



Mandating Downstream Human Rights Due Diligence

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In February 2022, the European Commission published its proposed draft *Corporate Sustainability Due Diligence Directive* (CS3D). Consistent with its [ongoing engagement on mandatory human rights due diligence](#), UN Human Rights welcomes the EU's leadership. We [have noted](#) various ways in which the directive should be strengthened to ensure better alignment to international standards, notably the *UN Guiding Principles on Business and Human Rights* (UNGPs) and *OECD Guidelines for Multinational Enterprises*.

Building on these earlier calls for this milestone piece of legislation to be aligned with international standards, UN Human Rights is concerned about the proposition being advanced by some stakeholders that the requirements of CS3D should not apply to downstream¹ impacts on human rights that a company may be involved in. As this statement sets out, such an exclusion would:

- **Not align with the UNGPs** and could undermine the international consensus about the scope of the Corporate Responsibility to Respect Human Rights.
- **Undercut the EU's own stated objectives** to “foster sustainable and responsible corporate behaviour throughout *global value chains*” ([link](#)) and “avoid fragmentation of due diligence requirements in the single market and create legal certainty for businesses and stakeholders as regards expected behaviour and liability” (see page 3 of the [draft proposal](#)).
- **Neglect significant human rights impacts related to business activities in key sectors**. Examples include but are not limited to online and offline technology-related harms such as algorithmic discrimination, as well as parts of the retail, tourism, hospitality, food and beverage, and consumer finance sectors.
- **Lag behind the extensive efforts by companies in diverse industries to implement downstream human rights due diligence (HRDD)**. Such action offers a clear market signal that companies and their stakeholders deem downstream impacts as critically important, and demonstrate that human rights due diligence along the whole value chain is possible.

A) The scope of the Corporate Responsibility to Respect Human Rights includes “downstream” impacts

As the UNGPs explain, “*Business enterprises may be involved with adverse human rights impacts either through their own activities or as a result of their business relationships with other parties.... For the purpose of these Guiding Principles a business enterprise's ‘activities’ are understood to include both actions and omissions; and its ‘business relationships’ are understood to include relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services.*” (GP 13, Commentary (emphasis added)).

¹ “Downstream” refers to the part of the value chain that involves the production, sale/licensing and distribution of goods and services. As noted here (Part B), downstream business activities and relationships can take many forms in many different sectors.

As such, the scope of a company's responsibility to respect human rights under the UNGPs encompasses impacts across its **full value chain including downstream business relationships**. Moreover, a company can:

- **"Cause"** downstream impacts on human rights – for example, by selling faulty products or failing to protect consumers or end-users' privacy.
- **"Contribute"** to downstream impacts – for example, via acts or omissions in product design, sales or marketing of products and services.
- Be **"linked to"** downstream impacts *via* business relationships such as those with private or public sector customers.

In addition, severity of risks to people should always be the determining factor for a company when deciding where to prioritize its due diligence efforts across its value chain. For some companies, severe impacts may, or do, occur in downstream contexts, often also making them the most material in terms of financial, operational, and reputational risk.

It follows that excluding downstream impacts from the scope of human rights due diligence would not be in line with the UNGPs and risks undercutting the international consensus and resulting clarity around the scope of business responsibility.

B) The scope of downstream business activities

"Downstream" business activities and relationships can take many forms in many different sectors, and these can connect a company to adverse, and often severe, human rights impacts. Examples include:

- **Logistics/Distribution** – for example, where a fashion or online retail company contracts a third party to fulfil deliveries of products to consumers and that third party does not provide basic labour protections to its workers.
- **Franchises** – for example, where a hospitality company operates a franchise model (to create *independent* businesses to access and serve customers) but workers in those franchisee operations are in conditions of forced labour.
- **Selling or licensing technology, including in high-risk contexts** – for example, where a company provides network / infrastructure services to a State-run company and the government then abuses this capability to target human rights defenders; or when a company sells surveillance or AI capability to the public sector (criminal justice system, law enforcement, or departments overseeing benefits/social security/housing) and its use results in heightened discrimination against certain ethnic/minority groups.
- **Incentivizing the sale of potentially harmful products** – for example, where a pharmaceutical or financial services company has in place sales incentives that result in harm to vulnerable populations from their products (such as opioid dependence) or services (such as predatory lending).

Every company is likely to classify these types of activities and business relationships differently; some companies will see them as downstream, others as part of their core operations, and others as working with a supplier who provides a service. As such, excluding "downstream" creates risks of significant regulatory confusion that would prove impractical and a drain on resources for both regulators and enforcement agencies, and equally companies. Equally concerning, it could incentivise gaming via re-classifying such relationships – which is also a key problem with the wider concept of "established business relationships" as an arbitrary limit on where businesses should focus their attention.

C) Corporate conduct confirms the feasibility of conducting downstream HRDD

There are numerous ways in which companies are already implementing HRDD for downstream human rights impacts. As this [UN Human Rights B-Tech commentary](#) highlights, this is even the case in the rapidly evolving context of the design, development, sale/licensing and end-use – often at considerable scale – of new digital technologies. The commentary also emphasizes that the business processes and practices applied in the tech sector are relevant for the work of non-tech companies.

Existing corporate practice demonstrates how companies in several sectors are putting in place policies, processes and practices to identify and address downstream risks and impacts:

- Corporate human rights policy commitments that explicitly identify downstream impacts as in scope.
- Company-wide saliency analyses that are spotlighting the need for deeper end-use due diligence.
- Engagement with expert voices, civil society and affected stakeholders as part of HRDD with regards to product/service design, build, sales/deployment, and use.
- Product/service-specific human rights assessments, embedding of human rights considerations into existing product and service processes and practices, and efforts to establish and apply leverage. For example:
 - o Integrating human rights reviews at key decision-points in the conceptualization, design and approval of products, services, and solutions.
 - o Adapting sales, including export, processes to include human rights reviews at different levels of depths depending on levels of risk to people – due to the nature of the product/service, the proposed use-case and who the customer is. This can include adapting existing Know Your Customer due diligence to include human rights considerations.
 - o Use of contractual, including terms of use, language as one tool to build and apply leverage, including on when/how products may be transferred to new owners.
 - o Ceasing, or temporary restrictions on, sales of certain products/services to customer segments until meaningful mitigation efforts can be identified and implemented.
 - o Working with sales partners and distributors to build these organisations' commitment, competence, and systems towards operating with respect for human rights.
 - o Clear, well-rehearsed internal escalation processes that are triggered when changes to political contexts or local law increase risks to product/service end-users and others.
 - o Engaging public sector customers to question, and often define as out of scope, certain technical functionalities that would contravene a company's own policy commitment or create significant risks to people's human rights.
 - o Transparency and communication to educate the general public and civil society organisations about the ways in which products can be abused by third parties.
 - o Participation in multi-stakeholder initiatives to spotlight and enable collective action on root-causes of systemic human rights risks related to end-use.

A small step back from the details of the emerging practices above reveals a landscape of very similar tools, techniques, and tactics that States are already regulating in supply chain contexts.

Conclusion

There are compelling reasons to include downstream HRDD within the scope of application of the CS3D. Companies are already demonstrating that it is important and feasible to implement downstream human

rights due diligence. A law that excludes such activities lags behind the status quo of corporate conduct. Excluding downstream HRDD would run counter to both the spirit and letter of the UNGPs, as well as to the stated policy objectives driving this landmark initiative.