One Step Forward, Two Steps Backward: Progress Towards the EU's Proposed Corporate Sustainability Due Diligence Directive and Provisions for Global South Participation in Due Diligence Processes

By:

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On the 1st of December 2022, the EU Council adopted its eagerly anticipated negotiating position ("general approach") on the corporate sustainability due diligence directive. As the hard earned result of a clear political compromise, the general approach differs in some significant respects from the proposal adopted in February this year, as well as from the far reaching proposals for amendment in the draft report issued by the committee on legal affairs in

November 2022, with Ms. Lara Wolters as rapporteur. This brief contribution intends to analyse the three proposals, with a particular focus on how each proposal provides for, or fails to provide for (as the case may be), the participation of global south voices in the due diligence processes. Ultimately, I argue that as the draft makes its way through the legislative process, it appears that the EU seems to have taken one step forward but two steps backward as regards the provisions on the participation of global south rightsholders.

The February draft of the EU CSDDD did not do enough to center the potentially affected global south rightsholders. Rather than mandating that companies include such rightsholders in due diligence processes, the Directive instead opted for a "where relevant" formulation, that allows companies to decide when to include potentially affected groups in consultation processes. Case in point, Article 6 on identifying actual and potential adverse impacts provides in sub-section 4 that "Companies shall, where relevant, also carry out consultations with potentially affected groups including workers and other relevant stakeholders to gather information on actual or potential adverse impacts." A similar formulation is adopted in Article 8 on bringing actual adverse impacts to an end, whose sub-section 3 (b) provides that "Where relevant, the corrective action plan shall be developed in consultation with stakeholders." This formulation could be argued to compound the situations of vulnerability within which global south rightsholders already find themselves in, by allowing already asymmetrically powerful companies to pick and choose when to consult such rightsholders. Another troubling aspect of this draft was its requirement that companies carry out due diligence activities within the context of their established business relationships, with such relationships defined in Article 2 (f) as "a business relationship, whether direct or indirect, which is, or which is expected to be lasting, in view of its intensity or duration and which does not represent a negligible or merely ancillary part of the value chain." Arguably, given the fact that most violations occur lower in the value chain rather than in the upper tiers, this formulation jeopardizes the interests of global south rightsholders operating in these lower tiers by allowing the company to have "plausible deniability" as to what is actually occurring in the value chains of suppliers with whom they lack established or lasting relationships.

The Lara Wolter's draft was a step in the right direction, with its tenacious insistence on centering potentially affected stakeholders and giving them a seat at the (consultation) table. More specifically, numerous wide sweeping amendments were made geared towards mandating consultations with affected stakeholders throughout the covered companies' due diligence processes. These include inter alia, Amendment 15 which introduced into the text of Recital 27, a requirement that companies "consult with affected stakeholders throughout this process"; Amendment 16 which introduced into the text of Recital 28 a requirement that companies should have in place a due diligence policy "developed in consultation with stakeholders"; Amendment 26 which introduced into the text of Recital 38 a requirement regarding "implementing a corrective action plan developed in consultation with affected stakeholders"; Amendment 32 introducing into the text of Recital 43 a requirement that "companies should monitor and verify the implementation and the effectiveness of their due diligence measures in consultation with affected stakeholders." Amendment 34 is particularly noteworthy for its introduction of a new requirement that "companies should consult affected stakeholders by carrying out good faith, effective, meaningful and informed engagement with them throughout the due diligence process." In addition, the amendment spells out that "consultation should be ongoing and proactive, providing timely and culturally sensitive information to stakeholders" and requiring such consultation to "take due account of barriers to participation and specific needs of vulnerable stakeholders and ensure that stakeholders are free from retaliation and retribution, including by maintaining confidentiality and anonymity." In addition, these consultation requirements were also introduced into the main text of the directive. For instance, Amendment 156 introduced a new Article 11 (a) into the text of the Directive titled "Consultation of Affected Stakeholders" and outlined a number of useful procedural as well as substantive requirements detailing how such consultation should be carried out. As can be deduced from these examples, the Lara Wolter's draft made significant efforts to center potentially affected stakeholders such as rights holders from the global south, and give them a chance to be heard within the context of the implementation of the due diligence obligations imposed upon companies falling within the personal and material scope of the EU Directive. This is an important requirement that a number of mandatory Human Rights Due Diligence (mHRDD) laws recently enacted in Europe in countries such as France,

