

UPDATED

Alignment within Reach: Remaining opportunities to align the EU CSDDD with the OECD Guidelines

EXECUTIVE SUMMARY

In late May 2024, the EU lawmaking institutions agreed to a landmark EU Corporate Sustainability Due Diligence Directive (CSDDD or Directive). However, around a year later, the same EU institutions amended the Directive through the so-called Omnibus Simplification Package I (OSP or Omnibus). The original Directive represented the first EU-wide measure to require large EU-operating corporations to account systematically for a wide array of human rights and environmental impacts caused by them or their business partners within much of their value chains. Despite recent amendments, it still stands out as a critical next step towards regulation of corporate human rights and environmental harms through law rather than solely through soft law normative standards and voluntary initiatives.

EU policymakers have repeatedly endorsed the value of aligning national due diligence laws with existing international due diligence standards such as the [OECD Guidelines for Multinational Enterprises on Responsible Business Conduct \(Guidelines\)](#). Together with the [UN Guiding Principles on Business and Human Rights](#) (UNGPs) and the [ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy](#), the OECD Guidelines provide the leading international normative framework on due diligence. Updated in 2023 by the then-51 (now 52) governments that adhere to them and unanimously endorsed by the OECD Council, the Guidelines provide a valuable blueprint for states working to enshrine responsible business conduct (RBC) expectations into law. Alignment with these broad and robust standards not only streamlines and simplifies expectations for companies, but also better assures achievement of the Directive's objective of ensuring companies identify, prevent, and address impacts to people and the environment associated with their products and services.

EU policymakers, the majority of whom are Adherents to the OECD Guidelines, still expect companies to meet standards of the Guidelines to the fullest extent that does not place them in violation of domestic law.¹ As there is no conflict between these companies meeting the higher standards of the Guidelines and still fulfilling the lesser expectations of the Directive, companies are still expected to meet the Guidelines even where they may have satisfied the Directive and may, if they do not, still be subject to National Contact Point (NCP) complaints.

1 OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, Chapter I, paragraph 2.

Important opportunities remain to further strengthen alignment between the CSDDD and the OECD Guidelines. This paper updates an earlier paper which assessed alignment between the Guidelines and the original Directive text in relation to its **personal scope** of covered companies, **value chain scope** of covered business relationships, **material scope** of covered impacts, and description of the **due diligence duty**. Given that the Omnibus amended the original Directive in certain critical points, an update was required. The paper finds the amended CSDDD continues to take a significant step towards implementation of the international norms in law, but achieves only incomplete alignment and sometimes widens the gaps that already existed under the underlying Directive text. Important aspects of the due diligence duty itself, as well as the Directive’s scope of covered companies, business relationships, and material impacts, continue to fall concerningly short.

Specific areas in which the final amended CSDDD text is (still) not fully aligned with the OECD Guidelines include the following:

- Regarding personal scope, while the due diligence duty in the CSDDD applies to companies across all sectors of the real economy, the original CSDDD only covered the largest of companies headquartered or operating in the EU and will in practice apply differently to companies in different sectors. This concerning lack of alignment has been exacerbated by the Omnibus amendments, which further limit the Directive’s application to only the very largest companies.
- In relation to value chain scope, while the duty in the CSDDD covers all impacts arising in connection with a company’s ‘upstream’ business relationships, it does not explicitly mandate most ‘downstream’ relationships and impacts, leaving companies in legal uncertainty over what their downstream duty should entail, especially critical in relation to the financial sector and sectors with impacts heavily associated with their services. The Omnibus has not changed our assessments on the value chain scope of the Directive.
- Concerning material scope, the CSDDD’s complicated definition of human rights, linked to a limited list of human rights conventions, creates uncertainty over which human rights are covered. Regarding environmental impacts, the original Directive’s fragmented referral to selected environmental agreements, together with the Omnibus’ deletion of the autonomous climate obligation, could create confusion around this key environmental impact. This contrasts the OECD Guidelines’ broad framing of covered impacts. Without clarification, the approach taken on material scope could unhelpfully divert company resources towards assessing whether certain impacts are covered by the law, rather than addressing all impacts through a risk-based approach.
- The due diligence duty in the CSDDD reflects the six steps of due diligence outlined in the Guidelines and echoes the framing of core elements. However, important shortcomings exist in relation to requiring management-level oversight within companies, ensuring meaningful and continuous stakeholder engagement, discouraging over-reliance on multi-stakeholder initiatives (MSIs), and confirming the role of companies directly linked to an impact in providing or encouraging remediation of the impact. The Omnibus has made a few changes to a few of the steps of due diligence that, taken in sum, have mixed impact on alignment with the Guidelines.

The Omnibus amendments tend to weaken alignment with the international standards, and the process of amendment was itself a disappointment – displaying policymakers’ inexpert submission to a narrow but vocal set of short-sighted corporate interests.

Yet greater alignment can be secured. Moving forward, at least three key mechanisms exist for EU policymakers to further strengthen alignment between the CSDDD and the OECD Guidelines. At the end of each section or subsection in the analysis below, **this paper recommends specific actions to be taken** to enhance alignment – including with respect to the most recent Omnibus amendments – at each of these three levels:

- **Transposition:** At national level, although the Omnibus reduces some of the discretion and flexibility of Member States, they still enjoy some opportunities to clarify and strengthen a number

of provisions when transposing them into national law. Transposition therefore provides a first key opportunity for Member States to correct some gaps in alignment between the Guidelines and Directive.

- **EU Commission guidelines:** At the EU-level, the Directive tasks the EU Commission with developing guidelines for companies and Member State authorities to guide companies in fulfilling their due diligence obligations. As indicated in specific recommendations below, the Commission guidelines should draw heavily from the OECD Guidelines and broader OECD due diligence framework to better guide implementation towards alignment. This may be particularly helpful to clarify new ambiguities created by the Omnibus amendments.
- **EU-level review:** Finally, although pushed back in time by the Omnibus, the EU will need to review the Directive on 26 July 2031, and every five years thereafter. This review provides a third key opportunity to strengthen shortcomings in alignment as suggested in this paper.

Table 1 summarises our analysis of alignment between the OECD Guidelines, the CSDDD as agreed in 2024, and the final text following the Omnibus amendments. Green, yellow, and red colour-coding indicate alignment, incomplete alignment, and non-alignment respectively. A few topics are given an asterisk where evaluation of alignment requires more nuance, provided in the analysis section below.

The three new columns at the right portray whether and where there are opportunities to correct lack of alignment in the text. A “check” suggests an opportunity to correct actual or possible non-alignment of text. A “squiggle” suggests an opportunity to clarify existing non-aligned text in a way that may support greater alignment in practice. No mark conveys no or very limited opportunity for correction of misalignment. In the paper below, we offer recommendations and reflections for each mechanism for influence at every topic (Member State transposition, EU Commission guidelines, and EU-level review).

TABLE 1: Overview of alignment between the EU CSDDD (including post Omnibus amendments) and the OECD Guidelines; Analysis of opportunities to correct misalignment

OECD GUIDELINES	ELEMENT	CSDDD PRE-OMNIBUS	FINAL CSDDD	Opportunities to correct non-alignment in the text		
				Member State Transposition	EU Commission guidelines	EU Review
PERSONAL SCOPE						
✓	Covers companies of all sizes	✗	✗	✓		✓
✓	Covers all sectors	✓*	✓*	✓		✓
✓	Covers companies of all forms	~	~	✓		✓
VALUE CHAIN SCOPE						
✓	Covers all upstream business relationships	✓	✓	Already aligned	Already aligned	Already aligned
✓*	Covers all downstream business relationships	✗	✗	✓	~	✓
MATERIAL SCOPE						
✓	Covers all human rights	~	~	✓	~	✓
✓	Covers all environmental impacts	~	~	✓	~	✓
CLIMATE						
✓	Covers climate change as an environmental impact	~	~	✓	✓	✓
✓	Requires implementation and monitoring of climate plan covering scope 1, 2, and 3	~	✗	✓	~	✓

OECD GUIDELINES	ELEMENT	DUTY	CSDDD PRE-OMNIBUS	FINAL CSDDD	Opportunities to correct non-alignment in the text		
					Member State Transposition	EU Commission guidelines	EU Review
1. EMBED							
✓	Requires embedding of due diligence into policies		✓	✓	Already aligned	Already aligned	Already aligned
✓	Ensures senior level oversight		✗	✗	✓		✓
2. IDENTIFY AND ASSESS							
✓	Requires initial broad scoping to identify risks and impacts		✓	✓	Already aligned	Already aligned	Already aligned
✓	Requires in-depth assessment of prioritised risks and impacts		✓	✓*	✓		✓
✓	Bases prioritisation on severity; no "prioritisation haven"		✓*	✓*	✓		✓
3. ADDRESS							
✓	Bases company's response on involvement in impact		✓	✓	Already aligned	Already aligned	Already aligned
✓	Provides no closed list of measures to address risks and impacts		✓*	✓*		~	✓
✓*	Disengagement can be appropriate but must be responsible		✓	~	✓	~	✓
4. MONITOR							
✓			✓	~		~	✓
5. COMMUNICATE							
✓			~	~*	✓	~	✓
6. REMEDIATE							
✓	Ensures companies causing or contributing provide remedy		✓	✓	Already aligned	Already aligned	Already aligned
✓	Ensures companies directly linked participate in remedy		~	~	✓	~	✓
ELEMENTS CROSS-CUTTING THE DUTY							
✓	Ensures MSIs and schemes don't absolve company of responsibility		✓	✓	Already aligned	Already aligned	Already aligned
✓	Ensures no over-reliance on MSIs and schemes		~	~	✓	✓	✓
✓	Seeks meaningful stakeholder engagement throughout due diligence		~	✗	✓	~	✓
✓	Ensures prioritisation of engagement with impacted stakeholders		✗	~	✓	~	✓

In our paper [Alignment within Reach](#) of June 2024, we did not comment on provisions in the CSDDD related to enforcement – including on civil liability and fines. The reason is that the OECD Guidelines are a non-binding soft-law instrument, with no enforcement provisions to compare against binding provisions in the Directive. While the Guidelines are promoted by NCPs in Adhering Countries who can encourage companies to observe the standards, NCPs cannot compel companies to do so.

The fact that the CSDDD allows enforcement makes it stronger in that aspect than the non-binding Guidelines. We note that the Omnibus’ amendments, particularly the removal of the requirement that EU law will apply in a harmonised fashion to due diligence-related disputes, may make enforcement implementation unnecessarily complex.

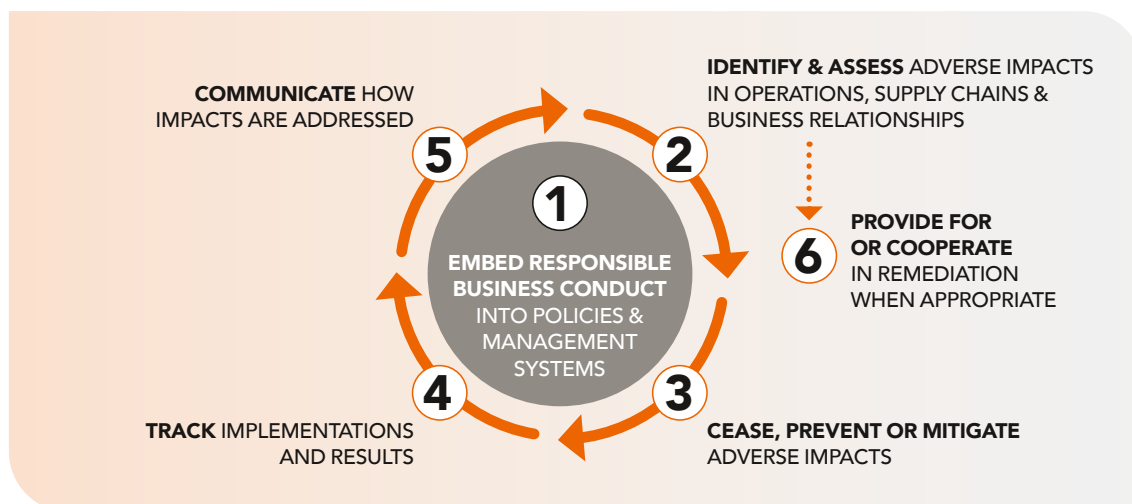
I. BACKGROUND

🎯 The OECD Guidelines and Due Diligence Guidance

The OECD Guidelines are recognised as the world’s leading, state-backed standard for responsible business conduct (RBC). They offer recommendations to multinational enterprises of all ownership models and sizes, operating in all sectors and across all geographies, on what it means to act responsibly regarding topics from human rights, workers’ rights, and the environment, to disclosure, technology, and corruption.

Human rights and environmental due diligence is the key tool offered by the Guidelines to help companies address their impacts. The OECD Guidelines defines due diligence as the process enterprises should carry out to identify, prevent, mitigate, and account for how they address the actual and potential adverse impacts they cause or contribute to through their own operations, and those they may be directly linked to through business relationships within the whole supply chain in which they operate.²

The OECD Guidelines outline a six-step process for the due diligence duty:



This six step due diligence process has been elaborated by the OECD in its cross-sectoral Due Diligence Guidance for Responsible Business Conduct (OECD Due Diligence Guidance) and backed by several sector-specific due diligence guidance. In this paper, the Guidelines and Due Diligence Guidance are collectively referred to as the “OECD due diligence framework”. The steps align with the framing of due diligence in other leading RBC standards, namely the UN Guiding Principles on Business and Human Rights (UNGPs) and ILO Tripartite Declaration on Multinational Enterprises.

As explained in the OECD Due Diligence Guidance, “the purpose of due diligence is, first and foremost, to cease and avoid causing or contributing to adverse impacts on people, the environment, and society, and to seek to prevent adverse impacts directly linked to operations, products, or services through business relationships. When involvement in adverse impacts cannot be avoided, due diligence expects enterprises to mitigate the impacts, prevent their recurrence and, where relevant, remediate them.”³

2 OECD Guidelines Chapter II, paragraph 11 and commentaries 15-28; OECD Due Diligence Guidance for Responsible Business Conduct, pg. 15.

3 OECD Due Diligence Guidance for Responsible Business Conduct, pg. 16.

Under the international norms, a company's involvement in an adverse impact determines the scope of actions the company should take to address the harm. Because of this, companies must understand their involvement in the harm before deciding the necessary actions to take. The UNGPs and Guidelines set out a three-tiered expectation for companies to respond to impacts based on their involvement in (or relationship to) the impacts.⁴ The value of this "involvement framework" is both that it makes clear that companies more closely involved in the harm (those causing or contributing to it) must take stronger measures to end and remedy it, but also that companies further from the harm (only directly linked through business relationships) still have responsibilities to address it too.



