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Feedback on *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937*

1. Introduction

The Norwegian National Human Rights Institution (NIM) welcomes the opportunity to provide input on the *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937* (hereafter referred to as “draft Directive”).

NIM is an independent public body established by law by the Norwegian Parliament in 2015 to strengthen the implementation of human rights in Norway. NIM has a [mandate](#) to promote and protect human rights nationally and to participate in international cooperation to realize this objective. NIM has [‘A status’ accreditation](#) with the Global Alliance of National Human Rights Institutions (GANHRI), meaning we comply with the requirements of independence, impartiality and integrity under the Paris Principles.¹ NIM is also member of the European Network of National Human Rights Institutions (ENNHRI).

The draft Directive will, through the EEA Agreement, potentially have an impact on the conduct of Norwegian companies, and we therefore deem it appropriate to make some observations about the proposal. We note that the draft Directive, with reference to its Article 1 (2), is without prejudice to the Norwegian Transparency Act (LOV-2021-06-18-99). This Act regulates companies’ human rights due diligence obligations, and will enter into force July 1st this year.

NIM welcomes and supports the draft Directive. We believe that it has a great potential to contribute to the implementation of human rights and protection of the environment. We align ourselves with the statement made by ENNHRI in March 2022 on

¹ *Principles relating to the Status of National Institutions (The Paris Principles)*, Adopted by the United Nations General Assembly resolution 48/134 of 20 December 1993.

the draft Directive.² NIM will not submit a comprehensive analysis of the entire draft proposal, but we will make some observations and recommendations on the provisions pertaining to human rights and environmental impacts.

2. Personal scope (Article 2)

Companies covered: Regarding the scope of the draft Directive (Article 2), we refer to the ENNHRI statement. We note that a very low percentage of corporations will be covered by the Directive. The norms in the UNGP and the OECD Guidelines, on the other hand, apply to all corporations. Given that the alternatives in Article 2 (a) are cumulative and not alternative, the threshold for *which* companies that are covered, is exceedingly high. Even though the threshold in Article 2 (b) is lowered somewhat for corporations in certain sectors, many companies will not be covered by the Directive at all.

We note that also the Norwegian Transparency Act has a much wider scope than the proposed scope of the draft Directive.³ The Transparency Act is estimated to cover 9 000 Norwegian companies, whereas the draft Directive will cover only 300.⁴

NIM therefore proposes that the Commission considers whether the personal scope of the directive should be widened. The draft Directive could for example be aligned with the scope proposed in the Corporate Sustainability Reporting Directive.⁵

Value chain: The draft Directive Article 1 (1) (a) specifies that the Directive applies to “entities with whom the company has an established business relationship”. The term “established business relationship” may exclude short, unstable or informal business relationships. Such relationships entail a greater risk for severe negative human rights or environmental impacts. Moreover, since such short business relationships are not covered, this in itself could constitute an incentive to enter into short or informal

² ENNHRI statement on the European Commission’s Proposal on Corporate Sustainability Due Diligence March 2022, available here: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance/F3257332_en

³ Art. 2 decides that “[t]he Act applies to *larger enterprises* that are resident in Norway and that offer goods and services in or outside Norway”, and “to larger foreign enterprises that offer goods and services in Norway, and that are liable to tax to Norway pursuant to internal Norwegian legislation”. (Emphasis added). Art. 3.1 a) defines “larger enterprises” as “enterprises that are covered by Section 1-5 of the Accounting Act, or that on the date of financial statements exceed the threshold for two of the following three conditions: 1. sales revenues: NOK 70 million 2. balance sheet total: NOK 35 million, 3. average number of employees in the financial year: 50 full-time equivalent.” Moreover, “[p]arent companies shall be considered larger enterprises if the conditions are met for the parent company and subsidiaries as a whole”.

⁴ Forbrukertilsynets høringsvar om EU-kommisjonens forslag om tilbørlig aktsomhet for bærekraft for foretak og endring av direktiv (EU) 2019/1937, 26.04.2022, s. 2.

⁵ Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting, 21.04.2022 re Directive 2013/34/EU Art. 3; [European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability](#) (2020/2129(INL)) Art. 2.

business relationships with an aim of avoiding falling within the scope of the due diligence obligations in the Directive.

