FoEE Messages on draft Corporate Sustainability Due Diligence law – March 2022

Friends of the Earth Europe is committed to ending corporate impunity for human rights violations and environmental devastation. Our network has been proactive in taking cases in Europe against transnational corporations, for example recent successes on compensation for Nigerian farmers for oil spills and real climate action. We have ongoing cases in France seeking an end to the human rights violations linked to land grabbing for a huge oil project in Uganda and Tanzania, and to protect consumers from misleading climate greenwashing.

As such we have been following closely the process for an EU legislation on human rights and environmental due diligence, to ensure that it is fit to meet the aims of preventing harm to people and planet, protecting human rights, contributing to our environmental and climate goals and guaranteeing justice for affected people worldwide. Following the release of the Corporate Sustainability Due Diligence Directive (CSDDD) proposal on 23 Feb 2022, we share our first analysis.

With the arrival of the CSDDD proposal, **the EU must no longer delay and must urgently obtain an ambitious mandate to formally enter negotiations on the UN binding treaty** to regulate transnational corporations and other business enterprises. This mandate should be **complementary** to the CSDDD and must also take into consideration the below recommendations.

Here is our analysis on what the law needs to include to be effective and where it needs to be strengthened.

- **Make due diligence a substantive obligation that must be effectively implemented by corporations through continuous and adequate measures, not only a process or reporting obligation.**
    - The proposal does not yet include a general clause that obliges companies to respect human rights and the environment and the climate, in their own operations, and those of their subsidiaries or other controlled entities and entities in their global value chains. **Harm prevention should be included clearly in the subject matter** of the proposal.
    - The proposal has an over-reliance on contractual assurances that mean a large company could avoid making meaningful efforts to address harm and/or could push that burden on to smaller companies in the value chain, which is exactly the opposite of what the directive should aim at. **The proposal must clarify that the company's primary obligation is to prevent or bring an end to harm,** that it is not merely obligated to sign contracts etc., and that it cannot offload its responsibility (and liability) onto smaller companies in the value chain.
    - The proposal must also clarify that companies **remain liable even where they have sought to verify compliance though industry schemes and third-party audits**. Such industry schemes and social auditing have been proven to be unreliable, and giving them a central role risks allowing corporations to discharge their obligations without preventing, ending or remedying harm and making it harder for victims to hold a company accountable for harms in court.

- The legislation **should not limit the relevant business relationships to 'established' ones.** It should ensure that companies instead focus on **where the risks of harm are** in their value chains.

- **Make civil liability effective.** Civil liability must first and foremost be about providing remedy and justice to affected people. Providing legal certainty to companies cannot come at the expense of this goal. The inclusion of civil liability on parent and lead companies for harms by their subsidiaries and in their global value chains is an **indispensable provision** of this proposal. However, **several loopholes and weaknesses of the regime mean it will not help affected people**, and at worst could undermine existing stronger regimes.

    - For affected people to successfully hold a company liable under this legislation, there must be a demonstrable causal link between the failure of the company to meet its obligations and the resulting harm. However, this link is often near impossible for the claimant to prove in practice as it is the *company* that controls access to the relevant information, so **the onus should be not be on victims to prove this link in order for claims for damages to succeed.**

    - **The proposal must also clarify that the onus is on the company to prove to the judge that it met its obligations.** The company is always best placed to collect and provide the necessary evidence about its own activities and relationships and therefore the onus should be on the company to demonstrate what it did or did not do to avoid harm occurring.

    - Further, **Companies must have to prove that they took *all reasonable or appropriate measures* to avoid the harm.** The l**egislation must avoid that corporations can escape liability by arguing they are have fulfilled procedural obligations e.g. seeking contractual assurances, or membership of its partners in industry schemes, or via third party audits.**

    - For cases involving **subsidiaries, the liability should be absolute**. Subsidiaries are a part of the corporate structure, not a business relationship, and the parent company should be automatically held responsible when a harm is caused by the subsidiary's action or inaction.