OECD Watch/SOMO, modified from the OECD's 2018 Due Diligence Guidance for Responsible Business Conduct, page 72. We added a "remedy layer" at the bottom of the figure to clarify responsibilities related to remedy in the various relationship scenarios.

The Guidelines also endorse a risk-based approach to due diligence. Companies sometimes misinterpret the "risk-based approach" narrowly as requiring due diligence only on prioritised risks and impacts, but the meaning is far broader. A full-fledged risk-based approach entails the continuous, ongoing, and iterative identification of and response to risks and impacts across the company's full value chain of business relationships, with all human rights and environmental impacts in scope.

4 OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, Chapter II, commentaries 16, 19, 21-23.

Due diligence thus prescribes a standard of conduct, based in part around the company's means and involvement in the harm, but also focused integrally on ensuring that companies measure results and adapt their conduct accordingly to effectively address adverse impacts.

Broadly speaking, the Guidelines set the leading standard for effective due diligence because of their broad coverage of:

- Types and sizes of multinational enterprises (personal scope);
- Impacts linked to companies within their whole value chain⁵ (value chain scope); and
- Impacts to all human rights, the environment, and society at large (material scope).

They also represent the leading standard because of their:

- Robust description of the steps and aspects of due diligence (due diligence duty).

When implemented correctly, the collective OECD due diligence framework can have tremendous impact in securing better business conduct and ceasing and preventing business-associated harm to people and the planet.

Government interest in developing national legal frameworks on RBC that align with the Guidelines

Because the Guidelines set the leading standard - and because of their state-backing and support among business, union, and civil society stakeholders at the OECD - governments that adhere to the Guidelines (including 25 of the 27 EU member States) have committed in multiple instruments to promoting broad corporate observance of their standards, including through supporting development of legal frameworks that align with the Guidelines. In Chapter I of the Guidelines (Concepts and Principles), adherent governments declare their "wish to encourage the widest possible observance of the Guidelines" and assert that they, as governments, "will implement them and encourage their use."⁶ In the Preface to the Guidelines and a separate [Recommendation of the Council on the Role of Government in Promoting Responsible Business Conduct](#), the OECD Council recognises the importance of coherence across international RBC standards. To this end, the OECD Council "recommends that governments develop and review legal and other regulatory frameworks to enable RBC and support the continued implementation and effective enforcement of these frameworks by... aligning with RBC standards and in particular OECD Due Diligence Guidance when developing new policies, laws, or regulations, including secondary rules, legislative guidelines, or sectoral policies." That sentiment is echoed in a 2023 [Declaration](#) by high-level ministers of Guidelines-adhering governments, who acknowledge the importance of fostering alignment and harmonisation of industry, government, and multi-stakeholder sustainability initiatives with international RBC standards, and call on the OECD to support alignment of legal and other policy expectations with OECD due diligence standards. In response to the 2023 Declaration and to help support broadening government interest in pursuing due diligence law, the OECD has launched an "Inclusive Platform on Due Diligence Policy Co-operation", already twice convening policy makers from OECD Member States and over 30 other nations to discuss and align domestic efforts.

5 The OECD Guidelines do not use the term "value chain" and rather rely on the definition of covered business relationships to make clear that the full value chain is covered.

6 OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, Chapter I, paragraphs 6 and 11.

● EU Corporate Sustainability Due Diligence Directive and its alignment with the Guidelines

The EU Corporate Sustainability Due Diligence Directive (CSDDD or Directive), including as amended by the Omnibus, represents a valuable step by EU governments towards fulfilment of that commitment to develop legal and regulatory frameworks to enable RBC. The aim of the CSDDD, despite some of the recent amendments widening alignment gaps, continues to aspire to that of the Guidelines: namely, to ensure companies contribute to sustainable development through the prevention and mitigation of actual or potential human rights and environmental adverse impacts in companies' chains of activities.⁷ This includes through ensuring covered companies identify (prioritise), prevent and mitigate, end, minimise, and remediate adverse human rights and environmental impacts connected with their own operations and those of subsidiaries and business partners in their chain of activities, and ensure that people harmed have access to justice and legal remedies.

Within the Directive itself, EU policymakers have explicitly emphasised the goal of alignment with international standards including the OECD Guidelines. Recital 6 of the original directive explains how the concept of human rights due diligence, initially formalised in the UNGPs, "was specified and further developed in the Guidelines for Multinational Enterprises (MNE Guidelines) of the Organisation for Economic Co-operation and Development (OECD) which extended the application of due diligence to environmental and governance topics." Recital 6 of the CSDDD describes the OECD Guidelines and Due Diligence Guidance, including the sectoral guidance, as establishing an internationally recognised framework for practical implementation of the steps of due diligence. Recital 20 of the original Directive then asserts that "the due diligence process set out in this Directive should cover the six steps defined by the Guidance for Responsible Business Conduct." And Recital 46 of the original instrument directs the EU Commission to use relevant international guidelines and standards as a reference when developing to guide implementation of the directive. The Omnibus amendments do not change the applicability of these recitals to interpret the instrument.

The CSDDD is thus inspired by and broadly echoes the due diligence framework in the Guidelines. However, at more granular detail, important differences between the Guidelines and Directive exist, resulting in incomplete alignment:

- Regarding personal scope of covered enterprises, while the Guidelines recommend due diligence by all multinational enterprises regardless of their size, sector, form or ownership model, the amended Directive focuses excessively narrow on very large entities with over 5,000 employees on average and EUR 1,5 billion in turnover within specific corporate legal forms.
- Regarding value chain scope, the Guidelines assign multinational enterprises responsibility for their own impacts as well as those to which they are directly linked through business relationships both up and down their value chain. The Directive (unchanged in this aspect by the Omnibus amendments) takes a narrower approach by focusing on business relationships insofar as they are related to the production of goods or the provision of services of the company. While the Directive applies widely to impacts occurring "upstream" of the covered company, the "downstream" scope of the directive only explicitly includes impacts related to distribution, transport and storage of products if performed for, or on behalf of the company, leaving due diligence around the disposal, design, sale, and foreseeable use or misuse of products or services not explicitly covered. The directive also creates explicit carve-outs for the downstream impacts of certain sectors such as the financial sector and armament sector, as well as dual-use items, and creates an effective carve-out for impacts from services, allowing an unduly light downstream duty for service sectors such as the technology and consulting sectors where impacts are largely felt downstream.

7 EU Corporate Sustainability Due Diligence Directive, Recital 16.

- On the material scope, the Guidelines expect due diligence over all impacts to all internationally recognised human rights and the environment, including climate change. In contrast, regarding human rights, the Directive creates a complicated definition of human rights linked to a limited list of human rights conventions that yields some ambiguity over which rights are covered, when, and to what extent. Regarding environmental impacts, the Directive's fragmented referral to selected environmental agreements from the due diligence could also leave some common environmental impacts out of scope. Notably the Paris agreement was not listed in the original directive. Further, the Omnibus removed a separate autonomous corporate obligation related to climate change. As a result, the amended Directive still requires in-scope companies to address climate-related impacts as part of their broader due diligence obligation, albeit without the benefit of a specific, legally clear and prescribed behavioural strategy to guide them.
- Finally, concerning the due diligence duty itself, the Directive adopts the six steps of due diligence laid out in the Guidelines, but does not ensure alignment on all key aspects and elements related to the duty. The original Directive already omitted ensuring senior-level oversight of the process. Meanwhile, the amended Directive takes an even more limited approach to the requirement for comprehensive, adequate, continuous, and meaningful stakeholder engagement throughout all steps of due diligence. Differences in nuances, elaborated in this paper below, persist in the instrument, resulting in non-alignment that weakens the Directive's potential to achieve its objectives.

● Reasons to ensure alignment between the CSDDD and OECD Guidelines

As outlined above, OECD governments have recognised the value of coherence between the Guidelines and national RBC and due diligence legislation. Companies and other stakeholders have also pushed for coherence between national laws and the international norms. There are several reasons why alignment continues to be valuable.

First, alignment strengthens the Directive's impact. Because of the Guidelines' broad scope and duty, they help cease, prevent, and remedy more impacts, through implementation of more responsible practices. Greater alignment tends towards greater effect.

Second, alignment reduces complexity for companies, who are seeking simplification. The same companies covered by the Directive (plus countless more) are still expected by OECD Guidelines-adhering governments to meet the higher standards in the OECD Guidelines. A number of in-scope companies and their business partners are already familiar with the Guidelines – and indeed were already investing in embedding Guidelines-aligned due diligence strategies from the moment of the May 2024 adoption of the original Directive. Instead of setting up a parallel system of slightly different requirements that do not, in all instances, ensure companies meet their due diligence expectations under international norms, EU policymakers and individual governments should promote interpretation and implementation of the CSDDD in a manner that best supports alignment toward a single standard.

Third, alignment increases legal certainty and a level playing field for companies. In a number of instances, the Directive does not fully align with the OECD Guidelines, resulting instead in unclear, unnecessarily complex, or even discriminatory obligations for companies, as well as the risk that companies may comply with the CSDDD but still be liable to an NCP complaint under the OECD Guidelines. Here, further alignment with the OECD Guidelines would result in a more practical, fair, and results-oriented obligation for companies.

Fourth, alignment by the EU could help drive alignment by the many other countries outside the EU currently pursuing due diligence or broader RBC regulation or legislation. That the EU, a significant international market, has taken the step of requiring sustainability due diligence has helped prompt

governments from South Korea, Thailand, and Indonesia, to Australia and the UK, to pursue the same in their jurisdictions. Meanwhile, initiatives have already been underway in Brazil, Colombia, and other states. The direction of travel is clear, and the standards in the Guidelines are – and critically must remain – the common denominator across these countries. Further action towards alignment at the EU-level, now that the Directive is finalised, will help drive coherence, ambition and leadership in other countries.

Means available to the EU and Member States to promote alignment

While the gaps between the Guidelines and Directive are concerning, EU policymakers have themselves helped pave the way for greater alignment over the next years of implementation. They have done this by recognising the value of the OECD Guidelines and OECD Due Diligence Guidance as an interpretive guide for the implementation of the Directive.⁸ Policymakers within Member States and at the EU level have important means at their disposal to achieve greater alignment between the CSDDD and the OECD Guidelines.

National level transposition and harmonisation

At the national level, transposition of the Directive into national law provides a key opportunity to strengthen alignment. Transposition is the process by which EU Member States incorporate a directive into national law through legislation, regulation, and administrative provisions. Member states are required to transpose the requirements of the CSDDD by July 2028 (a timeline updated by the Omnibus). The European Commission monitors transposition to ensure that it is done in a timely and correct manner and implemented so that the results intended by the relevant directive are attained. Transposition under Article 37 of the CSDDD needs to be read together with the expanded Article 4 of the CSDDD on Harmonisation, which clarifies which provisions of the CSDDD Member States must be transposed within the confines of the Directive, and which others they may make more stringent or ambitious to better achieve the objectives of the Directive.

Article 4 gives EU Member States great flexibility to impose national provisions stronger than the floor set in the Directive. The Omnibus extends the number of elements of the CSDDD subject to a “maximum harmonisation” approach requiring Member States to transpose requirements without imposing stricter obligations. This maximum harmonisation approach applies now to a significant part of the due diligence duty, namely the article on group-level due diligence (Article 6), the articles on risk identification and prioritisation (Articles 8 and 9), the article on prevention and bringing impacts to an end (Articles 10(1) to (5) and 11(1) to (6)) with the exception of suspension, as well as the articles on notification and complaint mechanisms (Article 14), monitoring (Article 15) and communication (Article 16).

Finally, the original Directive contained a non-regression principle in Article 1 requiring governments to maintain existing protections present at national level such as in labour law, environmental law, or product and food safety laws. Unfortunately, the Omnibus introduces an exception to this principle, allowing Member States to amend existing national laws relevant to due diligence in order to align them with the CSDDD, especially on scope. This amendment risks weakening alignment between the EU due diligence regime more broadly and the international standards. It contradicts Member States’ obligation to avoid regression against international human rights laws and, more specifically, the International Covenant on Economic, Social and Cultural Rights. It also contradicts recent Advisory Opinions of several international courts that find a duty under international law for states to address climate change, including by regulating impacts of private entities, and adopting credible climate transition plans.

⁸ EU Corporate Sustainability Due Diligence Directive, Recitals 6 and 62.

EU Commission guidelines

Under Articles 18, 19, and 20 of the CSDDD, the EU Commission is called to develop guidelines on how to conduct due diligence, including for specific sectors. These guidelines shall be developed in consultation with stakeholders, Member States, EU agencies and, where appropriate, international organisations and other bodies having expertise in due diligence. As mentioned above, Recital 46 of the original CSDDD clarifies that the Commission should use relevant international guidelines and standards as a reference when developing guiding tools. Meanwhile, Recital 6 of the original CSDDD acknowledges the OECD due diligence framework as “an internationally recognised framework setting out practical due diligence steps to help companies identify, prevent, mitigate and account for how they address actual and potential impacts in their operations, supply chains and other business relationships.” The Omnibus has made the EU Commission guidelines increasingly critical as a tool to clarify newly created ambiguity such as around material scope (including climate change impacts) and stakeholder engagement. The Commission has an important opportunity, through its guidelines, to use the OECD standards to guide interpretation of the Directive to ensure both greater impact and efficiency of corporate due diligence and a more uniform application across the EU.

Review and reporting

Still at the EU level, a third key opportunity to strengthen alignment will be at the anticipated formal “review and reporting” on the Directive in (as updated by the Omnibus) July 2031. Article 36 of the CSDDD mandates such a review and already requires consideration of many of the shortcomings identified in this paper. The review and potential redrafting of the Directive will enable policymakers to address these issues and any others identified over the next five years of implementation.

As an important aside, it will also be critical for the EU to ensure coherence between the OECD Guidelines and other EU instruments relevant to RBC. This should include also existing instruments that are coming up for review.

Purpose and structure of this paper

Given the broad scope, robust duty, state-backing, and broad stakeholder endorsement of the OECD Guidelines, as well as the weight EU policymakers have already placed on using them to guide interpretation and implementation of the Directive, this paper argues for strengthening alignment between the CSDDD and the Guidelines. The four analysis sections of the paper explain the broad and comprehensive personal scope, value chain scope, material scope, and due diligence duty of the OECD Guidelines, and then evaluate whether and how the CSDDD, as amended by the Omnibus, aligns or not with the key elements of each topic. Where there is ambiguity in the Directive, the paper uses (and encourages governments to use) the Guidelines to interpret the CSDDD in a manner that aligns with the Guidelines, thereby better ensuring it achieves its objectives. Where the Guidelines are stronger than the CSDDD, the paper offers recommendations to policymakers to ensure – through national level transposition, drafting of the EU Commission guidelines, and eventual review of the Directive – improved alignment with the Guidelines.

