



the instruments comprising the International Bill of Rights and all fundamental Conventions of the ILO, but also other international and European human rights treaties and non-binding instruments reflecting international human rights law. The material scope should further include international and European climate and environmental law, including the Paris Agreement.

## **2. Definition of adverse human rights impact (Art. 3 CSDDD)**

To clarify the material scope of the due diligence obligation, the three positions of the EU institutions define “human rights impact” in Art. 3(1)(c) by reference to the Annex, where singular rights as well as conventions are listed.

Part I of the Annex comprises a list of human rights norms (1.) and instruments (2.) that do not follow any conventional classification. Part II lists provisions from international conventions on environmental protection. While there is agreement on this general structure, each version differs in the definition of an adverse impact and in the choice of provisions and international instruments included in the Annex.

The Commission and the Council describe an adverse human rights impact as a “violation” or an “abuse”, while the Parliament, drawing on the language of the UNGPs Interpretive Guide, defines the term as an action which removes or reduces the ability of an individual or group to enjoy a right.<sup>4</sup>

The former terms carry the connotation of a breach of duty by States under international human rights law. Introducing this concept to the Directive risks raising the threshold of what qualifies as an impact to be addressed by a company’s due diligence process. This is especially the case when the definition of an adverse human rights impact is linked to the violation of specific rights and prohibitions listed in the Annex, such as in the Commission’s proposal. The Council expands the definition by including “human rights abuses” not expressly mentioned but enshrined in the listed conventions and instruments but sets complex and restrictive conditions. According to the Council’s restriction in Art. 3(c)(ii), the latter should only constitute an adverse human rights impact, if (1) the human right can be abused by a company or legal entity other than a Member State or a third country, (2) the human right directly impairs a legal interest protected under the instruments listed in Part I Section 2 and (3) the human rights “abuse” could have been reasonably identified within company’s own operations, those of its subsidiaries or its business partners. These conditions would have a very limiting effect on the scope of human rights under consideration and add a level of complexity to a company’s

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<sup>4</sup> [RtRInterpretativeGuide.pdf \(ohchr.org\)](#) p. 6.

evaluation on adverse human rights impacts with regards to the three conditions proposed by the Council.

Further, as noted above, it is not clear whether, in the context of civil liability, a court would be required to determine that there has been a violation in order for a claim to succeed. The final Directive should favor the terminology set out in international standards, reflected in the Parliament's position.

**Recommendation:** NHRIs that form part of GANHRI WG on Business and Human Rights, recommend that an adverse human rights impact is defined as **any action which removes or reduces the ability of an individual or group to enjoy the rights or to be protected by the prohibitions enshrined in international conventions and instruments**, rather than as a violation of such rights.

### 3. Determination of listed rights through a rightsholder-centered approach

Human rights are indivisible and interdependent. As the UNGPs make plain, business activities can impact virtually the full scope of human rights and for that reason, businesses should, at a minimum, be assessing impacts on the full spectrum of rights contained in the International Bill of Human Rights (IBHR) (consisting of the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights), coupled with the fundamental principles and rights enshrined in the 11 ILO core conventions as set out in the Declaration on Fundamental Principles and Rights at Work.

The apparent intention behind the creation of an annex which lists out specified rights and prohibitions and relevant instruments is to make obligations clear and easily understandable for companies.

However, the three versions set out different human rights norms and instruments in the respective parts of the Annex. While the annex to the Commission's proposal at first glance appears relatively comprehensive in its human rights coverage, it is not entirely clear how the list of rights was developed. The presentation of rights in the annex does not follow conventional ways of organising human rights, e.g. by civil and political and economic, social and cultural rights or potentially affected groups (workers, communities, end users/consumers). In addition, some rights are framed in novel ways, which are not entirely aligned with the conventional representation of international human rights instruments or the

rights and prohibitions they contain. This may open avenues for interpretation of what is included and not in the rights listed.

