

Strengthening Stakeholder Engagement in the EU Corporate Sustainability Due Diligence Directive

February 16, 2023

Joint Reflections on How to Ensure Meaningful Engagement with Affected Stakeholders and Better Alignment with International Standards

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Introduction

The proposal for a Corporate Sustainability Due Diligence Directive (CSDDD) adopted by the European Commission (the Commission Proposal) promises a big enhancement of companies’ respect for human rights worldwide. However, at least on stakeholder engagement, the draft risks undermining international standards and regulatory coherence.

In this blog post, we first analyse the definitions and principles that should be considered to guide stakeholder engagement. In this regard, we compare the Commission Proposal to international standards, specifically, the UN Guiding Principles on Business and Human Rights (UNGPs) and the OECD Guidelines for Multinational Enterprises (OECD Guidelines) and their existing interpretive guidance and make recommendations for alignment. We then describe the role of stakeholder engagement throughout all phases of the due diligence process, analysing the shortcomings of the draft CSDDD in comparison to the international standards, and proposing improvements.

Strengthening the Definition of Stakeholders and Ensuring a Rights-Holders Centred Approach in the Commission Proposal

Human rights serve to protect people, and human rights and environmental due diligence (HREDD) are a means for companies to ensure that. Without the perspective and insights of the rights-holders, i.e., the people that HREDD aims to protect, the effectiveness of relevant measures will always be limited. Rightfully, the UNGPs Interpretive Guide therefore points out that, 'the key to human rights due diligence is the need to understand the perspective of potentially affected individuals and groups' (UNGP's Interpretive Guide, p. 33).

As outlined in the OECD Due Diligence Guidance for Responsible Business Conduct (OECD Guidance), 'not all individuals and groups considered as stakeholders will have interests that can be affected by a specific activity carried out by an enterprise' (see OECD Guidance, Q8. p. 48). The UNGPs and the UNGPs Interpretative Guide clearly make a distinction between 'affected groups' and 'other relevant stakeholders' (see Principle 18(b)). Thus, in line with international standards, it is important for companies to identify, first, the potentially and actually affected stakeholders that we usually refer to as 'rights-holders' as a subset of stakeholders.

Secondly, companies should identify 'the individuals and groups with interests that must be taken into account with respect to a specific activity' who qualify as 'relevant stakeholders' (see OECD Guidance, Q8. p. 48). This second group constitutes the legitimate representatives of rights-holder interests (see below). Engaging with them is also essential because they have insights into rights-holders' situations and expertise in representing them in a business setting. Stakeholder engagement needs to include both rights-holders and relevant stakeholders, but engagement with rights-holders should be given priority.

The Commission Proposal defines stakeholders in Article 3(n) and identifies some obligations on stakeholder engagement in the context of the HREDD provisions (see below). In the draft directive, 'stakeholders' mean 'company's employees, the employees of its subsidiaries, and other individuals, groups, communities or entities whose rights or interests are or could be affected by the products, services and operations of that company, its subsidiaries and its business relationships'. In comparison with international standards, this broad definition remains vague and does not differentiate between 'rights-holders', whose human rights may be directly impacted, and 'relevant stakeholders'. The EU Parliament's Committee of Legal Affairs Draft Report, published in November 2022 under the auspices of rapporteur Lara Wolters (see Wolters' Draft Report, p.58-59), and the Council of the European Union's final position (see Council Proposal, p. 76) neither account for this crucial distinction.

To better align with the rights-holder centred approach provided in the UNGPs, a future CSDDD should clearly distinguish stakeholders in general from rights-holders in particular in the definition under Article 3. It should also stress that corporate engagement should focus particularly on 'rights-holders' and especially on those people who may be marginalised or particularly vulnerable especially in global south (see Caroline Lichuma). The future CSDDD should therefore clearly define under Article 3(n) 'rights-holders', 'vulnerable stakeholders' and 'other relevant stakeholders' and outline 'rights-holders' as a distinct subset of stakeholders.

Clearly Referring to Legitimate Representation as a Key Criterion for Stakeholder Engagement

The question of legitimate representation arises with both, rights-holders and relevant stakeholders. Both the UNGPs Interpretative Guide (p. 56) and the OECD Guidance (p. 27) refer to 'legitimate representatives'.

First, when engaging with rights-holders, companies should determine if it can engage directly with rights-holders. If this is not possible, companies need to identify other credible sources that can raise voices and concerns, and it must seek to engage with their 'legitimate representatives'. This is especially the case during community engagements and in particular with indigenous peoples (see Sanabria & Schönfelder), where companies crucially need to determine the legitimate representatives of the local community. Importantly, the elected or officially recognised community representative does not always represent the interests and perspectives of the broader community. Legitimate representatives need to be perceived and recognised as legitimate by the rights-holders themselves. While companies cannot always be able to verify this 'from the outside', companies should seek advice from 'credible external sources' (UNGPs Interpretive Guide, p. 80) locally to ensure the adequacy of their legitimate representatives' mapping.