Finally, we remind other Adherent governments considering or pursuing due diligence or related legislation to remember their commitments to seek coherence with the OECD Guidelines – not with the EU Directive. The Guidelines, and not the CSDDD, must remain the standard to ensure highest impact by, and a level playing field for, companies.

II. ANALYSIS AND RECOMMENDATIONS ON ALIGNMENT

① Personal scope of covered enterprises

OECD GUIDELINES	ELEMENT	CSDDD PRE-OMNIBUS	FINAL CSDDD	Opportunities to correct non-alignment in the text		
				Member State Transposition	EU Commission guidelines	EU Review
✓	PERSONAL SCOPE					
✓	Covers companies of all sizes	✗	✗	✓		✓
✓	Covers all sectors	✓*	✓*	✓		✓
✓	Covers companies of all forms	~	~	✓		✓

OECD Guidelines

The OECD Guidelines apply to all companies with international operations, business partners, or value chains, irrespective of their size, sector, form, ownership, or (group) structure.⁹ This broad personal scope ensures wider impact for the Guidelines by encouraging all multinational enterprises to operate responsibly on a level playing field. The Guidelines implicitly recognise that size is not correlated with risk, as smaller companies can sometimes generate significant risks and impacts. The Guidelines also do not distinguish between the due diligence responsibilities of companies according to sector; the same due diligence standard applies to companies in all sectors. Finally, the Guidelines do not define a form, ownership model, or particular (group) structure for covered multinational enterprises and, in practice, have been applied broadly by states even to non-traditional enterprises such as some export credit agencies, MSIs, sustainability certification agencies, a non-governmental organisation, and an international sports association.

CSDDD

The personal scope of the CSDDD, addressed in Article 2 of the Directive¹⁰, is one of its aspects least aligned with the OECD Guidelines, a gap that is further exacerbated by the amended Directive. First, the Directive applies only to companies with limited or unlimited liability form. Second, only the very largest EU companies with 5,000 employees on average and an annual turnover of EUR 1.5 billion, and non-EU companies with an annual net turnover of EUR 1.5 billion in the EU, are covered by the amended Directive. It also applies to companies that do not meet these thresholds but are the ultimate parent companies of groups that reach these thresholds, as well as to companies that have entered into franchising or licensing agreements in the EU in return for royalties amounting to more than EUR 72 million in the EU, and a net turnover of more than EUR 275 million.

As a result of these form and size limitations, the Directive applies only to an extremely narrow fraction of the EU companies that are covered by the OECD Guidelines. According to calculations by the Dutch Centre for Research on Multinational Corporations, the total number of EU companies expected to be covered by the amended CSDDD is around 1,500, which is significantly lower than the 5,500 covered by the original CSDDD, which is, in turn, significantly lower than the 16,000 covered in the original

9 OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, Chapter I, paragraphs 4 and 6.

10 EU Corporate Sustainability Due Diligence Directive, Article 2.

Commission proposal, or the estimated 23,5 million companies within the EU.¹¹ For perspective, a similar law of neighbouring European Free Trade Association partner Norway covers companies from 50 employees upwards.

The Omnibus amendments removed a previously phased entry-into-force for the Directive. Given that the personal scope is narrowed to companies with 5,000 employees and 1.5 billion turnover, the categories of the phased application no longer exist, rendering it unnecessary.

Third, while in principle the Directive applies to all industry sectors, in practice certain sectors receive a more limited duty obligation as a result of limitations of due diligence over downstream business relationships and impacts. See this discussed in Section II.2 on value chain scope below.

Recommendations on personal scope

To better achieve the Directive's aim of ensuring that companies address their impacts on people and the planet, Member States should expand the personal scope of the Directive to achieve greater alignment with the Guidelines and guide more companies to responsible conduct.

Transposition: At national level, Member States can pursue several options to cover more companies under their national legislation, steps permitted of States notwithstanding the Omnibus' new tighter restrictions towards harmonisation:

- Lower the employee or turnover thresholds in general, or at least for specific sectors;
- Expand the type of entities covered to include all economic actors regardless of their legal form; and
- Extend supportive measures for companies falling outside the new narrower personal scope, but which nevertheless want to align with the CSDDD, OECD Guidelines, and other relevant EU directives.

Commission guidelines: The Commission guidelines cannot resolve the narrow personal scope of the Directive. Nevertheless, the narrowed personal scope of covered companies should prompt the EU Commission to place even greater focus on guiding covered companies to support their business partners, especially SMEs, in implementation, to still achieve the CSDDD's goal of elevating standards throughout global value chains.

Review: The CSDDD review Article 36 already requires policymakers to consider whether the employee or turnover thresholds should be revised, and additional corporate forms covered. This review will provide an important opportunity for the EU to pursue greater alignment with the OECD Guidelines.

11 SOMO (Centre for Research on Multinational Corporations) (2025) CSDDD Datahub, <https://www.somo.nl/csddd-datahub-reveals-law-covers-fewer-than-3400-eu-based-corporate-groups/> Eurostat (2023) Business demography statistics, https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Business_demography_statistics_

② Value chain scope over related business relationships

OECD GUIDELINES	ELEMENT	CSDDD PRE-OMNIBUS	FINAL CSDDD	Opportunities to correct non-alignment in the text		
				Member State Transposition	EU Commission guidelines	EU Review
	VALUE CHAIN SCOPE					
✓	Covers all upstream business relationships	✓	✓	Already aligned	Already aligned	Already aligned
✓*	Covers all downstream business relationships	✗	✗	✓	~	✓

OECD Guidelines

The OECD Guidelines expect companies to undertake due diligence across their whole value chain, thereby ensuring both that more impacts are addressed and that companies fully account for impacts to which they are connected throughout their business operations.

The Guidelines expect enterprises to carry out due diligence on their own activities and those of their business relationships both “upstream” and “downstream” of their own role and place in the larger value chain. The Guidelines do not use the term “value chain,” but rely on the definition of business relationships to clarify the full scope over business relationships up and down in the chain. Under the Guidelines, “the term ‘business relationship’ includes relationships with business partners, sub-contractors, franchisees, investee companies, clients, and joint venture partners, entities in the supply chain which supply products or services that contribute to the enterprise’s own operations, products or services or which receive, licence, buy or use products or services from the enterprise, and any other non-State or State entities directly linked to its operations, products or services.”¹² Therefore, as the Guidelines clarify, “business relationships include relationships beyond contractual, ‘first tier’ or immediate relationships”.¹³

Serious impacts often happen in connection with downstream business relationships, as evidenced by numerous complaints handled by NCPs under the OECD Guidelines.¹⁴ Companies can have leverage over these impacts through design of a product or service itself, as well as through monitoring of the downstream chains of business relationships that put the product or service into use. The Guidelines explicitly note that because it can be difficult for companies to monitor impacts, build or exert leverage “after a service is rendered or a product is sold or re-sold”, companies should therefore make particular effort to identify risks and take preventative or mitigating actions “prior to and at the point of sale”,¹⁵ such as through “building expectations around responsible business conduct and due diligence specifically into commercial contracts”.¹⁶

In clarifying the scope of due diligence over downstream actors, the Guidelines make clear that companies can contribute to harms caused by consumers. The Guidelines note that while “relationships with individual consumers, who are natural persons acting for purposes that are unrelated to a business, commercial, or governmental activity, are not generally considered ‘business relationships’ under the Guidelines [...] an enterprise can contribute to adverse impacts caused by them.”¹⁷

12 OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, Chapter II, commentary 17.

13 OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, Chapter II, commentary 17.

14 OECD Watch, “Updated Guidelines reconfirm downstream application of due diligence,” 13 June 2023, <https://www.oecdwatch.org/updated-oecd-guidelines-reconfirm-downstream-application-of-due-diligence/>.

15 OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, Chapter II, commentary 24.

16 OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, Chapter II, commentary 23.

17 OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, Chapter II, commentary 17.

Finally, the Guidelines clarify that due diligence “should take into account known or reasonably foreseeable circumstances related to the use of the product or service in accordance with its intended purpose, or under conditions of reasonably foreseeable improper use or misuse, which may give rise to adverse impacts”.¹⁸ Known or foreseeable misuse of products is a common cause of adverse impacts, such as with the misuse of pesticides or certain digital technologies.

CSDDD

The CSDDD takes a more limited approach to corporate value chains – a fact not altered by the Omnibus amendments. The Directive defines covered companies’ “chain of activities” as including both the enterprise’s own activities as well as those of its business partners.¹⁹ Upstream, both direct and indirect business partners are covered insofar as they are related to the production of goods or the provision of services, including the design, extraction, sourcing, manufacture, transport, storage and supply of raw materials, products or parts of the products and development of the product or the service.²⁰ We consider the CSDDD aligned with the Guidelines as regards coverage of upstream business relationships.

In terms of downstream activities, however, the Directive’s approach is ambiguous at best. On one hand, several points in the Directive make the scope of coverage of downstream impacts appear very narrow. The Directive only explicitly requires companies to address impacts of downstream business partners associated with the distribution, transport, or storage of the product on behalf of the company.²¹ This could likely exclude, as downstream business partners, certain types of companies expressly covered in the Guidelines such as franchisees, investee companies, clients, joint venture partners, and entities in the supply chain that receive, licence, buy, or use products or services from the enterprise unrelated to distribution, transport, or storage.²² The Directive also does not explicitly require due diligence over downstream impacts linked to post-consumer activities.

Yet, on the other hand, as regards their own conduct, we highlight that the Directive also explicitly requires companies to do due diligence over their own operations, actions and omissions. Since many adverse human rights impacts result from poor design, manufacture, installation, composition, or implementation of products or services, companies have a clear ability to avoid those impacts at the design, creation, production, or marketing phases. This necessarily implies an obligation to amend their own harmful acts or omissions at these stages to avoid downstream harm related to how their products or services are used, potentially misused, or disposed of. In this regard, downstream due diligence may be interpreted more broadly.

We suggest this ambiguity can and should be read both in light of the *ratione legis*, as well as in alignment with the Guidelines,²³ as effectively requiring companies to address downstream impacts even just directly linked to them in relation to the distribution, transport, or storage of the product, but also downstream impacts caused or contributed to by them through their own irresponsible acts or omissions.

Regarding due diligence expectations across sectors, the CSDDD limits these for certain sectors, in three ways. First, the Directive explicitly exempts financial institutions from performing due diligence over their most harmful downstream business activities - namely, impacts associated with their financial services.²⁴ While financial institutions are still expected to undertake due diligence over their upstream business

18 OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, Chapter II, commentary 20.

19 EU Corporate Sustainability Due Diligence Directive, Article 3(1)(g).

20 EU Corporate Sustainability Due Diligence Directive, Article 3(1)(g)(i).

21 EU Corporate Sustainability Due Diligence Directive, Article 3(1)(g)(ii).

22 The OECD Guidelines hold franchisees and joint ventures responsible for impacts they cause or contribute to themselves, and also hold companies responsible for impacts directly linked to them through franchisees or joint ventures up- or downstream of them in their value chain. This is distinct from the framing in the Directive. Under the Directive, franchisees and joint ventures may contribute to a company reaching the thresholds for being subject to the duty in and of itself. (According to Article 2(2)(c), certain types of franchisees surpassing a minimum of 22.5 million EUR revenue in the EU market do contribute to whether a company is in scope. Similarly, a number of investee companies (namely, falling in scope of article Article 2(10) of Directive 2013/34/EU) and controlled undertakings (as defined in Article 2(1)(f) of Directive 2004/109/EC) also count to this threshold. The definition of controlled undertaking will be less likely to result in joint ventures being captured in this way.) However, the Directive does not explicitly cover impacts stemming from franchisees and joint ventures within the downstream value chain.

23 EU Corporate Sustainability Due Diligence Directive, Recital 6.

24 EU Corporate Sustainability Due Diligence Directive, Recital 26.

relationships, because of the critical link financial institutions provide by funding the activities that cause adverse human rights and environmental impacts, the exclusion of financial institution's financial services from the scope of the Directive represents a significant limitation in its impact and value. On a positive note, at a minimum, the CSDDD does require banks, insurers, and investors to adopt and put into effect climate transition plans in line with the decarbonisation goals of the Paris Agreement.

Second, the Directive explicitly excludes due diligence over product disposal and services. The latter exclusion could be read to release numerous service sectors - such as the digital services sector (e.g. artificial intelligence, social media, digital work platforms)²⁵ and consulting sectors, to name just a couple - from the requirement to address some of their most severe impacts downstream.

And thirdly, the Directive also exempts companies from doing due diligence over arms, weapons, and dual use items²⁶ after an export licence is awarded for them.

Finally, it is important to note that under the Corporate Sustainable Reporting Directive²⁷, companies are already required to identify and report upon their adverse human rights and environmental impacts across their whole value chain.

Recommendations on value chain scope

The broad value chain scope of the Guidelines ensures that companies do not overlook ways in which their conduct can cause, contribute to, or be linked to harm throughout their value chain, thereby assuring that many more harms resulting from irresponsible business conduct are covered, no matter where they appear in the chain. To better achieve the Directive's aim of ensuring that companies address all their impacts on people and the planet, member states should expand the value chain scope of the Directive to enable greater alignment with the Guidelines (and the Corporate Sustainable Reporting Directive) and guide more companies to responsible conduct.

Transposition: At the national level, Member States should extend the duty to other downstream direct and indirect business partners including sub-contractors, franchisees, investee companies, clients, joint venture partners, and entities in the supply chain that receive, licence, buy, use, or dispose of the goods or services. They should ensure due diligence applies to downstream impacts of services. Member States could also require companies to undertake due diligence over the arms, weapons and military applications of dual-use items to seek to prevent unintended human rights abuses or violations of human rights and International Humanitarian Law that might occur despite the award of an export licence. These actions would be permitted notwithstanding the Omnibus' more limiting harmonisation requirements, which do not cover definitions (Article 3(1)).

Commission guidelines: The potential clash between the narrow list of downstream business relationships included in the due diligence duty, and the implications of carrying out effective appropriate measures to strengthen a company's own practices, could create significant confusion over the scope of downstream due diligence and the actions companies should take to address downstream harms. The Commission guidelines should clarify that companies should at a minimum take into account (address) adverse impacts downstream of them that can be affected by their own practices, by making appropriate adjustments in their design of, education about, or sale of, etc., their product or service.

25 A number of these are covered by separate instruments such as Regulation (EU) 2022/2065 (Digital Services Act), Regulation (EU) 2022/1925 (Digital Markets Act), which do include a (different) form of due diligence.

26 As governed by Regulation (EU) 2021/821.

27 Directive (EU) 2022/2464 on Corporate Sustainability Reporting. See also section II(4)(A) step 5 Communicating below.

Review: In the longer term, the review clause already requires EU policymakers to consider revising the definition of “chain of activities” to ensure the Directive meets its objectives, in particular addressing adverse impacts. This will be an important moment to expand and clarify the value chain scope of the Directive.