Favoring a more limited approach, the Council position confines the list of instruments to those that are ratified by all EU Member States and legally binding under international law. It thereby excludes, for example, international customary norms deriving, inter alia, from the Universal Declaration of Human Rights. These restrictions do not apply in the other versions. In contrast, the Parliament's text extends the list of instruments by adding, for instance, several conventions by the ILO.

While the explanatory memorandum to the Council's General Approach speaks of the need to ensure "legitimacy" by including only instruments that are legally binding and ratified by all Member States, the signatories of this statement are of the view that neither legally binding status nor ratification of an instrument by all EU Member States are necessary conditions for inclusion of an instrument in Part 1 Section 2 of the Annex. If the objective of the annex is to provide clarity for companies, then companies would be better served by a broad inclusion of instruments, reflecting the widely accepted approach outlined in the UNGPs that companies can impact virtually the full spectrum of rights. This means inclusion of instruments such as declarations or other non-binding or soft law instruments where these provide critical guidance for companies on rights or prohibitions in relation to which their activities or relationships may remove or reduce the ability to enjoy, for example, the UN Declaration on the Rights of Indigenous Peoples or the Declaration on Human Rights Defenders.

The CSDDD will require companies to undertake human rights and environmental due diligence across global value chains. This includes obligations to identify and address impacts which occur not only in Europe but also in third countries. The status of ratification of an instrument by a European Member State should not place a constraint on the consideration of what impacts a company can have globally within scope of the CSDDD.

**Recommendation:** The signatories of this statement support broad inclusion of international human rights instruments in line with the approach of the UNGPs. The Annex should include at a **minimum** the instruments comprising **the International Bill of Rights** and all fundamental Conventions of the ILO, but also other international and European human rights treaties and non-binding instruments reflecting international human rights law, in particular regarding **rightsholder-groups that are at a proportionally high risk of negative impacts by corporate activities.**

#### **4. Environmental impacts**

Parallel to adverse human rights impacts, Art. 3 (b) CSDDD defines adverse environmental impacts and Part II of the Annex complements with references to international and European environmental law, including the Paris Agreement on Climate Change that should be covered under the CSDDD.

The Commission's proposal defines adverse environmental impact as "an adverse impact on the environment resulting from the violation of one of the prohibitions and obligations pursuant to the international environmental conventions listed in the Annex, Part II;" Art. 3(b) CSDDD. Likewise, Council and Parliament base their definition proposals on a reference to international conventions. Environmental impacts shall be interpreted, where relevant, in line with the prohibitions and obligations pursuant to the international environmental conventions listed in the Annex, Part II.

The Annex specifies the environmental and human rights impacts relevant for the Directive. Part II sets out the material scope of protection for rightsholders in claims due to environmental impacts of businesses. The proposals of the Commission and the Council follow a legality approach and entail a list of legal instruments that protect the environment. The Parliament, on the other hand, restates the obligation to combat environmental impact on environmental categories and sets out a list of such impact categories. Covering impact categories and specifying the impacts by referring to relevant provisions appears to ensure that the two parts interact effectively. This risk-based approach has been made use of in other international instruments, for example the Batteries Regulation. Having impact categories as a starting point over directly relying on international conventions favors affected groups and ensures legal certainty to companies. The impact categories should be based on the international standards under the revised OECD Guidelines.

**Recommendation:** NHRIs that form part of GANHRI WG on Business and Human Rights, recommend including **all relevant international and European environmental law regulations** in Annex Part II.

## **V. Review of Annex**

The CSDDD should leave room for expanding the list of human and environmental rights to allow for the adaption to new developments in the field.

The Commission and the Council each include an explicit requirement in Article 29 to revisit the Annex as part of the Commission's report to the Parliament and Council on implementation of the Directive, requiring review of "Whether the Annex needs to be modified, including in light of international developments". The signatories to this statement recommend that this

text should instead read “Whether the Annex needs to be expanded, including in light of international developments”, to ensure that a more restrictive approach is not taken to the inclusion of norms and instruments over time.

**Recommendation:** NHRIs that form part of GANHRI WG on Business and Human Rights, therefore recommend **to explicitly declare the Annex open for updates and amendments** to comply with any new developments in the field of international human and environmental rights law.