companies find themselves directly or indirectly complicit in severe adverse HEIs it is appropriate that they are able to terminate their business relationships. Nor do the UNGPs single out financial services companies for special treatment in this regard.
- 8.5. The exclusion of financial services companies from ongoing CSDD obligations is a missed opportunity for the financial services industry to apply its significant leverage to improve standards among their customers. As with large brands and purchasers, financial services companies can likewise apply significant leverage on their customers to improve human rights and environmental standards. Some lenders have begun to issue sustainability-linked loans with variable fee structures and margins that reflect the borrower’s ability to meet certain sustainability criteria.<sup>58</sup> Other lenders require sustainability-related disclosures and information to be provided by borrowers during annual credit reviews, or integrate sustainability and human rights-related criteria during periodic geographic and industry risk assessments.<sup>59</sup> All of these practices are reflective of an ongoing approach to CSDD which extends beyond the initial contractual stage. Given this, there is no reason why financial services companies should be excluded from conducting ongoing CSDD using a risk-based approach in line with the UNGPs.

#### **Recommendations:**

- (a) The Directive should clarify that CSDD obligations apply not only at the stage of forming business relationships, but also at the stage of termination.**
- (b) Where the termination of a business relationship is justified under the Directive, businesses should be required to take steps to minimise the harm caused to workers affected by the termination. Such steps may include supporting affected workers to transition to alternative employment, supporting the payment of unpaid wages and severance payments that are unable to be recovered from the primary employer, or providing access to compensation for rights violations giving rise to the termination decision. Businesses should likewise be required to provide similar support to workers whose livelihoods are affected by the implementation of corrective action plans.**
- (c) The carve-outs for financial services companies under Articles 7(6) and 8(7) of the Directive should be removed.**

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<sup>57</sup> Directive, Articles 7(6) and 8(7).

<sup>58</sup> See, OECD (2020) [Promoting responsible lending in the banking sector: The next frontier for sustainable finance](#).

<sup>59</sup> Ibid.



## 9. The Directive should offer guidance on how CSDD obligations will apply in conflict-affected areas

- 9.1. The need to have regard to how business and human rights principles interact with conflict-affected areas is, sadly, a reality that policy makers need to engage with. In Asia, recent experiences of Norwegian telecoms company Telenor in Myanmar demonstrate the need for clear guidance for businesses on managing human rights issues when operating in conflict-affected areas, and on how to manage responsible exit if required.<sup>60</sup>
- 9.2. While the UNGPs provide guidelines for supporting business respect for human rights in conflict-affected areas,<sup>61</sup> the proposed Directive is silent on these issues. Given the salience of business and human rights-related risks in conflict-affected areas in Asia and across the world, it is critical that the Directive clearly addresses the issue.

### Recommendations:

- (a) Drawing upon the UNGPs and other relevant international guidance, the Directive should clearly state how Member States should support business respect for human rights in conflict affected areas.<sup>62</sup> This should include, among other things, provision for how businesses should manage a responsible withdrawal from conflict affected areas – having regard to minimising adverse impacts for affected persons.
- (b) Article 5(1) of the Directive should specify that companies' due diligence policies shall include a description of the company's approach to due diligence in situations of conflict (where conflict is likely to be a material risk to the company's operations or value chain).
- (c) Corporate disclosure obligations under Article 11 of the Directive should include, among other things, a statement of how the company has applied CSDD processes in situations of conflict (to the extent the company's operations and value chain have been affected by conflict during the reporting period).

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<sup>60</sup> Business and Human Rights Resource Centre (22 February 2022) [Myanmar: Civil society calls for tech companies to resist military pressure to activate surveillance and abuse social media platforms; includes company responses.](#)

<sup>61</sup> UNGPs, Principle 7.

<sup>62</sup> See, e.g., UN Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises on Business (2020) [Human rights and conflict-affected regions: towards heightened action.](#)

## Signatories



MAP FOUNDATION



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<sup>63</sup> A list of Migrant Working Group's members is available on its [website](#). An endorsement on behalf of Migrant Working Group does not necessarily represent or reflect an endorsement or signature of any individual member of Migrant Working Group.