③ Material scope of human rights and environmental impacts, and climate change

OECD GUIDELINES	ELEMENT	CSDDD PRE-OMNIBUS	FINAL CSDDD	Opportunities to correct non-alignment in the text		
				Member State Transposition	EU Commission guidelines	EU Review
	MATERIAL SCOPE					
✓	Covers all human rights	~	~	✓	~	✓
✓	Covers all environmental impacts	~	~	✓	~	✓
	CLIMATE					
✓	Covers climate change as an environmental impact	~	~	✓	✓	✓
✓	Requires implementation and monitoring of climate plan covering scope 1, 2, and 3	~	✗	✓	~	✓

OECD Guidelines

The OECD Guidelines have a broad material scope covering human rights and environmental impacts, and particularly with respect to technology, other impacts such as harm to the “quality of democracy” and to “social cohesion”. This broad material scope ensures the Guidelines achieve their goal of expecting corporations to address all their harmful impacts to people and the planet, in whatever form those impacts appear.

Concerning human rights, the OECD Guidelines call on companies to respect all internationally recognised human rights, including workers’ rights.²⁸ The Guidelines do not provide an exhaustive list of rights covered, or specify that the rights be those that can be impacted by business conduct.

Concerning the environment, the OECD Guidelines call for due diligence over potential and actual adverse environmental impacts, broadly defined as “significant changes in the environment or biota which have harmful effects on the composition, resilience, productivity or carrying capacity of natural and managed ecosystems, or on the operation of socio-economic systems or on people”.²⁹ Environmental impacts are thus covered whether or not they have effects on people. The Guidelines additionally identify an illustrative and non-exhaustive list of broad harmful impacts often linked to business activity, including climate change; biodiversity loss; degradation of land, marine, and freshwater ecosystems; deforestation; air, water and soil pollution; and mismanagement of waste including hazardous substances.³⁰

²⁸ OECD Guidelines, Chapter II, paragraph 2; Chapter IV, paragraphs 1-3.

²⁹ OECD Guidelines, Chapter VI, commentary 68.

³⁰ OECD Guidelines, Chapter VI, chapeau.

Regarding the critical global challenge of climate change, the Guidelines give extensive detail on expectations for companies to undertake due diligence to identify and address their impacts on climate change, such as by reducing their greenhouse gas (GHG) emissions and transitioning away from fossil fuels towards greener energies and methods.³¹ The Guidelines expect companies to show their GHG emissions meet internationally-agreed global temperature goals (including in the Paris Agreement) based on best-available science. They also expect companies to implement science-based climate change policies and transition plans. In this regard, companies must set and monitor GHG emissions mitigation targets that are short-, medium-, and long-term; based on the latest available science; include absolute and also, where relevant, intensity-based GHG reduction targets; and take into account scope 1, 2, and to the extent feasible based on best information, scope 3 GHG emissions.

Further, companies are directed to prioritise eliminating or reducing sources of emissions over offsetting, compensation, or neutralisation measures, and use carbon credits or offsets (of high integrity) only as a last resort. The Guidelines focus on both climate mitigation and climate adaptation. Critically, they call on companies to avoid activities that undermine the resilience and climate adaptation ability of communities, workers, and ecosystems. Finally, companies should report accurately and publicly on their climate impacts, including as financially “material” risks to the company (that is, risk that affects the value of the company).³²

CSDDD

In contrast with the open-ended and comprehensive material scope of the OECD Guidelines, the Directive takes a more restrictive approach, thereby potentially leaving out many rights and environmental impacts that result from irresponsible business activity.

Human rights impacts

Regarding human rights, the Directive defines a human rights impact as the impact resulting from an “abuse” of:

- Selected human rights and prohibitions listed in Part I, section 1 of the Annex; and
- Other human rights enshrined in a list of international instruments in Part I, section 2 of the Annex, provided that:
 - i. The human right can be abused by a company;
 - ii. The human right’s abuse directly impairs a legal interest protected in the human rights instrument; and
 - iii. The company could have reasonably foreseen the risk that such human right might be affected.³³

This definition introduces ambiguity that may ensure only incomplete coverage of human rights impacts. The first part of the definition of “human rights impact” links to the Annex Part I, section 1, containing a closed and exhaustive list of human rights phrased both as prohibitions (such as against unequal treatment in employment) and as positive rights (such as the rights to organise and collective bargaining). This list is drawn from a limited list of conventions ratified by EU Member States, contained in the Annex Part I, section 2. These conventions are, namely, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child, and the eight core conventions of the International Labour Organisation (with power delegated to the EU Commission to include Occupational Health and Safety later when all EU Member States have ratified that convention).

The second part of the definition of a “human rights impact” introduces an unhelpful level of interpretive complexity that risks encouraging companies to spend more time assessing whether a human right is

31 OECD Guidelines, Chapter VI, commentaries 76-77, 79.

32 OECD Guidelines, Chapter III, commentary 33.

33 EU Corporate Sustainability Due Diligence Directive, Article 3(1)(c).

covered than simply avoiding the harm.³⁴ The first condition of the test requires companies to take a view on whether a right among the “other human rights” could be abused by a company. While there is increased agreement among legal practitioners that corporations can and do abuse human rights, the contours of this question are not fully settled under international law and should not be left to the market or individual companies to be further refined. Requiring corporate analysis on this point could result in interpretations that diverge from those of other companies, regulators, national judges, or the designated treaty bodies empowered to make these interpretations, all of which in turn may - not least in the hands of those inexperienced in applying international human rights law - diverge from the longstanding inclusive and coherent approach of the international business and human rights standards.

The second condition in the definition requires that the abuse “directly impair a legal interest protected by the human rights instrument”. This is confusing, for it is not clear how a “legal interest” can be distinguished from a “right” in the covered conventions. The phrasing could also introduce the risk that companies misinterpret “direct” to suggest responsibility only for human rights they themselves directly harm, in contrast with the Directive’s clear requirement that companies address harms they cause, contribute to, or are directly linked to within their value chains.

Finally, the third condition on foreseeability seems tautological within the context of a human rights due diligence obligation.

Regarding the list of human rights conventions in Part I, section 2 of the Annex, there is some ambiguity in how to understand its implications for what rights are covered in the CSDDD. On one hand, the list leaves out several important conventions, including the UN Declaration on the Rights of Indigenous Peoples (UNDRIP); the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; the UN Convention Against Corruption; and UN Declaration on Human Rights Defenders. The list also makes no reference to International Humanitarian law.

Yet these omissions do not mean the rights at focus in these conventions are excluded. The ICCPR and ICESCR arguably cover a significant part of the rights outlined in more topic-specific conventions. For example, the omission of UNDRIP from the list of instruments seems compensated by articles 1 and 27 of the ICCPR, which provide a grounding for the inclusion of the rights of Indigenous Peoples.³⁵ Further, a couple recitals bring some of the omitted conventions explicitly into consideration. For example, Recital 33 invites companies to consider a range of additional relevant standards, including UNDRIP and Free Prior and Informed Consent, among other human rights conventions.³⁶ Recital 65 also mentions UNDRIP in relation to ensuring vulnerable communities’ participation in stakeholder engagement. Similarly, Recital 42 invites companies to perform heightened due diligence in line with International Humanitarian Law. All these elements suggest, in practice, a broad scope of covered rights.

What is clear from the ambiguity described above is that inclusion of only some international instruments in Part I, section 2, of the Annex, coupled with the complexity of the definition of covered human rights impacts, complicates the application of the human rights scope of the Directive for companies. Very concerningly, this approach risks diverting corporate resources to haggling over whether and to what degree a particular right is in scope, rather than simply applying the risk-based due diligence approach sought by EU policymakers.

34 EU Corporate Sustainability Due Diligence Directive, Article 3(1)(c)(ii).

35 EU Corporate Sustainability Due Diligence Directive, Article 3(1)(c).

36 International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of Persons with Disabilities.

Environmental impacts

The CSDDD also does not reflect the Guidelines' broad and simple definition for an adverse environmental impact. Instead, the Directive covers environmental impacts in two ways:

- First, environmental degradation is covered if it violates human rights included in Part I, section 1 of the Annex (rights and prohibitions) discussed above. This approach seems aligned with the recently recognised right to a clean, healthy, and sustainable environment and could capture a broad range of impacts. More specifically:
 - Paragraph 15 of Part I, section 1, of the Annex captures an environmental impact that occurs where there is measurable environmental degradation or other impact on natural resources *paired with* negative impacts on either the rights to food, water, sanitation, health, safety, and property, or ecosystem services contributing to human well-being.³⁷
 - Paragraph 16 of Part I, section 1 of the Annex captures an environmental impact that occurs where there is unlawful land grabbing or natural resource appropriation *paired with* negative impacts on rights of individuals, groups and communities to lands and resources, or the right not to be deprived of means of subsistence.³⁸
- Second, adverse environmental impacts can result from breaches of a scattered selection of international environmental obligations and prohibitions listed in Part II of the Annex. To know what tangible impacts they should address in relation to these prohibitions and obligations, companies will need to interpret them as they have been further developed under relevant national legislation.

The Directive's approach of limiting the scope of environmental impacts to those listed in various international environmental agreements is not aligned with broad and inclusive framing in the Guidelines. A chief problem is that the legislators chose to construct the concept of "environmental impact" by drawing from existing international environmental agreements, instead of from broader environmental principles (such as the precautionary principle). As a result, for some topics – for example, biodiversity and habitat protection, chemicals and waste management, and pollution prevention – a number of agreements do provide a basis for finding prohibitions and obligations. But for others - such as freshwater protection, marine pollution, soil degradation, and plastic pollution - the lack of adequate or any coverage in international agreements could complicate their place in the scope of the CSDDD. The narrow coverage of topics, paired with the fact that only some provisions of the already limited list of international instruments are incorporated into the Directive, raises the risk that many impacts will be left out of scope.

Climate change impacts

Regarding climate change, because the Directive does not reference the Paris Agreement, climate change is not explicitly included in the list of covered environmental impacts. However, paragraph 15 of Part I, section 1, of the Annex prohibits causing "harmful emissions" that "harm a person's health, safety, or normal use of land" – which is easily interpreted to cover greenhouse gas emissions.

The Omnibus removes the CSDDD's original separate autonomous obligation to adopt and put into effect a plan to ensure that the business model and strategy of the company are compatible with the transition to a sustainable economy and with the goal of limiting global warming to 1.5°C in line with the Paris Agreement.³⁹ In our review, this amendment does not mean that companies no longer have an obligation in relation to climate change. The general corporate due diligence obligation in relation to environmental impacts, in particular paragraph 15 of Part I, section 1 of the Annex, still requires companies to address impacts related to emissions of greenhouse gases and, in correlation, impacts on

37 EU Corporate Sustainability Due Diligence Directive, Annex, Part I, section 1, paragraph 15.

38 EU Corporate Sustainability Due Diligence Directive, Annex, Part I, section 1, paragraph 16.

39 EU Corporate Sustainability Due Diligence Directive, Article 22.

climate change. We also assert that a transition plan is, and can still be expected as, an “appropriate measure” under Articles 10 and 11. In light of this, the removal of the autonomous obligation has not changed the duty, only made the legal framework in which companies address their climate impacts more uncertain. The removal leaves companies with less clarity on how practically to discharge their climate-related obligations. Regrettably, the removal of the autonomous duty, combined with shifts in other sector-level obligations, disclosure obligations and evolutions in climate related litigation, may give some companies the false impression that there are no climate-related obligations in the Directive, leading some to omit or misaddress (significant) climate impacts, to their own detriment.

Recommendations on material scope

The broad material scope of the Guidelines ensures that companies address all impacts caused, contributed to, or directly linked to the enterprise across its value chain. That, paired with the simplicity of the Guidelines’ definitions, ensures companies follow a rights-based approach instead of disputing whether certain rights or impacts are in or out of scope. To better achieve the Directive’s aim of ensuring a true risk-based approach to due diligence, not a fight over whether impacts are covered by the law or not, Member States should simplify and expand the material scope of the Directive.

Transposition: Regarding human rights coverage, one simple way Member States can expand the material scope in national law is to remove the list of conventions and instead require due diligence over “impacts to internationally recognised human rights”, without reference to the additional confusing conditions. A secondary, simple option is to make the catalogue of covered rights and instruments non-exhaustive.

Short of these simple steps, the list of covered human rights and environmental instruments could be expanded. For example, in recognition of the particular impacts company operations have on women, the Convention on the Elimination of all forms of Discrimination Against Women could be included. For another example, in recognition that many companies operate in conflict-affected areas, it should explicitly reference International Humanitarian Law. Other important instruments to be covered include UNDRIP, the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention on the Elimination of All Forms of Racial Discrimination. Lastly, it would also make sense to include regional instruments such as the European Convention on Human Rights and the EU Charter of Fundamental Rights.

Regarding environmental impacts, the simplest way Member States can expand the material scope is by broadening the definition of environmental impacts to match the breadth of that in the OECD Guidelines, or alternatively to make the catalogue of prohibitions in Part II of the Annex non-exhaustive.

With respect to climate change, Member States wanting to provide legal clarity to business would do well to craft an additional explicit behavioural climate obligation based on the OECD Guidelines clarifying common sense expectations to help companies implement efficient climate mitigation and adaptation measures. This should be coupled with a mandate to national supervisory authorities to monitor companies’ implementation of their climate transition plans. In ironic parallel with EU policymakers’ disappointing retreat from climate progress in the CSDDD, multiple international courts have found a state duty under international law to protect the climate from greenhouse gas emissions. Notably, the International Court of Justice, for example, has found that a state must put in place a legal and enforcement framework on climate change whose “rules and measures must regulate the conduct of public and private operators within the States’ jurisdiction or control and be accompanied by effective enforcement and monitoring mechanisms to ensure their implementation.” Indeed, “a State may be responsible where, for example, it has failed to exercise due diligence by not taking the necessary regulatory and

legislative measures to limit the quantity of emissions caused by private actors under its jurisdiction.”⁴⁰ Avoiding the reality of climate change, and failing to help companies address their role in and impacts on it, is an (illegal and) head-in-the-sand approach that governments should not be short-sighted enough to endorse. Transposition provides them an opportunity to fulfil their state duty, avoid liability and propel their own businesses forward in leading societies and economies through a just transition.

Commission guidelines: The EU Commission’s guidelines must clarify the definition of adverse human rights impacts for the purposes of the CSDDD, as well as the rights and issues covered by the listed human rights and environmental instruments. When doing this, it is critically important that the Commission promote alignment with the broad and simple material scope in the OECD Guidelines. The guidelines must tilt the calculus for companies towards simply investing their resources in implementing genuine risk-based due diligence, not towards devising legal arguments that certain impacts are out of scope.