3. Material scope (Articles 3 (b) and 3 (c))

3.1 Introduction

Article 1 of the draft Directive specifies that the Directive lays down obligations for companies regarding “actual and potential human rights adverse impacts and environmental adverse impacts”.

The draft Directive Article 3 (b) defines “adverse environmental impact” as an impact resulting from a “violation” of “one of the prohibitions and obligations pursuant to the international environmental conventions listed in the Annex, Part II”.

The draft Directive Article 3 (c) defines an “adverse human rights impact” on “protected persons” as resulting from a “violation” of one of the rights or prohibitions listed in the Annex, Part I. The Annex itself has the heading “Violations of rights and prohibitions”.

The Annexes in the draft Directive that define the material scope of these two provisions are listed in the opposite order; the human rights annexes are listed before the environmental annex. The reason for this is not clear.

3.2 Material scope of “adverse human rights impact”: Annex Part I

The draft Directive contains one Annex, Part I (1), listing a number of human *rights*, and another Annex, Part I (2), listing a number of human rights *instruments*, setting out the material scope of the draft Directive’s reference to human rights. The Annex Part I (1) lists rights that are laid down in the conventions listed in Annex Part I (2). It is somewhat unclear why this construction with the two human rights annexes has been chosen. It hardly constitutes added value in terms of clarifying the material scope of the draft Directive.

Some of the core human rights listed in Annex Part I (1), such as the prohibition against torture, right to life, the right to security and liberty, freedom of expression and religion and the right to privacy are mentioned only with reference to the Universal Declaration on Human Rights (UNDHR), and not with reference to their more clear-cut legal bases, the UN Covenant on Civil and Political Rights (ICCPR) or the European Convention on Human Rights (ECHR). Some of the rights in Annex Part I (1) refer to the UNDHR *as well as* the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR). It is not clear what these distinctions entail.

The ICCPR is listed in Annex Part I (2). However, neither the ECHR nor the European Charter of Fundamental Rights is listed at all. It would seem useful and appropriate to include these two, in a Directive that is essentially European.

The material scope of the two annexes appears more comprehensive than the scope of the UNGP, but it is *de jure* more limited. While only a few core conventions are actually listed in UNGP Principle 12, it is specified that other human rights instruments may apply, depending on the circumstances:

“For instance, enterprises should respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them. In this connection, United Nations instruments have elaborated further on the rights of indigenous peoples; women; national or ethnic, religious and linguistic minorities; children; persons with disabilities; and migrant workers and their families. Moreover, in situations of armed conflict enterprises should respect the standards of international humanitarian law.”⁶

Another shortcoming is that the draft Directive’s Annexes do not include ILO Convention No. 169 on the rights of indigenous peoples. The UN Declaration on Indigenous Peoples Rights is included, but this is not a legally binding instrument. The omission of ILO Convention No. 169 is unfortunate, because in those states that have indigenous populations, it is particularly interferences by business corporations in traditional land areas that constitute one of the greatest human rights challenges for such peoples, in addition to climate change. The negative impact of developments by companies, such as mining, power plants, agriculture or forestry, can be severe for indigenous communities.

Moreover, the UN Convention on Enforced Disappearance and the ILO Convention (No. 190) on Sexual Harassment, are not included in the Annex. Both these conventions are highly relevant when it comes to corporate human rights due diligence.

NIM recommends a wider material scope with regard to the human rights that companies should take into consideration when carrying out due diligence. If the model with annexes remains, a human rights annex should refer the relevant *instruments*, and not list individual *rights*. NIM also recommends the inclusion of the above-mentioned instruments (lacking in the present draft) in such a list.

3.3 Material scope of “adverse environmental impact”: Annex Part II

The draft Directive contains an Annex Part II with a list of environmental conventions, setting out the material scope of the Directive.

It is NIM’s primary view that in order to ensure that the EU’s overall objectives of securing that a “high level of protection and improvement of the quality of the environment” is achieved,⁷ the focus should be on *preventing adverse impacts on the*

⁶ UNGP Principle 12, Commentary.