Germany and Norway deliberately failed to include, and is a problem that the EU Directive should do its best to overcome. Some other notable amendments in the Lara Wolter's draft that contribute to the robust protection of global south rightsholders as well as their participation in due diligence process include: its deletion of the concept of an established business relationship (Amendments 10, 73); its introduction of the concept of "vulnerable stakeholders" (Amendment 79); its clarification of remedial actions that can be taken by a company that has contributed to an actual adverse impact, including non-financial remedies such as restitution, rehabilitation, public apologies, reinstatement and contribution to investigations (Amendment 30); its introduction of a new provision in Article 14 (1a) requiring member states to "provide support for stakeholders, including for their capacity development, and provide them with information and assistance to facilitate their access to justice" (Amendment 162); its provision on developing and strengthening cooperation and partnership mechanisms with third countries to address the root causes of adverse impacts on human rights, the environment and good governance (Amendment 164). As a whole, the Lara Wolter's draft did more than the other two drafts in advancing the position of global south rightsholders in the due diligence processes contemplated by the EU Directive.

The negotiating position on the EU CSDDD adopted by the Council on the 1st of December tempers the progressive consultation provisions in the Lara Walter's draft and takes the proposed EU Directive simultaneously forwards and backwards in its quest to achieve a compromise. While on the one hand introducing a number of provisions (a la Lara Walters) requiring companies to consult potentially affected stakeholders, it simultaneously maintains some of the troubling provisions from the February draft. In light of the concerns identified in earlier sections of this contribution, a number of noteworthy compromises in the negotiating position, inter alia, include the following: its abandonment of the concept of an established business relationship; its introduction of a recital 26 (a) that provides that "in order to conduct meaningful human rights and environmental due diligence, companies should consult with stakeholders throughout the process of carrying out the due diligence actions"; its inclusion of a requirement in recital 43 that "Companies should monitor the implementation and effectiveness of their due diligence measures, with due consideration of relevant information from stakeholders";

its requirement in Article 8 (3) (b) that a “corrective action plan shall be developed in consultation with stakeholders.”

In contrast, it is troubling that the negotiating position maintains the “where relevant” formulation, for instance, in Article 6 (4) requiring companies to carry out consultations to gather information on actual or potential adverse impacts only where relevant. In addition, it disregards a number of important proposals in the Lara Wolter’s draft. These include, inter alia: the concept of vulnerable stakeholders introduced in Amendment 79; the explanation of meaningful engagement in Amendment 80; the requirement that companies consult with affected stakeholders throughout the actions listen in Article 4, as captured in Amendment 87; the requirement that the due diligence policy is developed in consultation with stakeholders as provided for in Amendment 88; Article 11 (a) on consultation of affected stakeholders as provided for in Amendment 156. On balance, it is clear that the negotiating position is quite clearly a compromise text as regards the consultation and participation rights of global south stakeholders in the due diligence process.

As we wait for the Council presidency to begin its negotiations with the European Parliament and for the Directive to make its way through the EU legislative process in 2023, it is clear that despite the avowed intention behind this due diligence Directive being the desire to reduce the corporate accountability gap and to contribute to the extraterritorial protection of human rights and the environment in global south countries, there is room for more to be done, in order to impose obligations on covered companies to meaningfully engage with and consult with the people who are most affected by their actions and inactions. Only time will tell whether the EU Directive will live up to its potential of giving a voice to global south stakeholders, and allowing them to robustly take part in due diligence processes. Until then, the calls to put rightsholders at the center of Business and Human Rights (BHR) developments must ceaselessly continue.

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