As regards climate, the Commission guidelines should make explicit that greenhouse gas emissions are included among those addressed in paragraph 15 of Part I, section 1 of the Annex and identify a transition plan as an appropriate measure to address climate impacts. This will help guide companies in addressing their climate impacts as they would other environmental impacts covered by the Directive.

Review: The review clause already requires the Commission, Council and Parliament to reconsider the material scope of the CSDDD, which in six years should allow opportunity to correct the narrow approach taken in the current text and reinstate the autonomous climate obligation or otherwise clarify obligations to implement climate mitigation and adaptation measures.

40 International Court of Justice, Obligations of States in respect of Climate Change (Advisory Opinion, 23 July 2025), General List No 187, para. 282; para. 428.

④ The due diligence duty

A. The six steps of due diligence

OECD Guidelines

As described in the Background section of this paper, the OECD due diligence framework outlines a six-step process for due diligence.

DUE DILIGENCE STEP 1: EMBED

OECD GUIDELINES	ELEMENT	CSDDD PRE-OMNIBUS	FINAL CSDDD	Opportunities to correct non-alignment in the text		
	DUTY			Member State Transposition	EU Commission guidelines	EU Review
	1. EMBED					
✓	Requires embedding of due diligence into policies	✓	✓	Already aligned	Already aligned	Already aligned
✓	Ensures senior level oversight	✗	✗	✓		✓

OECD Guidelines

The OECD Guidelines expect companies to embed RBC into policy across the company. The OECD Due Diligence Guidance explains that this means companies should update or devise new RBC policies, embed these policies into oversight bodies and management systems, and establish clear RBC expectations of business relationships.⁴¹ The OECD Due Diligence Guidance is clear that the company should ensure highest-level oversight of RBC issues, calling on the company to “assign oversight and responsibility for due diligence to relevant senior management and assign board level responsibilities for RBC more broadly.”⁴² Ensuring top-level oversight makes the difference in ensuring the duty is meaningfully implemented.

CSDDD

A strength of the CSDDD is that it broadly mirrors the OECD Guidelines’ approach to due diligence in its operational parts. As pointed out in the subsections below, in some places, the Directive even improves upon the framing in the Guidelines by incorporating clearer or stronger provisions that support addressing of impacts. Like the Guidelines, the CSDDD stresses the importance for companies of embedding RBC considerations into policy across the company. Under Article 7 of the CSDDD, companies are obliged to integrate and regularly update risk-based human rights and environmental due diligence into all their relevant policies and risk management systems.

Yet the CSDDD is not aligned with the Guidelines in respect of ensuring top-level oversight for RBC-related matters. EU Member States have historically preferred to regulate corporate governance at the national level. This is a partial cause of divergence between corporate governance forms and models across Member States, and differences in views over which responsibilities should be overseen at the highest level of the company. Because of this variability, the Directive has not ensured highest level oversight of due diligence implementation.

The Omnibus has not changed expectations for companies regarding step 1 of due diligence.

41 OECD Due Diligence Guidance for Responsible Business Conduct, pg. 22-24.

42 OECD Due Diligence Guidance for Responsible Business Conduct, pg. 23.

Recommendations on Step 1 of the due diligence duty

Corporate due diligence obligations will only be taken seriously when board members and/or highest-level officers are informed about the due diligence policies and practices of their company and made responsible for effective implementation. To better ensure implementation of meaningful due diligence, all opportunities should be taken to ensure highest-level oversight.

Transposition: Corporate governance rules are dictated at the national, not EU, level and thus transposition provides the logical and critical time for Member States to ensure that due diligence and RBC considerations are assured the highest level of oversight possible under their national law.

Commission guidelines: It is important that the Commission’s guidelines clarify that, notwithstanding the various corporate governance forms and approaches employed by individual Member States, ensuring highest-level oversight within companies is the strongest and safest way to achieve effective implementation of due diligence obligations.

Review: During review, EU policymakers should assess whether there is sufficient common ground to better reflect, within the Directive, the need to embed RBC at the highest level of corporate governance.

DUE DILIGENCE STEP 2: IDENTIFY AND ASSESS

OECD GUIDELINES	ELEMENT	DUTY	CSDDD PRE-OMNIBUS	FINAL CSDDD	Opportunities to correct non-alignment in the text		
					Member State Transposition	EU Commission guidelines	EU Review
2. IDENTIFY AND ASSESS							
✓	Requires initial broad scoping to identify risks and impacts		✓	✓	Already aligned	Already aligned	Already aligned
✓	Requires in-depth assessment of prioritised risks and impacts		✓	✓*	✓		✓
✓	Bases prioritisation on severity; no "prioritisation haven"		✓*	✓*	✓		✓

OECD Guidelines

As a second step in the due diligence process, the OECD Guidelines require companies to identify and assess risks and impacts they cause, contribute to, or are directly linked to through business relationships.⁴³ As elaborated in the OECD’s Due Diligence Guidance⁴⁴, companies should begin by undertaking a risk scoping exercise. Through this, the company should map the business within its value chain, collect data to understand possible risks related to the company’s sector, geography, or company, identify the most significant risks, and continuously update the mapping to incorporate lessons learned from the broader six-step due diligence process, or other changes in circumstances.

43 OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, paragraphs 11-12, commentary 15.

44 OECD Due Diligence Guidance for Responsible Business Conduct, pg. 25-28.

Having completed the risk and impact scoping, the company should then do a deeper assessment of its most significant risks and impacts and consider the nature of its own involvement (whether it is causing, contributing, or directly linked). The OECD Due Diligence Guidance further specifies that when enterprises are performing assessments, both the nature and methodology of these assessments should correspond to the human rights risks that can be expected.

Finally, and only where necessary because not all impacts can be addressed at once, the company should prioritise the most significant RBC risks and impacts for action, based on their severity and likelihood. The OECD Due Diligence Guidance makes clear that once the most significant impacts are identified and dealt with, the enterprise must still move on to address less significant impacts.

CSDDD

The original CSDDD essentially follows the framing of the Guidelines in calling on companies, in Article 8, to identify and assess actual or potential adverse human rights and environmental impacts arising from the company's operations or those of its subsidiaries and, where related to its chain of activities, from its business partners.

During the Omnibus negotiations, efforts were made to replace the CSDDD's original promotion of the risk-based approach to due diligence with a requirement that companies limit risk identification to their direct business partners. The approach considered could have reduced risk identification to an effort to blanket direct partners with information requests, a practice observed in relation to the German supply chain law that burdened partners while failing to identify risks where they actually appear in the value chain. Fortunately, EU policymakers rejected proposals to this effect, following support for the risk-based approach from business as well as other stakeholders.

As amended, the CSDDD keeps the two-step approach to risk identification. The first step entails a broad scoping exercise of the company's own operations, its subsidiaries and, if applicable, its business partners' operations to pinpoint "general areas" prone to adverse impacts. The notion of "areas" can be geographic or indicate a specific stage or part in the value chain. In undertaking this broad scoping, companies should rely only on "reasonably available" information such as internal data, independent reports, information from sector initiatives, and complaint mechanisms.

The second step – namely to carry out in-depth assessment of certain operations based on the scoping results – is also maintained under the Omnibus. These assessments, using appropriate measures, are to help companies gain a better understanding of the expected impacts, to correctly prioritise them and to develop appropriate measures to address them.⁴⁵ Notably the Omnibus introduces stricter conditions on how companies may request information from business partners, limiting these to targeted requests where information is "necessary", and where the business partner has fewer than 5000 employees, "only when the information cannot reasonably be obtained by other means". This restriction aims to protect business partners from overly broad, general and standardised information requests. But depending on its implementation, it may harmfully lead companies to forgo requests they genuinely need, or to face legal hurdles from smaller partners asserting they are being given unjustified requests.

Regarding prioritisation, the CSDDD continues to make clear that if it is not possible for a company to address all identified adverse impacts simultaneously and to their fullest extent, they should prioritise addressing impacts based on their severity and likelihood.⁴⁶ The actual or potential influence of the company on its business partners, the level of involvement of the company in the adverse impact, its proximity to the subsidiary or the business partner, or its potential liability are not relevant factors in the prioritisation of adverse impacts. The Omnibus asserts that impacts that were not addressed due to being correctly (de)prioritised on the basis of severity and likelihood should not lead to sanctions or

⁴⁵ Recital 29a states that "obtaining accurate and reliable information, in particular about the nature and extent, causes, severity and likelihood of the identified adverse impacts, to enable the company to conduct, where relevant, the prioritisation in accordance with Article 9 and adopt appropriate measures to address them in accordance with Articles 10 to 12."

⁴⁶ EU Corporate Sustainability Due Diligence Directive, Article 9(1) and (2).

liability. We would note that the reverse should also be understood in interpretation by the EU Commission and States: that sanctions or liability may be incurred for the incorrect prioritisation of impacts based on other grounds.

The updated Directive also includes a strange new provision asserting that where impacts are thought to be “equally likely to occur or equally severe in several areas”, companies may prioritise the in-depth assessment of their direct business partners. This prioritisation covers the sequencing of the in-depth assessments, and in case companies assess direct business partners first, they must follow-up with the other severe and likely impacts afterwards. Yet we find this quoted provision effectively impossible to implement: on what basis can a company practically assess that impacts are equally likely at Tier 1 or another tier of the supply chain? We suggest instead that hewing simply to the international normative risk-based approach provides a tested, more implementable method for prioritising risks wherever they appear in the chain.

Finally, mirroring the Guidelines, the CSDDD makes clear that once the most severe and likely adverse impacts are addressed within a reasonable timeframe, companies shall then address less severe and likely adverse impacts⁴⁷

Recommendations on Step 2 of due diligence

To ensure effective implementation, the OECD Guidelines and due diligence framework should be used as a guide for the Commission and national governments in developing tools and guidelines for companies to effectively identify, assess, and prioritise their potential impacts.

Transposition: The simplest place to clarify the risk-based approach is most likely in the Commission guidelines rather than through transposition. However, at the national level, Member States can still help guide companies through their implementation. For example, they should ensure care in assessing when information is “necessary” from business partners so as not, through an unduly narrow interpretation, to cause companies to skip asking for information they genuinely need. States should also ensure accountability for the incorrect prioritisation of impacts based on grounds other than severity or likelihood. Such implementation approaches would be compatible with the maximum harmonisation clause.

Commission guidelines: The Commission should use the guidelines as a critical tool to clarify the correct risk-based approach, as based on the OECD Guidelines and UNGPs. The guidelines should explain that risks are to be identified wherever they appear in the value chain, and that companies should follow the risk, not the tier of business relationship. The guidelines should clarify that the Directive’s limitation on requests of information from smaller business partners is intended both to alleviate undue information requests from partners, as well as to prevent companies from effectively passing their due diligence to partners through standardised non-contextualised information requests. The guidelines should explain that the legislation should result in more context-specific, bespoke risk engagement by covered companies, as well as more impactful and strategic partner engagement throughout the due diligence process. As noted just above, the guidelines should also clarify that sanctions or liability may be incurred for the incorrect prioritisation of impacts based on grounds other than severity or likelihood.

47 EU Corporate Sustainability Due Diligence Directive, Article 9(3) and recital 80 of the CSDDD provides additional guidance around the relationship between prioritisation and liability: “As the adverse impacts should be prioritised according to their severity and likelihood and addressed gradually, if it is not possible to address at the same time to the full extent all adverse impacts it has identified, a company should not be liable under this Directive for any damage stemming from any less significant adverse impacts that were not yet addressed. The correctness of the company’s prioritisation of adverse impacts should, however, be assessed when determining whether the conditions for the company’s liability were met as part of the assessment of whether the company breached its obligation to adequately address the adverse impacts it identified.” We read this text as absolving companies, so long as they have prioritised impacts correctly, of damages liability for failing to do due diligence over impacts de-prioritised, but not absolving them of their responsibility to address such impacts, including where applicable through remediation. We read this text to align with the OECD Guidelines, which does not address liability, but does ensure companies remain responsible to address all impacts, including those arising from risks correctly de-prioritised.

Review: During review, EU policymakers should ensure a risk identification approach that explicitly calls for identifying and prioritising risks notwithstanding their place of occurrence in the value chain. Updated legal text should clearly incentivise meaningful risk evaluation through robust and tailored evaluation by covered companies themselves, as well as strategic engagement with and support for partners.

DUE DILIGENCE STEP 3: ADDRESS

OECD GUIDELINES	ELEMENT	DUTY	3. ADDRESS	CSDDD PRE-OMNIBUS	FINAL CSDDD	Opportunities to correct non-alignment in the text		
						Member State Transposition	EU Commission guidelines	EU Review
✓			Bases company's response on involvement in impact	✓	✓	Already aligned	Already aligned	Already aligned
✓			Provides no closed list of measures to address risks and impacts	✓*	✓*		~	✓
✓*			Disengagement can be appropriate but must be responsible	✓		✓	~	✓

OECD Guidelines

At the third step of the due diligence process, companies are expected to cease, prevent, and mitigate adverse impacts in accordance with their relationship to or involvement in it. The OECD Guidelines and Due Diligence Guidance make clear that companies should first look internally to correct their own harmful activities.⁴⁸ First, companies should stop their own actual (current) impacts, and where stopping the company action is complex, develop a phased roadmap to cease the action causing or contributing to harm. Second, companies should prevent their own future impacts. The OECD's due diligence framework emphasises that companies should build leverage to address impacts they jointly cause or contribute to, and provide many examples of how to build leverage.⁴⁹ The Guidelines make clear that potential impacts are to be addressed through prevention or mitigation, while actual impacts are to be addressed through cessation and remediation.⁵⁰

Alongside addressing their own harmful activities, the Guidelines expect companies to take action to prevent or mitigate impacts directly linked to the company through business relationships.⁵¹ The Guidelines discuss working with the business relationships in question, including by building and using leverage over them. The Due Diligence Guidance suggests that companies also encourage local authorities to address the issue as relevant.⁵²

48 OECD Guidelines paragraphs 12 and 13; OECD Due Diligence Guidance for Responsible Business Conduct pg. 29-31.

49 OECD Guidelines commentaries 22-23.

50 OECD Guidelines commentary 16.

51 OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, Chapter II, paragraph 13 and commentaries 23-26; OECD Due Diligence Guidance for Responsible Business Conduct pg. 30.

52 OECD Due Diligence Guidance for Responsible Business Conduct pg. 31.

As regards the nature of company response, the Guidelines prescribe no particular or specific measures to be used to address adverse impacts. This means companies have full flexibility to take whatever measures will be most effective (as corresponds to the company's involvement in the harm) in ceasing the impact or the company's contribution to the impact, mitigating remaining adverse effects, and ensuring remedy. The absence of a list of necessary measures avoids a "box ticking exercise", instead incentivising companies to invest appropriately in their in-house capacity to assess risks and determine the most impactful steps to address them on a case-by-case basis.