    - **The legislation must remove the *de facto* exemption for liability** for when a corporation has contractual assurances from indirect suppliers. Such assurances cannot guarantee harms will not occur, so this exemption will only serve to deny access to justice as well as protection and restoration of the environment.

    - The proposal only includes liability when harm has already occurred. But, if this legislation is to be effective at preventing harm, it must also empower civil society, workers' representatives and affected people to go to court *before* a harm has occurred **by creating an injunctive option in the civil liability regime**. This injunctive action must include the possibility to file a case under summary or emergency proceedings and for the judges to order interim measures.

    - It should include provisions making it possible to sue the parent company, subsidiaries and business partners together and establish their **joint and several liability**, placing the largest responsibility on the parent or outsourcing companies, but also recognising the (probably lesser) liability of the subsidiaries, providers and

subcontractors. This would also serve to avoid large companies offloading their responsibility to smaller companies in the value chain.

- **The proposal does not include provisions on criminal liability.** The EU must ensure corporations and their CEOs etc. can be held criminally liable for egregious cases of harm and that EU legislations on environmental crimes are applicable to the *transnational* activities of EU corporations. The EU should also consider how to enshrine **ecocide** as a serious crime against people and planet.

- **Take the climate crisis seriously**
  - **Climate due diligence must be mainstreamed with concrete obligations** for all companies to identify the climate risks in their value chains, make a plan to bring them in line with the Paris Agreement, including short, medium and long term emission reduction targets and take measures to reduce their total emissions (scope 1, 2 and 3) in their global value chains. The proposal attempts to set out some corporate obligations on climate, however, these are separated from the main due diligence obligations and they remain unclear. It is not spelled out which reduction paths and targets companies must follow, and companies are not in fact obliged to *implement* corrective action plans to reduce greenhouse gas emissions. It must also be made clear that climate 'risks' mean risks of harmful emissions and not risks to the company itself.
  - The climate obligations are also not linked to civil liability. Companies **must be held liable in court for their climate impacts** and related human rights violations. It must also be possible to take a company to court for inadequate climate plans. The legislative proposal includes the possibility to reassess whether climate should be included in the main obligations. But this is only envisioned for 7 years after the directive enters into force, so potentially 10 years from now. This is worryingly misaligned with the EU's 2030 climate targets. **We need climate action now, not in a decade.**
- **Ensure that all relevant human rights and environmental and climate impacts are covered by the legislation**
  - It **must be clarified that the proposed Annex listing the rights and prohibitions covered under the legislation is non-exhaustive, rather than a closed**. A closed list that excludes certain rights and obligations would make it impossible to hold companies accountable for any impacts not listed and would therefore bring about the opposite result of the intention of the legislation.
  - **The Annex list must at the same time be expanded, especially Part 2 on environmental obligations**, which is highly restrictive and does not cover for example marine protection, air pollution or oil spills on water. These are stark omissions, especially in light of the recent tragic oil spill in Peruvian waters by Spanish oil company Repsol that has created an ecological and human rights disaster.
  - **The Paris Agreement** must be included in the Annex to ensure companies are required to apply due diligence steps to their climate impacts and that they can be held liable in court. (see above: Climate Crisis).

- **Remove the other obstacles affected people face when seeking justice**
    - A robust civil liability option is essential – but there are many other legal barriers that must be addressed to make it possible for people to enforce their rights in court, like ensuring there are legal mechanisms in place so that companies must **disclose relevant evidence**, and that affected people have **enough time to bring claims** for damages and reparation before EU courts, and allowing affected people to join together and take **collective action. Financial aid** should be provided to support affected people if they take a company to court. People affected should also be able to **choose which countries' laws apply** to the case.
- **Guarantee affected peoples' and workers' rights to participation and consultation**
    - It should not be left to the discretion of companies to decide 'where relevant' to consult affected people. The legislation must ensure the full recognition and protection of the rights of workers (and their representatives) and communities and individuals (potentially) affected by corporate activities. Affected people must be **meaningfully consulted in every step of the corporate operations** through independent consultations overseen by the state. The **right to free, prior and informed consent** enshrined in the ILO's Indigenous and Tribal Peoples Convention 169 must be fully respected, as well as all affected peoples' right to say no to projects.