⁷ Art. 3.3 of the Treaty on European Union.

environment itself. Under international law, a State has a due diligence obligation to prevent transboundary damage; a State is “obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State.”⁸ *Mutatis mutandis*, the focus under the Directive should be on preventing significant harm or impact on the environment itself, in line with the French *Loi relative au devoir de vigilance*.⁹

In the alternative, Part II of the Annex should be widened. The Annex draft Directive lists several specific treaty provisions. This makes the material scope of the environmental due diligence obligations considerably narrower than if the Annex listed the conventions themselves.

NIM would also like to underline that the Annex is limited to mentioning a few rights in a few Conventions, and should in any case be expanded as to, in addition, include all the rights in minimum the following:

- *Procedural environmental human rights*; the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) from 1992
- *Relevant climate regulations*; The United Nations Framework Convention on Climate Change (UNFCCC) from 1992, the Kyoto Protocol from 1997 and the Paris Agreement from 2015, and Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality (European Climate Law)
- *Regulations on air pollution*; UNECE Convention on Long-Range Transboundary Air pollution from 1979 and its protocols, and the EU regulations of air quality standards; Ambient Air Quality Directive, Directive 2008/50/EC and Directive 2004/107/EC, the Ambient Air Quality Directive
- *Regulations on environmental impact assessments*; the Espoo Convention from 1991 and the Strategic Environmental Assessment Protocol from 2003, and the EU regulations; Directive 2011/92/EU, as amended by Directive 2014/52/EU (EIA directive) and EU Directive 2001/42/EC (SEA directive)

As a minimum, the listing of rights and prohibitions covered in the Annex should be non-exhaustive. This would allow for a more flexible and dynamic approach, ensuring that the draft Directive will stay relevant, practical and effective over time.

⁸ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgement, ICJ Reports 2010, para. 101. See also *Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries in the Yearbook of the International Law Commission*, 2001, vol. II, Part Two.

⁹ “Le plan comporte les mesures de vigilance raisonnable propres à identifier les risques et à prévenir les atteintes graves envers [...] l’environnement [...]”, see Article 1er of *LOI no 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre*. See also Decision no. 2011-116 QPC.

3.4 Threshold (requirement of “violation”)

NIM would like to note the requirement of a “violation” in Article 3 (b) and 3 (c) is a significantly higher threshold than what is laid down in the UNGP and the OECD Guidelines. Here, the obligation for companies is that they should “avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.”¹⁰ Thus, these applicable international standards do not require *violations*, but refer to adverse human rights impacts, which may or may not constitute violations. Similarly, the Norwegian Transparency Act Article 4 (1) (b) focuses on the due diligence obligations in relation to a responsibility to *avoid negative consequences* the relevant right.

The high threshold of the draft Directive can thus lead to a narrow focus which entails that companies aim at avoiding *violations* rather than preventing *negative impacts on human rights or the environment* through their operations. In NIM’s view, the definition should thus be changed to ensure that companies aim at preventing negative consequences for human rights and the environment.

3.5 “Protected persons”

NIM would like to note that the use of the term “protected persons” in Article 3 (c) is unfortunate. The term is not associated with human rights, but with international humanitarian law.¹¹ Human rights protect all human beings, regardless of their status. “Protected persons” are civilians, or sick or wounded soldiers, in the context of an armed conflict. The use of the term “protected persons” in the draft Directive may unintentionally lead to interpretations which could reduce the intended scope of human rights protection. Moreover, the term “protected person”, as a key concept in the context of armed conflicts, risks being undermined if used as a description of those entitled to human rights.

4. Climate change (Article 15)

One of the main objectives of the EU is to “[combat] climate change”.¹² The draft directive includes Article 15, which sets of obligations for “Member States” regarding how to ensure that companies adopt a plan and strategy compatible with the 1.5°C target. NIM supports this important provision. The *minimum* reduction pathways necessary to achieve this goal should also be described, along the lines of the European Climate Law (climate-neutral by 2050 and reducing emissions by at least 55% by 2030).¹³

¹⁰ UNGP Principle 11.

¹¹ E.g. the four Geneva Conventions of 1949 and their two Additional Protocols of 1977.