Finally, the Guidelines also consider that appropriate responses may include temporary suspension of the relationship while pursuing ongoing risk mitigation; or, as a last resort, disengagement from the business relationship either after failed attempts at mitigation, or where the enterprise deems mitigation not feasible, or because of the severity of the adverse impact. The concept of disengagement from business relationships because of their adverse impacts features in the Guidelines in two ways.

- First, "communicating the possibility of responsible disengagement" is offered as an example of how to use leverage over a business relationship to encourage it to improve its practices.⁵³ The OECD Due Diligence Guidance elaborates that "a real possibility of disengagement is necessary in many instances for an enterprise's leverage to be effective."⁵⁴
- Second, the Guidelines acknowledge that there are limitations to using leverage over business relationships. The Guidelines never require disengagement, but instead prescribe a more nuanced and case-by-case analysis, identifying responsible disengagement⁵⁵ as an appropriate measure and "a last resort...either after failed attempts at mitigation, or where the enterprise deems mitigation not feasible, or because of the severity of the adverse impact." The Guidelines clarify a preference for staying engaged "where it is possible for enterprises to continue the relationship and demonstrate a realistic prospect of, or actual improvement over time" of the harm. Furthermore, the decision to continue to engage or disengage should not be a rushed one, but "take into account potential social, environmental and economic adverse impacts related to the decision to disengage." When nevertheless a company decides to leave a business relationship, the Guidelines make clear that "enterprises should do so responsibly, including by seeking meaningful consultation with relevant stakeholders in a timely manner and, where possible, by taking reasonable and appropriate measures to prevent or mitigate adverse impacts related to their disengagement." The OECD Due Diligence Guidance adds additional practical suggestions for companies to ensure their disengagement is responsible.⁵⁶

CSDDD

The CSDDD broadly echoes the core concepts of the OECD Guidelines' third step of due diligence. Yet its approach of requiring companies to take a broad but closed list of actions ("appropriate measures") to address risks and impacts may not encourage responses that are sufficiently tailored to the harm at hand.

The CSDDD differentiates between the actions companies should take to prevent potential harm (Article 10) and address actual harm (Article 11). Like the Guidelines, the Directive asserts that potential adverse impacts shall be prevented and, if prevention is not immediately possible, adequately mitigated, and that actual adverse impacts should be brought to an end or, if that is not immediately possible, minimised in their extent.⁵⁷

In line with the Guidelines, the CSDDD directs companies, before addressing both actual and potential impacts, to consider their involvement in the impact, phrased as (a) whether the potential adverse impact stems solely from the company, jointly from the company and its subsidiary or business partner, or solely

53 OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, Chapter II, commentary 23.

54 OECD Due Diligence Guidance for Responsible Business Conduct, Q39.

55 OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, Chapter II, commentary 25.

56 OECD Due Diligence Guidance for Responsible Business Conduct, Q39.

57 EU Corporate Sustainability Due Diligence Directive, Article 10(1), 11(1) and (2).

from the company's business partner in the chain of activities; (b) whether the potential adverse impact may arise in the operations of the subsidiary, direct business partner, or indirect business partner; and (c) the company's ability to influence the business partner responsible for or contributing to the potential adverse impact.⁵⁸

Recitals 44 and 53 to the CSDDD first discuss how companies should improve their own activities, perhaps implicitly emphasising action by the company itself. Companies should take appropriate measures to prevent or mitigate (for potential impacts) or bring to an end or minimise the extent of (for actual impacts) impacts that they cause by themselves or jointly with subsidiaries or business partners ("causing" and "contributing" under the Guidelines). Companies are reminded that this applies irrespective of whether third entities outside of the company's chain of activities are also causing the adverse impact. The recitals then focus on actions towards business partners, reminding companies to "aim to use their influence" to prevent, mitigate, or cease impacts caused by their business partners, or to increase their influence to do so.

A key difference between the Guidelines and CSDDD is the latter's exhaustive list of "appropriate measures" companies should use to address both potential and actual impacts.⁵⁹ A closed list of measures runs counter to the flexible, risk-based approach outlined in the Guidelines and could result in companies formally ticking-off each measure and then claiming to have met the duty. However, the CSDDD arguably prevents this risk through two important elements.

- First, Article 3 of the Directive on definitions defines "appropriate measures" as "measures capable of achieving the objectives of due diligence, and effectively addressing the adverse impact identified". This means the CSDDD does not exonerate companies that formally "tick-off" the measures from the list without regard for their impact; companies only meet their duty if the measures they implement will "effectively address the impact"⁶⁰ or in other words prevent, adequately mitigate or bring it to an end.⁶¹ And in reverse, a company that takes measures not genuinely capable of effectively addressing the impact cannot claim to have met its duty.
- Secondly, the measures listed in the Directive are framed so broadly, each encompassing a category of actions, that they can be interpreted as an open list. Several of the categories of measures focus on addressing the company's own actions, such as neutralising the impact or minimising its extent, making financial or non-financial investments into facilities or processes, and making modifications or improvements to the company's plans, strategies, and operations, including purchasing practices, design, and distribution practices. Other categories of measures guide the company in strengthening its due diligence engagement with business partners, such as by seeking contractual assurances that the partner will comply with the company's prevention action plan, or by providing financial or other support to a partner that is a small or medium-sized enterprise (SME).
- Critically, both Articles 10 and 11 note that "Companies may take, where relevant, appropriate measures in addition to the measures" listed.⁶² These two provisions helpfully signal that in certain contexts, companies will need to go beyond the broad measures suggested to respond impactfully to the issues at hand. Pursuing such additional measures will be in companies' best interests, particularly to help them avoid the eventual need to disengage if their first measures are unsuccessful.

58 EU Corporate Sustainability Due Diligence Directive, Article 10(1)(a-c), 11(1)(a-c).

59 EU Corporate Sustainability Due Diligence Directive, Article 10(2), 11(3).

60 EU Corporate Sustainability Due Diligence Directive, Article 3 (1) (o), defines appropriate measures as "measures that are capable of achieving the objectives of due diligence by effectively addressing adverse impacts in a manner commensurate to the degree of severity and the likelihood of the adverse impact, and reasonably available to the company, taking into account the circumstances of the specific case, including the nature and extent of the adverse impact and relevant risk factors."

61 EU Corporate Sustainability Due Diligence Directive, Article 10 (1) states that "companies take appropriate measures to prevent, or where prevention is not possible or not immediately possible, adequately mitigate, potential adverse impacts", which is mirrored by article 11 (1) where "companies take appropriate measures to bring actual adverse impacts (...) to an end, ..."

62 EU Corporate Sustainability Due Diligence Directive, Article 10(3), 11(4).

There is some concern regarding the framing of contractual assurances in the Directive. First, by giving contractual assurances notable weight as one of the listed categories of appropriate measures, the CSDDD may encourage companies to seek first to pass their obligation on to business partners, instead of first addressing their own irresponsible conduct. A designated article (Article 18) on model contract clauses developed by the Commission further contributes to the prominence of this strategy to prevent or mitigate impacts. Second, by explicitly condoning use of third-party verification, including through MSIs, to verify compliance with contractual assurances, the CSDDD risks encouraging overreliance on MSIs. See the latter concern discussed further below in the section II(4)(B) on the role of industry and MSIs.

Finally, the original Directive largely follows the approach of the Guidelines in contemplating the possibility of responsible disengagement, although this approach is modified by the Omnibus.⁶³ The amended Directive specifies that if the measures to address the potential or actual harm are ineffective, the company shall, as a last resort, suspend the business relation and refrain from entering into new or extending existing relations with the business partner in connection with which the impact has arisen. In such case, the company should “adopt and implement an enhanced prevention/corrective action plan”, although the requirements of such a plan are less detailed in the amended Directive. The company must monitor and periodically reassess potential impacts and appropriate measures available. The company must also prevent, mitigate or bring to an end the impacts of suspension of the business relationship.

The key change made by the Omnibus is to remove the prescribed obligation to terminate the business relationship if the underlying impacts are severe, the implementation of the enhanced plan fails to prevent or mitigate the adverse impacts, and if there is no reasonable expectation that the efforts would succeed, and if the impacts of disengagements are not manifestly more severe, the company is required to terminate the relationship.

The fact that the amended CSDDD no longer requires termination at a certain point could be argued to increase alignment with the Guidelines, which leave the decision as an option for companies to assess on a case-by-case basis. Under the Guidelines, threat of termination is specifically identified as a tool to leverage meaningful change in supply chain practices, and as such is a valuable part of due diligence. However, removal of all language whatsoever on termination is not really a positive change, as it risks encouraging companies to remain engaged even where no credible prospect of impact improvement exists. The removal also means that no guidance is given on how full termination of a business relationship (as with suspension) must be done responsibly. The changes risk, in practice, legally enabling the status quo on both continuation of irresponsible business relations, and the irresponsible departure of companies from harmful partnerships. We suggest recommendations below to address these risks.

Regrettably, under the Omnibus amendments, stakeholders no longer must be consulted in relation to the decision to terminate a business relationship.⁶⁴ See this discussed further in the section below on stakeholder engagement.

63 EU Corporate Sustainability Due Diligence Directive, Article 10(6), 11(7).

64 EU Corporate Sustainability Due Diligence Directive, Article 13(3)(c).

Recommendations on Step 3 of due diligence

The risk-based approach to due diligence encourages case-by-case analysis of impacts and bespoke design and implementation of appropriate responsive measures, rather than box-ticking to satisfy generalised requirements. Given possible ambiguity and tension between the closed list of categories of appropriate measures in Articles 10 and 11 of the CSDDD and the expectation that companies tailor the appropriate measures to meet the nature and severity of the risk (as contained in the definition in Article 3), it is important that legislators and regulators provide additional clarity.

Transposition: In light of the maximum harmonisation provisions, Member States may not be able to make the list of appropriate measures illustrative rather than exhaustive, to better align with the Guidelines. However, the definition of appropriate measures already provides companies flexibility to develop measures that are most effective in the given context. State laws should highlight that flexibility for companies to choose specific actions appropriate to the issues at hand. Member States should also ensure rigour in assessing whether the measures taken by a company were genuinely “capable of effectively addressing the adverse impact identified.”

The maximum harmonisation clause does not cover the articles on suspension (or, obviously, newly deleted articles on termination). Member States are therefore free to provide an additional course of action in their transposition laws to ensure that suspension or terminations, if used, are undertaken responsibly, including with stakeholder engagement.

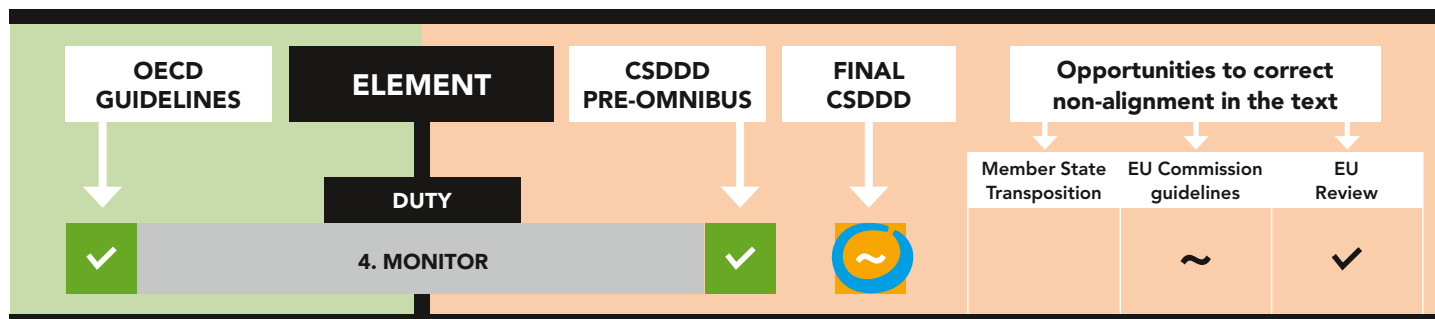
Commission guidelines: The Commission’s guidelines should emphasise the risk-based and impact-focused approach endorsed in the Guidelines and CSDDD, by tying together both the flexible scope of the “appropriate measures” and the emphasis on genuine effect (“effectively addressing” risks) in the term’s definition, to direct companies to identify in a case-by-case way the specific measure(s) needed. The guidelines should explicitly explain to companies that a formulaic approach to implementing suggested measures will not allow them to fulfil their duty, and instead that they must choose effective measures, including with an eye to the sector, geography, and other context of their value chain, and the intersecting vulnerabilities of rightsholders (potentially) impacted.

In a similar vein, the Commission should frame the model contract clauses as a supportive tool for other measures and not the central strategy for ensuring compliance with the Directive duty. The OECD Due Diligence Guidance provides additional ideas useful for the Commission in helping companies understand how to identify the right measures to take for their circumstances, including taking into account risks to rightsholders based on intersecting aspects of their identity. The Commission’s guidelines should also emphasise prioritising actions to improve the company’s own business practices wherever necessary, not just to influence the conduct of business relationships.

Finally, the Commission guidelines should bring careful nuance into the issue of disengagement. The guidelines should discourage companies from simply remaining engaged with irresponsible partners, even ones they deem essential. The guidelines should encourage companies to use the threat of suspension (including indefinite suspension) as a tool for leverage to ensure avoidance and/or remediation of adverse impacts. In line with the Directive’s goal of ensuring companies avoid and address harm and improve business conduct throughout the value chain, suspension should be explained as a key tool for leverage, echoing the Guidelines’ framing of both suspension and termination. Further, the guidelines should clarify that suspension (especially indefinite suspension) and termination measures, if used, should be undertaken responsibly. The OECD Guidelines, due diligence guidance, and related OECD analysis elaborate on measures to ensure suspension and termination are responsible.

Review: During the review of the legislation, EU policymakers should consider adopting the recommendations suggested to Member States, above, to improve the Directive.

DUE DILIGENCE STEP 4: MONITOR



OECD Guidelines

Step four of the OECD due diligence framework calls for companies to track the implementation and effectiveness of their due diligence activities. The OECD Due Diligence Guidance explains that this involves the company tracking its own internal commitments, activities, and goals on due diligence, for example by carrying out periodic internal reviews and communicating results at relevant levels within the enterprise.⁶⁵ This also involves repeatedly assessing business relationships to verify that adverse impacts have actually been prevented or mitigated. The guidance notes the need for stakeholder engagement with impacted rightsholders during the tracking and monitoring phase. The OECD Due Diligence Guidance in general emphasises feeding back lessons learned from the monitoring to improve processes and outcomes in future. Given that due diligence is framed as a continuous process, the concept of monitoring in the OECD Guidelines is also one of continuous review to meaningfully address impacts and improve business practices.