Additionally, when seeking to engage with 'other relevant stakeholders', a company needs to seek engagement with the 'legitimate stakeholders' – meaning the ones who can legitimately represent the interests of the rights-holders it could affect. These stakeholders need to be capable of really understanding, representing and sharing the concerns and perspectives of rights-holders.

The Commission Proposal does not refer to legitimate representation as a criterion to be considered for stakeholder engagement. We suggest using this criterion for both, the rights-holders and 'other relevant stakeholders'. 'Other relevant stakeholders' could be defined as 'individuals and organisations informed about rights-holders' perceptions of impacts and capable of speaking on behalf of them', with specific reference to trade unions and workers' representatives, non-governmental organisations (NGOs) with local knowledge, and human rights and environmental defenders.

Including a Clear Reference to 'Meaningful Stakeholder Engagement' and General Principles to Guide Engagement with Potentially Affected Stakeholders

Effective human rights due diligence is grounded in meaningful stakeholder engagement: the UNGPs state that the process of identifying human rights risks should 'involve meaningful consultation with potentially affected groups and other relevant stakeholders' (UNGPs, Principle 18). The OECD Guidelines provide that companies should 'engage with relevant stakeholders in order to provide meaningful opportunities [...]' (OECD Guidelines, p. 20). The concept of 'meaningful stakeholder engagement' also appears in the OECD Guidance (see for instance Q9, *What is "meaningful stakeholder engagement"?*, p. 49). Ensuring 'meaningful stakeholder engagement to reinforce respect for human rights and enable remedy' is also one of the key goals in the UNGPs 10+ Roadmap published by the UN Working Group on Business and Human Rights (See Goal 5, p. VII).

However, the Commission Proposal does not refer to 'meaningful stakeholder engagement' but merely requires companies under Article 6(4) to 'carry out consultations with potentially affected groups including workers and other relevant stakeholders'. Thus, the proposal creates the risk to require only 'token representation', and rendering the task of stakeholder engagement a formal tick-box exercise. A future CSDDD should include a specific provision to define and require stakeholder engagement to be 'meaningful' under Article 3. The definition provided in the Wolters' Draft Report (see, Amendment 80 for Article 3, p. 59) is a good starting point, but it needs to be strengthened to include all the principles that should be followed for stakeholder engagement to be characterised as meaningful.

It should be clarified in the CSDDD, in line with the OECD Guidance (see p. 49), that 'meaningful stakeholder engagement' should: 1) involve two-way communication and consultation, 2) be conducted in 'good faith' on both sides, 3) be responsive and timely, and 4) be on-going. Other key principles to be included encompass the need for companies to ensure that stakeholder engagement is 5) inclusive and adapted to the needs and rights of marginalised and vulnerable groups and that due account is taken of potential barriers to

participation faced by affected stakeholders and 6) context-sensitive and safe with adequate safeguards in place to protect participants from intimidation, retaliation or retribution, 'including by maintaining confidentiality or anonymity' (see Wolters' Draft Report, Amendment 156, Article 11a, p. 96) especially in conflict-affected contexts.

A future CSDDD should call for companies to adopt language, format, and a manner of stakeholder engagement that is appropriate, clear, and accessible to the most vulnerable and marginalised groups. This should, in light of the UNGPs (see p. 20) and the OECD Guidance (p.51) include gender-responsive stakeholder engagement and bottom-up approaches to stakeholder engagement to address the limits of current 'top-down corporate led' stakeholder engagement (see Maher and Buhmann).

Providing Guidance on How Companies can Prioritise Engagement with Rights-Holders and Relevant Stakeholders

With potentially millions of rights-holders along some companies' complex value chains, it is critical for companies to be able to prioritise engagement with the most vulnerable groups who face the risk of the most severe violations. However, the Commission Proposal does not provide any guidance on how companies can prioritise engagement with rights-holders and relevant stakeholders.

To be consistent with the UNGPs and OECD Guidelines, we recommend the inclusion of specific criteria to guide companies in their prioritisation exercise in the future CSDDD. We recommend 1) taking a risk-based approach to include rights-holders who are most likely to be directly and negatively impacted in connection with business operations and value chain and 2) applying a vulnerability lens to rights-holders mapping. As part of any rights-holders engagement process, companies should proactively identify and engage with the most vulnerable groups (or their legitimate representatives), that are at heightened risk of severe harm due to their vulnerable situation or marginalisation, which make them commonly voiceless groups in a classic engagement exercise.

In the literature on stakeholder engagement, there is a number of tools that look in more details at criteria (influence, expertise, orientation, capacity, trust) that might determine the selection of stakeholders to engage with (see for instance, BSR Five-Step Approach to Stakeholder Engagement).