¹² Art. 191 of the Treaty on the Functioning of the European Union. See also Art. 192 and 193.

¹³ See also the draft Directive recital para 8.

Moreover, Article 15 (2) sets out that “Member States shall ensure that, in case climate change is or should have been identified as a principal risk for, or a principal impact of, the company’s operations, the company includes emission reduction objectives in its plan.” As several courts already have recognized, a State or a company can also be held legally responsible for the *combustion emissions* (or scope 3 emissions) resulting from fossil fuels extraction.¹⁴ The draft Directive should thus clarify that these emissions must be included in the plan for emission reductions.

The draft Article 29 (d), on *review* of the Directive, presupposes that “adverse climate impacts” is not meant to be included in the term “adverse environmental impact” in Article 3 (b). Moreover, it is clear from Article 29 that the due diligence obligations of companies (in Articles 4 to 14) do not extend to adverse climate impacts. NIM finds this proposed distinction between climate and environment unfortunate and somewhat confusing. There is no evident justification for separating climate impacts from the environment itself.¹⁵ Moreover, in NIMs view, the duty to take appropriate measures to avoid climate harm already forms part of several human rights obligations included in the Annex Part I, such as the right to life, the right to privacy and physical integrity and the right to health. Climate damage can also fall within the norms in Annex I Part 1, no. 18.

In NIM’s view, climate impacts therefore seem to already be covered under the definitions in Article 3 (b) and (c). There is thus no need for a separate definition. If the proposed distinction is to be kept, the draft Directive should as a minimum mainstream the need to combatting climate change and reach the 1.5°C goal into the general *due diligence obligations* of the company and extend the draft Directive Articles 4 to 14 to climate impacts.

5. An article on the right to information?

The right to information and to receive information is protected by several human rights instruments, for example ECHR Article 10 and the ICCPR Article 19. Moreover, the right

¹⁴ *HR-2020-2472-P* (Supreme Court of Norway), 22.12.2020, paras. 149, 155, 167 and 260; *Ctr. for Biological Diversity v. Bernhardt (Liberty)*, 982 F.3d 723 (9th Cir. 2020), p. 19–23; *Sovereign Inupiat for a Living Artic et al v. Bureau of Land Management et al. (Willow)*, p. 28–31., *District Court of Alaska*; *Friends of the Earth et al. v. Debra A. Haaland et al. Civil Action, No.: 21-2317 (RC) (Friends of the Earth)*, *District Court of Columbia*, 27.01.2022, p. 23–40, *Gloucester Resources Ltd v. Minister for Planning* (2019) 234 LGERA 257, para 513, with reference to a tenfold of other cases in paras. 499–512; *Shell*, ECLI:NL:RBDHA:2021:5339 (The Hague District Court), 26.05.2021 paras. 4.4.19, 4.4.25 (appealed); *Friends of the Earth v. UK Export Finance*, High Court of Justice, Case No: CO/3206/2020, 15.03.2022, para. 244 (dissent 1-1, appealed).

¹⁵ For example, the Norwegian Supreme Court has held that “there is no basis for claiming that climate is not covered” by the Norwegian Constitution Article 112, which protects the “environment”, see *HR-2020-2472-P* para 147.

to environmental information has a particularly strong legal protection in the Aarhus Convention Articles 4 and 5 and ECHR Articles 8 and 10.¹⁶

The draft Directive does not include a right to information. NIM therefore suggests the inclusion of a right of any person to receive information from a company on how it complies with the due diligence obligations proposed in the draft Directive Articles 4 to 14. This would be in line with the Norwegian Transparency Act Article 6.

In NIM's view, the inclusion of a right to information would be essential to ensure the realization of the draft Directive's objectives, by raising awareness and ensuring transparency on the compliance with the obligations under the draft Directive. It would also enable the public to encourage or influence companies to improve their human rights-, environmental and climate policies.

Best regards

On behalf of
The Norwegian National Human Rights Institution

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¹⁶ Steering Committee for Human Rights (CDDH), *Manual on Human Rights and the Environment (3rd edition)*, 01.02.2022, Chapter IV.