CSDDD

The CSDDD broadly reflects the Guidelines by requiring monitoring. Under Article 15 of the Directive, companies shall assess the implementation and monitor the adequacy and effectiveness of their own operations and measures, those of their subsidiaries and, where related to their chains of activities, those of their business partners regarding the identification, prevention, mitigation, bringing to an end, and minimisation of the extent of adverse impacts.⁶⁶

However, the CSDDD's formal description of monitoring, worsened by amendments made in the Omnibus, lower the monitoring provisions' alignment with the Guidelines. In contrast with the Guidelines' recommendation of "periodic" assessments, the amended CSDDD seeks monitoring without undue delay after any significant changes, as well as monitoring at least every 5 years (reduced from every 12 months prior to the Omnibus amendments). Even though the text also calls for monitoring whenever there are reasonable grounds to believe that significant new risks regarding adverse impacts may arise, we fear that the five-year framing in combination with the emphasis on response only to "significant" changes or risks, will encourage companies to take a minimalist and formulaic approach.

Further, as we flag in section II(4)(B) below, the amended CSDDD is less aligned as regards ensuring stakeholder engagement throughout the monitoring phase. This is a serious concern, as stakeholder engagement is an indispensable component of effective monitoring.

⁶⁵ OECD Due Diligence Guidance for Responsible Business Conduct, pg. 32.

⁶⁶ EU Corporate Sustainability Due Diligence Directive, Article 15.

Recommendations on Step 4 of due diligence

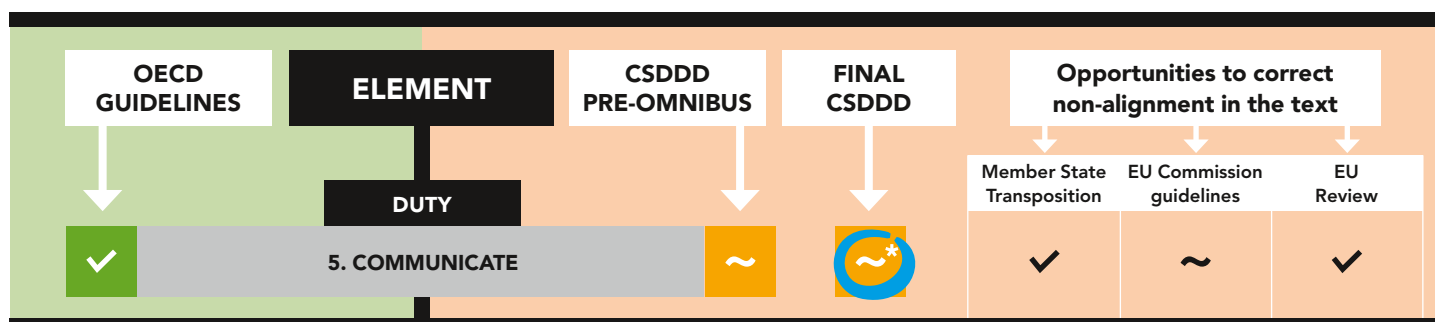
The Guidelines go far further than the CSDDD in ensuring more robust, continuous monitoring by companies of their due diligence impacts. We offer a few recommendations to strengthen alignment.

Transposition: The heightened harmonisation expectations prevent policymakers at national level from requiring more frequent monitoring.

Commission guidelines: The EU Commission can partially rectify the situation by clarifying that the approach to monitoring in the CSDDD is meant to ensure a meaningful feedback loop to help companies address risks effectively and, in so doing, lower their costs. With that end in mind, the guidelines should encourage an ongoing, flexible, and responsive monitoring approach, rather than a rote survey or box-ticking method. The guidelines should highlight that the five-year period only applies to the overall monitoring and not to the risk analysis or other specific requirements. The guidelines can provide examples for when monitoring is likely needed outside the five-year cycle, using these examples to steer companies towards monitoring meaningfully when in doubt. The guidelines can also encourage an inclusive monitoring process involving diverse stakeholders to ensure efficiency and better outcomes.

Review: At the next review of the Directive, EU policymakers should shorten the timeframe for monitoring and ensure meaningful engagement with stakeholders during all aspects of this stage.

DUE DILIGENCE STEP 5: COMMUNICATE



OECD Guidelines

Step five of due diligence under the OECD Guidelines calls for companies to communicate how impacts are addressed. The OECD Due Diligence Guidance explains that this involves communicating externally relevant information on all due diligence steps of the company.⁶⁷ The information should be published in a way that is easily accessible and appropriate, such as on the company's website, at their premises, and in local languages. The guidance explains that the company must "communicate with impacted or potentially impacted rightsholders in a timely, culturally sensitive and accessible manner information that is specifically relevant to them."

Chapter III of the OECD Guidelines (Disclosure) focuses on corporate disclosure expectations generally. It calls on companies to disclose RBC information, including as a part of their due diligence.⁶⁸ Information should be timely, reliable, clear, complete, and comparable.⁶⁹ Enterprises should also disclose issues related to their environmental and social impacts whenever these could be "financially

67 OECD Due Diligence Guidance for Responsible Business Conduct, pg. 33.

68 OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, Chapter III, paragraph 3.

69 OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, Chapter III, paragraph 1.

material” to investors, including in the future.⁷⁰ Companies should disclose the various information important to all of its respective stakeholders, and take special steps to overcome barriers for communities seeking information.⁷¹

CSDDD

The CSDDD’s reporting and communication requirements fall significantly short of those in the Guidelines, particularly in terms of communicating information in a manner accessible to impacted rightsholders. Companies subject to the Corporate Sustainable Reporting Directive (CSRD),⁷² a directive that requires companies to report sustainability information on an annual basis, can discharge this step by compliance with the CSRD. Companies not subject to the CSRD must instead publish an annual statement on their website. The statement must be published in at least one official language of the EU Member State of the supervisory authority designated under the CSDDD and, where different, in a language common in the sphere of international business. It should be published within 12 months after the financial year’s balance sheet date or, for companies voluntarily reporting under the Accounting Directive, by the annual financial statements’ publication date. By 31 March 2027, the Commission is required to adopt delegated acts specifying more detailed reporting content and criteria, ensuring alignment and no duplication with existing EU sustainability reporting requirements. However, the CSRD was also amended by the Omnibus, reducing the datapoints notably and making the sector-specific guidelines voluntary.

As regards communication, Article 13 on stakeholder engagement does provide a slightly more helpful obligation. Article 13(2) stipulates that “when consulting with stakeholders, companies shall, as appropriate, provide them with relevant and comprehensive information, in order to carry out effective and transparent consultations.” However, companies could interpret this narrowly to require disclosure only of specific information necessary for the consultation, rather than broader information important to understand the company’s impacts or due diligence practice. Further, while the article allows “consulted stakeholders” (only) to make a “reasoned” request for relevant information which “shall be provided by the company within a reasonable period of time and in an appropriate and comprehensible format,” the company can refuse the request, with no more obligation than to provide a written justification for its refusal. This text gives insufficient comfort to impacted communities seeking information and meaningful dialogue regarding impacts to their rights or environment. Finally, specific requests for information may equally be obtained through the framework of the grievance or notification procedure.

70 OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, Chapter III, commentary 33.

71 OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, Chapter III, commentary 39.

72 The Corporate Sustainable Reporting Directive (EU 2022/2464) amends the Accounting Directive (EU 2013/34) on annual financial accounts.

Recommendations on Step 5 of due diligence

The Guidelines go far further than the CSDDD in promoting communication especially to impacted communities and rightsholders. To ensure greater respect for these stakeholders' rights, greater potential for them to inform and strengthen the company's due diligence process, and greater alignment with the Guidelines, member states should expand communication requirements of the Directive.

Transposition: The maximum harmonisation clause only covers companies' formal, annual, non-financial disclosure reporting. In practice a company may communicate additionally throughout the year about its human rights and environmental impacts, separate from its formal disclosure process. The CSDDD sets no guidelines for this aspect of communication. Therefore, we suggest Member states may set additional requirements for clearly communicating such due diligence information.

Member states should also ensure through transposition additional expectations for companies to communicate about their due diligence efforts in a way that reaches impacted or potentially impacted rightsholders, not only other businesses or regulators. Communication must be timely, culturally sensitive, and accessible. This would require not only reporting information that is specifically relevant to impacted stakeholders annually on the company's website, but also at the physical premises where it operates and from where it sources or sells, including in local languages. Companies should be required to take action to identify and overcome barriers to communities seeking information relevant to their defence of their rights.

Commission guidelines: When drafting its guidelines, the EU Commission should encourage companies to take a broad approach on communication, aligning it with the provisions and recitals on stakeholder engagement, and with the OECD Guidelines, to clarify that to meet the stakeholder engagement expectations, communication about due diligence activities and outcomes must reach impacted stakeholders and other non-business stakeholders. Critically, the guidelines must clarify that "communication" is not synonymous with and requires much more than periodic disclosures to regulators and business partners.

Review: At the next review of the Directive, EU policymakers should enlarge the obligation to communicate beyond a mere reporting obligation.

DUE DILIGENCE STEP 6: REMEDIATE

OECD GUIDELINES	ELEMENT	CSDDD PRE-OMNIBUS	FINAL CSDDD	Opportunities to correct non-alignment in the text		
	DUTY			Member State Transposition	EU Commission guidelines	EU Review
	6. REMEDIATE					
✓	Ensures companies causing or contributing provide remedy	✓	✓	Already aligned	Already aligned	Already aligned
✓	Ensures companies directly linked participate in remedy	~	~	✓	~	✓

OECD Guidelines

Step six of due diligence under the OECD Guidelines expects companies to provide for or cooperate in remediation for impacts they cause or contribute to.⁷³ Meanwhile, companies directly linked to harm through business relationships are responsible for using leverage to encourage those business relationships to remediate impacts.⁷⁴ The OECD Due Diligence Guidance elaborates⁷⁵ that this involves seeking to restore the affected person(s) to the situation they would be in had the adverse impact not occurred (where possible) and enable remediation that is proportionate to the significance and scale of the impact. The Guidance suggests types of remedy, such as apologies, restitution, or rehabilitation, and financial or non-financial compensation, that may be appropriate depending on the nature and extent of the adverse impact. The Guidance also clarifies that step six requires companies to provide for or cooperate with legitimate grievance mechanisms, including by cooperating in good faith with judicial and non-judicial mechanisms, and establishing an operational-level grievance mechanism for direct claims.

CSDDD

The Directive sets out several remedy-related requirements that are unaffected by the Omnibus and align with and sometimes exceed the Guidelines, except in one important respect.

The Directive states that when the company causes or contributes to an actual adverse impact, it shall provide remediation. Remediation is defined in a way equivalent to the OECD due diligence framework as “restitution of the affected person or persons, communities or environment to a situation equivalent or as close as possible to the situation they would be in had the actual adverse impact not occurred, proportionate to the company’s implication in the adverse impact, including financial or non-financial compensation provided by the company to a person or persons affected by the actual adverse impact and, where applicable, reimbursement of the costs incurred by public authorities for any necessary remedial measures.”⁷⁶

The Directive goes beyond the Guidelines in a couple ways. It enables supervisory authorities to compel remediation where it is due.⁷⁷ It also helpfully requires companies to provide remediation, where applicable, of costs incurred by public authorities.

73 OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, Chapter II, paragraph 12; Chapter IV, paragraph 6, commentary 51; Chapter VI, paragraph 1(e).

74 OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, Chapter II, commentary 23; Chapter VI, paragraph 1(e).

75 OECD Due Diligence Guidance for Responsible Business Conduct, pg. 34-35.

76 EU Corporate Sustainability Due Diligence Directive, Article 3(1)(t)

77 EU Corporate Sustainability Due Diligence Directive, Article 25(5)(a)(iii).

Equally critically, however, the Directive departs from the Guidelines' approach in not requiring that companies directly linked to impacts use their leverage to encourage the entity(ies) causing the impacts to remedy them.⁷⁸ The Directive follows the Guidelines in noting that companies directly linked to impacts "may" choose to offer voluntary remediation, but it does not require any further use of leverage to facilitate remediation by another actor. This is an unfortunate gap, potentially allowing many companies (those directly linked to impacts) to treat the sixth step of due diligence as optional.

The CSDDD does require companies to establish or participate in a "fair, publicly available, accessible, predictable, and transparent" complaints procedure, in which companies shall take reasonably available measures to prevent any form of retaliation by ensuring the confidentiality of the identity of the person or organisation submitting the complaint.⁷⁹ Individuals and organisations (and their representatives) with legitimate concerns about the actual or potential adverse impacts of a company's operations, operations of its subsidiaries, or business partners in the company's chain of activities can submit complaints to the company, demand appropriate follow-up actions, meet with company representatives for discussions, and shall be provided with the reasoning as to whether a complaint has been considered founded or unfounded.⁸⁰ In the case of a well-founded complaint, the company is required to take appropriate measures to address the impact, and ensure information for affected stakeholders on the actions taken or to be taken.⁸¹

Recommendations on Step 6 of due diligence

Regarding the important step of remediation, the Guidelines go further than the CSDDD by giving companies only directly linked to impacts a responsibility to use leverage to encourage the remediation of these impacts. Companies can wield powerful leverage in such cases, so to ensure remediation in all instances where it is due, EU policymakers should strengthen the remediation requirements of the Directive.

Transposition: Article 12 on remediation is not subject to the maximum harmonisation requirement. Therefore, Member States should act during transposition to oblige companies who are directly linked to harm to use their leverage to encourage remediation by the business partner causing the impact.

Commission guidelines: In drafting guidelines, the EU Commission should remind companies that are only directly linked to adverse impacts that they are responsible under the OECD Guidelines to use leverage to promote remediation. Given this, the Commission should encourage companies to do the same under the CSDDD.

Review and Evaluation: At the EU level, policymakers should take the opportunity of the next review of the Directive to ensure an appropriate remediation requirement for all covers companies involved in an impact.

78 EU Corporate Sustainability Due Diligence Directive, Article 12(2)

79 EU Corporate Sustainability Due Diligence Directive, Article 15(3)

80 EU Corporate Sustainability Due Diligence Directive, Article 15(4)

81 EU Corporate Sustainability Due Diligence Directive, Article 15(3)

④ The due diligence duty

B. Cross-cutting issues related to the due diligence duty

OECD GUIDELINES	ELEMENT	DUTY	CSDDD PRE-OMNIBUS	FINAL CSDDD	Opportunities to correct non-alignment in the text		
					Member State Transposition	EU Commission guidelines	EU Review
ELEMENTS CROSS-CUTTING THE DUTY							
✓	Ensures MSIs and schemes don't absolve company of responsibility		✓	✓	Already aligned	Already aligned	Already aligned
✓	Ensures no over-reliance on MSIs and schemes		~	~	✓	✓	✓
✓	Seeks meaningful stakeholder engagement throughout due diligence		~	✗	✓	~	✓
✓	Ensures prioritisation of engagement with impacted stakeholders		✗	~	✓	~	✓

THE ROLE OF INDUSTRY AND MULTI-STAKEHOLDER INITIATIVES

OECD Guidelines

The OECD Guidelines recognise that company participation in “multi-stakeholder initiatives focused on RBC due diligence...can foster greater effectiveness while reducing complexity and cost for businesses engaged in such initiatives”.⁸² But the Guidelines also include several caveats, namely that “self-regulatory practices and multi-stakeholder initiatives should be credible and transparent” and that they should be “aligned with relevant international standards such as the Guidelines”. The Guidelines also clarify that “although enterprises can collaborate at an industry or multi-stakeholder level, they remain individually responsible for ensuring that their due diligence is carried out effectively”.