The Commission Proposal Fails to Take a Systemic Approach to Stakeholder Engagement Across the Different Stages of HREDD in Line with International Standards

Both the UNGPs (Principles 16, 18, 20) and the OECD Guidance (see OECD, p. 52) explicitly require engagement with rights-holders. This is required at all stages of HREDD (explicitly OECD, p. 52). The obligations under a future CSDDD on stakeholder consultations are still in flux, as the Commission, the Council and Lara Wolters from the EP Judicial Committee are proposing very different models on this issue (as summed up concisely by Lichuma). As it stands, however, the Commission Proposal clearly falls short of international standards.

The wording of the proposal on stakeholder engagement is not entirely clear. The draft CSDDD mentions stakeholder consultations as part of specific HREDD obligations on several occasions, namely, in Articles 6(4), 7(2)(a) and 8(3)(a), but not as a general obligation to be fulfilled at all stages of the due diligence process. A clear obligation to consult stakeholders is only included in Article 7(2)(a), which requires companies to consult with affected stakeholders when enacting preventive action plans. The only other parts of the text that mention stakeholder consultations, Article 6(4) on the risk analysis and Article 8(3) on corrective action plans, only require it 'where relevant'.

However, 'relevance' is not defined. It could be read as providing 'a degree of discretion to

companies to elect when to engage in such consultation' (see DIHR, p. 28), which may be welcomed by companies to be able to prioritise in a situation where possibly thousands of stakeholders exist, but which is problematic because the draft provides no guidance on how to select these stakeholders. There are good reasons to believe that 'relevance' should be interpreted in line with the UNGPs and the OECD Guidance, as described above, and, therefore, be read as allowing and requiring companies to prioritise engagement with rights-holders – as the Commission Proposal makes extensive references to both standards and emphasises the need for coherence with them (see, Explanatory Memorandum to the CSDDD, p.9 and 11; recitals 5, 12, 26 and 44 to the UNGP; and recitals 6, 12, 16, 22 and 44 to the OECD Guidance).

However, the structure of the Commission Proposal might argue against this. The term 'adequateness', which is used in Article 3(q) of the draft CSDDD, captures many of these notions (on this term: Odile Dua and Leonard Feld). If the EU legislator uses another term – 'relevant' instead of 'adequate' – a systematic interpretation suggests that the legislator wanted the 'relevance' obligation to mean something else. Therefore, the notion of relevance is diffuse and creates both legal uncertainty and, most importantly, risks undermining the established principle of stakeholder engagement in HREDD, as per the international standards.

A better way to make stakeholder engagement feasible for companies is to let them prioritise – either by referring to adequateness or as proposed by Article 5 of the European Parliament resolution 2020/2129(INL) ('Undertakings may prioritise discussions with the most impacted stakeholders'). Where affected stakeholders exist, these should always be consulted when developing remedial measures (see OECD, p.18). To only have stakeholder engagements required only in some parts of the HREDD process also undermines international standards.

Outlook – Council and EP Legal Committee Want to Improve Coherence on Stakeholder Engagement in the CSDDD

Encouragingly, the EP's Legal Committee and, partially, also the Council seem to agree on the need to strengthen the rules on stakeholder engagement across the HREDD process in a future CSDDD. The EP's Legal Committee proposes comprehensive changes that would introduce a systematic approach to stakeholder engagement to cover all stages of HREDD, in line with international standards. The Council only proposes small, yet impactful changes: similar to Article 7(2)(a) regarding *preventive* action plans, the Council proposes a change to Article 8(3)(a) that would make stakeholder consultations with affected stakeholders obligatory for *remedial* action plans as well. This makes sense: in case of these action plans, a concrete situation is addressed in the interest of concrete rights-holders, so it is easier to know which specific persons should be engaged with. And these *should* be engaged with. The EP's Legal Committee and the Council's proposals give hope that the legislative procedure will lead to stronger alignment with existing international standards (they might take further inspiration from a policy paper that the University of Erfurt's Global Justice Clinic announced on this topic). This would be in the best interest of businesses, as it would give them clearer guidance than the diffuse notion of 'relevance' and ensure coherence with international standards that other laws require them to uphold. For example, the following laws all refer to either the UNGPs or relevant OECD standards: Article 18 EU Taxonomy Regulation, Article 4 Norwegian Transparency Act, and Article 2(q) EU Conflict Minerals Regulation. The Platform on Sustainable Finance of the Commission just recently pointed out that conformity with Article 18 of the EU Taxonomy Regulation also requires stakeholder engagement (see PoSF, p.10). A future CSDDD should therefore not create a double standard, but instead align and coherently require stakeholder engagement.

Suggested citation: C. G. Pires and D. Schönfelder, 'Strengthening Stakeholder Engagement in the EU Corporate Sustainability Due Diligence Directive: Joint Reflections on How to Ensure Meaningful Engagement with Affected Stakeholders and Better Alignment with International Standards', Nova Centre on Business, Human Rights and the Environment Blog, 15th February 2023.