- **Ensure protection measures for human rights and environmental defenders** (such as community leaders and members of local CSOs supporting them) are included, especially in terms of increasing risks of harassment, criminalization, arbitrary arrest or any unlawful interference with their human rights and fundamental freedoms prior, during and after legal proceedings, even if they are not directly plaintiffs in the legal case.

- **Ensure supervisory authorities are equipped to conduct real investigation of impacts on the ground**
    - The proposal includes supervisory authorities that will ensure administrative enforcement of the law. But it should also **set minimum sanction levels**, to ensure equal treatment of violations in all EU member states.

    - Supervision of due diligence must always be assessed based on the *effective* implementation of the due diligence measures on the ground. Therefore **authorities must also be well equipped to conduct real and substantive investigations and field work.** Otherwise there is a major risk that they conduct only 'on paper' oversight based on a restrictive and procedural interpretation of the corporate obligations, at worst reducing them to reporting requirements. This could complicate access to justice, if victims have to prove in court that a corporations' due diligence measures were still inadequate despite receiving approval by a supervisory authority.

- **Cover more companies.** The current proposal excludes most SMEs and only covers medium-sized enterprises in three high risk sectors. However, **companies of all sizes in all economic or industrial sectors have a duty to respect human rights and the environment**. Furthermore, the current proposal pushes the burden of due diligence and liability on to smaller companies in the value chain without formally recognising them. This only creates opportunities for

larger companies to escape their responsibilities. **Covering more companies cannot come at the cost of reducing the civil liability of companies.**

- **Meaningful coverage of the financial sector.** Reduced due diligence obligations for financial sector companies are unwarranted and unjustifiable. Limiting their due diligence obligations to the pre-contractual phase of a relationship and only to the activities of large corporate clients greatly undermines the role and responsibility the financial sector.

- **At the very least, this directive must not set the bar lower than existing global instruments.** The preamble to the proposal clearly states that the due diligence obligation is based on the **OECD guidelines and the UN Guiding Principles on Business and Human Rights (UNGPs).** However, the actual legal text deviates significantly from these international standards. In some cases this creates a lower standard, for example by limiting the value chain scope to 'established business relationships' rather than adopting a 'risk-based approach' where companies prioritise impacts based on the severity of the risk. The EU's legislation must improve on and make binding these standards by concretely obligating companies to respect human rights and the environment and by prioritising access to judicial remedy for affected people (which these voluntary guidelines neglected).

RELATED BRIEFINGS:

- **Do No Harm: the case for an EU law to hold businesses liable for human rights violations and environmental harm**: https://friendsoftheearth.eu/wp-content/uploads/2020/10/FoEE_Human_Rights_report_v15-pages-1.pdf
- **Global Solutions to Global Problems: Why EU legislation and a UN instrument on corporate accountability must be complementary**: https://friendsoftheearth.eu/wp-content/uploads/2021/10/Briefing-Why-EU-legislation-and-a-UN-instrument-on-corporate-accountability-must-be-complementary-1.pdf
- **How to make corporations effectively respect the environment and climate**: https://friendsoftheearth.eu/wp-content/uploads/2021/10/Briefing-How-to-make-corporations-effectively-respect-the-environment-and-climate-7.pdf
- **Friends of the Earth International principles for EU legislation to effectively regulate corporations throughout their global value chains**: https://www.foei.org/wp-content/uploads/2022/03/Principles-for-EU-legislation-to-effectively-regulate-corporations-throughout-their-global-value-chains.pdf