CSDDD

In contrast to the Guidelines’ limited references to MSIs, the CSDDD (unchanged in this regard by the Omnibus) heavily emphasises the use of MSIs and industry schemes to support all steps of due diligence. The Directive permits companies to “make use of or join relevant risk analysis carried out by industry or multi-stakeholder initiatives or by members of those initiatives, and...take or join effective appropriate measures through such initiatives.”⁸³ This article relates to all the steps of the due diligence duty (described in Articles 7 to 16), but specifically highlights the value of joint action in undertaking risk analysis (Article 8), contractual cascading, building leverage over and verifying compliance by business partners (Articles 10 and 11), carrying out stakeholder engagement (Article 13), and establishing a grievance mechanism (Article 14).

While the “appropriate measures” proposed in the Directive clearly encourage companies to act themselves to correct their own harmful activities, there is a risk that the Directive’s repeated mentions of third-party verification or collaboration with MSIs or other schemes to implement several aspects of due diligence may encourage companies to over-rely on these schemes to fulfil their due diligence duty. Extensive research has shown that industry initiatives, MSIs and other schemes suffer from inherent

82 OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, Chapter II, commentary 12.

83 EU Corporate Sustainability Due Diligence Directive, Article 20(4).

conflicts of interest, operate with limited transparency, and often adopt weak standards not in line with international norms.⁸⁴ These problems have resulted in such initiatives, at least at present, failing effectively to identify and address harms. Overreliance on MSIs could result in ongoing failure by companies to genuinely resolve their adverse impacts.

EU policymakers have endeavoured to prevent this risk through incorporation into the Directive of effectively the same caveats in the OECD Guidelines. Yet it remains to be seen whether the caveats will be enough to outweigh the overall heavy reference to and guidelines on engaging with initiatives, which do not appear in the Guidelines. The Directive states that companies must assess the usefulness and appropriateness of industry initiatives (potentially aided by guidelines developed by the Commission),⁸⁵ To support them, the Directive requires the Commission, in collaboration with Member States, to issue guidelines setting out fitness criteria and a methodology for companies to assess the fitness of industry schemes and MSIs (Article 20(4)). Critically, the Directive makes clear that reliance on an MSI will not exempt a company from liability: Article 29 on civil liability notes that “Companies that have participated in industry or multi-stakeholder initiatives, or used third-party verification or contractual clauses to support the implementation of due diligence obligations can still be held liable in accordance with this Article.”

Recommendations on industry initiatives and MSIs

The CSDDD’s repeated references to MSIs risk encouraging a hands-off approach to due diligence by companies, which could lead to delegated responsibilities and leave adverse impacts inadequately identified and addressed. To ensure companies take ownership of their own due diligence, Member States should clarify expectations regarding appropriate versus inappropriate reliance on MSIs in relation to the Directive.

Transposition: The CSDDD frames engagement with MSIs as an option, not requirement. At national level, Member States can and should use legislative text as well as implementation measures to encourage companies to minimise reliance on MSIs and remain actively and personally engaged in ensuring their due diligence is carried out correctly, including if they participate in an MSI or similar initiative. Member states should also ensure MSIs are themselves genuinely aligned with the OECD Guidelines.

Commission guidelines: The guidelines to be issued by the Commission helping companies assess the fitness of industry schemes and MSIs will be crucial in heading off the risks of over-reliance on these entities. The guidelines must help companies effectively harness the economies of scale of collaborative initiatives, but at the same time ensure companies engage only with MSIs whose due diligence policy and practice aligns with international standards, and still remain actively engaged in each step of their own due diligence effort.

Review: During the review, EU policymakers will need to assess whether a company’s use of MSIs is genuinely strengthening their due diligence performance, and if not, redraft the Directive to correct the problem.

84 See for a more detailed analysis: Clean Clothes Campaign (2019), “Fig Leaf for Fashion: How social auditing protects brands and fails workers,” <https://cleanclothes.org/file-repository/figleaf-forfashion.pdf/view>; MSI Integrity (2020), “Not Fit-for-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance,” https://www.msi-integrity.org/wp-content/uploads/2020/07/MSI_Not_Fit_For_Purpose_FORWEBSITE_FINAL.pdf; LeBaron G Lister J and Dauvergne D (2017), “Governing Global Supply Chain Sustainability through the Ethical Audit Regime,” *Globalizations*, Volume 14, no. 6, pp. 958–975, <https://doi.org/10.1080/14747731.2017.1304008>; Locke R (2013), *The Promise and Limits of Private Power: Promoting Labor Standards in a Global Economy*, New York, Cambridge University Press; Clean Clothes Campaign (2005), “Looking for a quick fix: how weak social auditing is keeping workers in sweatshops,” <https://cleanclothes.org/file-repository/resources-publications-05-quickfix.pdf/view>.

85 EU Corporate Sustainability Due Diligence Directive, Article 20(4).

STAKEHOLDER ENGAGEMENT

OECD Guidelines

The OECD Guidelines describe meaningful stakeholder engagement as one of the essential characteristics and components of due diligence, and in some cases a right in and of itself.⁸⁶ This makes intuitive sense as stakeholders - in particular impacted rightsholders - have vital perspectives to share on what impacts are occurring or risked by business activity and how those impacts can be prevented or addressed.

The OECD Due Diligence Guidance explains that “meaningful stakeholder engagement is important throughout the due diligence process”.⁸⁷ Meaningful stakeholder engagement is defined as being ongoing (continuous), two-way, conducted in good faith by participants on both sides, and responsive to stakeholders’ views. It should be timely, accessible, appropriate, and safe for stakeholders. Companies should remove potential barriers to engagement for people in positions of vulnerability or marginalisation.

The Guidelines define stakeholders broadly as persons, groups, or their representatives who have rights or interests that are or could be affected by a company’s operations, products, or services. Critically, the Guidelines note that “Enterprises can prioritise the most severely impacted or potentially impacted stakeholders for engagement.” The Due Diligence Guidance provides more detail on when and how to carry out stakeholder engagement.

CSDDD

The CSDDD dedicates a specific article to stakeholder engagement, thus highlighting its importance. However, the Directive, particularly following Omnibus amendments, falls short of the Guidelines in how it prescribes implementation of stakeholder engagement.

First, the amended Directive mandates only engagement with those stakeholders that are actually or potentially affected. While the Guidelines prioritise these stakeholders, they do not limit engagement to affected stakeholders. Other relevant stakeholders cover a broad range of entities including community groups, national human rights institutions, and civil society who can provide additional valuable information for the corporate due diligence process.

Second, the amended Directive does not ensure stakeholder engagement throughout due diligence, as outlined in the Guidelines’ framework.⁸⁸ Companies are encouraged to engage with stakeholders continuously, but the Directive actually mandates engagement only at several specific moments, namely while the company gathers information on actual and potential impacts; develops or enhances preventive and corrective action plans and when adopting appropriate measures to remediate adverse impacts. The Omnibus deletes the obligation to engage stakeholders when terminating or suspending a business relationship and when developing quantitative and qualitative indicators for monitoring the due diligence performance.

While the moments for engagement identified in the amended Directive are still important, they leave out many other important moments including – but not limited to – the moments deleted by the Omnibus. For example, stakeholder engagement is not explicitly required for step one of due diligence, when in fact stakeholders could have important insight on how best to embed due diligence practices into management systems. Further, the specific moments mentioned cover only parts of the other steps of due diligence. For example, stakeholders are to be consulted to help identify risks (part of step two), but not necessarily to support the company’s prioritisation decisions. Stakeholders are to be consulted on the “appropriate measure” of developing a preventive or corrective action plan (part of step three), but not the other “appropriate measures” such as making investments into facilities or processes, or

⁸⁶ OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, Chapter II commentary 28.

⁸⁷ OECD Due Diligence Guidance for Responsible Business Conduct, Q10.

⁸⁸ Note: the UNGPs do not set out an expectation of continuous stakeholder engagement and have a more targeted system to which the CSDDD seems to align.

improving plans, strategies, and operations, including purchasing, design, and distribution practices, or suspending a business relationship. Regarding due diligence monitoring and evaluation (step four), the Omnibus' deletion of the requirement of engagement even on the development of quantitative and qualitative indicators, to say nothing of the rest of the monitoring process, is a significant loss – stakeholders clearly have valuable input to share during evaluation of the effectiveness of the due diligence process. Further, stakeholders are to be consulted when the enterprise is adopting remediation measures (part of step six), but not necessarily when the company is evaluating the effectiveness of its remediation measures. The narrow framing around stakeholder engagement raises concerns over how well it will be undertaken by companies.

Recommendations on stakeholder engagement

The Omnibus amended the CSDDD to allow an even more restricted approach to stakeholder engagement during the due diligence process. To ensure companies carry out stakeholder engagement at least as thoroughly and well as envisioned in the OECD Guidelines, EU policymakers should strengthen several expectations in the Directive.

Transposition: Neither Articles 3 (definitions) nor 13 (stakeholder engagement) are subject to maximum harmonisation. Therefore, Member States can expand the definition of stakeholders and the mandate for stakeholder engagement throughout the duty (Articles 7 to 16). While States should support prioritised focus on impacted stakeholders, they should also encourage engagement with other stakeholders including civil society as well, to ensure businesses practically benefit from the insights civil society have.

Commission guidelines: Companies are calling for more detailed guidance on how to undertake meaningful stakeholder engagement, a call the OECD should heed. At a minimum, the Commission guidelines should make clear “why” engagement is so critical from the company's perspective: to improve its effectiveness and reduce its costs by helping it ensure, by talking to all groups with useful perspective to share, that it is doing each step of due diligence well. The Commission's guidelines should interpret the provisions of Article 13 on stakeholder engagement as broadly as possible to bring about greater alignment with the Guidelines and, as a result, better results from companies' due diligence. First and foremost, the guidelines should emphasise that while the Directive places particular priority on engagement in a few places, engagement is expected throughout the due diligence process (including steps one and four). Then the guidelines could give examples to flesh out the value of stakeholder engagement at moments where the text seems ambiguous or light. For example, where the Directive seeks stakeholder engagement during development of action plans, the guidelines should clarify that this logically should extend to implementation of such plans. Where stakeholder engagement is sought on adoption of remedial measures, the guidelines should clarify that meaningful performance necessitates engagement to assess whether those remedial measures have been effective. The guidelines are also expected (as clarified in Article 19) to provide information to stakeholders and their representatives on how to engage throughout the due diligence process.⁸⁹ The guidelines should clearly outline an expectation of strong engagement by impacted rightsholders. The Commission should also ensure effective outreach on these guidelines to impacted stakeholders, including via their representatives amongst civil society, unions, etc.

Review: EU policymakers should strengthen the Directive by expanding the definition of stakeholders and more comprehensively and explicitly requiring stakeholder engagement continuously throughout all steps of due diligence, as well as maintaining clear priority on engagement with impacted rightsholders.

89 EU Corporate Sustainability Due Diligence Directive, Article 19(2)(g).

III. CONCLUSION

The EU law-making institutions have agreed to a Directive requiring EU-operating corporations to account systematically for the human rights and environmental impacts within much of their value chains. The measure represents a watershed moment in the endeavour towards binding regulation of corporate human rights and environmental harms through law rather than solely normative standards and voluntary initiatives.

EU policymakers have prioritised, including within the legislation itself, alignment with existing international due diligence standards such as the OECD Guidelines. Alignment with these broad and robust standards not only streamlines and simplifies expectations for companies, but better assures achievement of the Directive's objective of ensuring companies identify, prevent, and address impacts associated with their products and services.

In this paper, OECD Watch has assessed the alignment between the amended Directive text and the Guidelines in relation to their *personal scope* of covered companies, *value chain scope* of covered business relationships, *material scope* of covered impacts, and description of the *due diligence duty*. The paper finds that while the EU's goal of enshrining strong and aligned corporate sustainability due diligence requirements into law is a bold and necessary one, it is not yet fully realised (and indeed weakened by the Omnibus amendments): important aspects of the due diligence duty itself, as well as the Directive's scope of covered companies, business relationships, and material impacts, fall concerningly short.

Moving forward, at least three key mechanisms exist for lawmakers to close these gaps in alignment to better ensure the Directive's achievement of its objectives. This paper has offered specific recommendations to be taken by Member States during transposition of the Directive into national law, by the EU Commission when drafting implementation guidelines, and by EU policymakers during review of the Directive.

Essence of recommendations

- With respect to the three scope elements, this paper recommends options to expand the scope of covered companies, business relationships, and human rights and environmental impacts, not only to increase the effectiveness and impact of the Directive, but to simplify the process for implementation by companies, particularly regarding the value chain and material scope.
- Regarding the due diligence duty, this paper has recommended action to ensure highest-level governance of the due diligence process; reinforce the broad scope of appropriate measures for addressing risks and impacts; strengthen corporate communications requirements; discourage inappropriate reliance on MSIs to carry out due diligence elements; and ensure more meaningful stakeholder engagement with a broader group of stakeholders throughout all steps of due diligence.

OECD Watch looks forward to EU institutions and Member States revisiting these aspects of the Directive over the coming years where possible in the context of heightened harmonisation requirements.

We also continue to urge all governments pursuing binding due diligence legislation to ensure coherence with the OECD Guidelines, and not the Directive, as the guiding international standard.

Contributing writers: Marian G. Ingrams and Ben Vanpeperstraete

With thanks for input from: Barbara Bijelic, Gabrielle Holly, Marion Lupin, Emily Norton, David Ollivier de Leth, Virginia Rouas, Urs Rybi, Joseph Wilde-Ramsing, Ruben Zandvliet.

About OECD Watch

OECD Watch is a global network with more than 130 members in over 50 countries. Membership consists of a diverse range of civil society organisations bound together by their commitment to ensuring that victims of corporate misconduct have access to remedy, that business activity contributes to sustainable development and poverty eradication, and that corporations are held accountable for their actions around the globe.

Contact

OECD Watch Secretariat
The Netherlands

info@oecdwatch.org

www.oecdwatch.org