

# Putting the Environment in Human Rights and Environmental Due Diligence

Ensuring corporate accountability for environmental impacts in the upcoming EU directive on sustainable corporate governance

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As the European Union (EU) develops a directive on sustainable corporate governance, this briefing outlines why and how environmental protection must be integrated into companies' due diligence requirements alongside respect for human rights.

## Importance of including environmental protection

Many EU companies are causing or contributing to environmental damage through their own operations or global value chains, creating a huge environmental footprint worldwide.

As the largest trading bloc in the world, the EU has the responsibility to take action to stop business activity from causing and contributing to serious and irreversible environmental harm and loss of natural resources at home and abroad.

The scope of the directive must include the environment in order to effectively contribute to the sustainability objectives enshrined in the EU Treaties and the Green Deal, as well as to meet the EU's climate-related commitments. Establishing mandatory environmental due diligence requirements at the EU level is crucial for ensuring that companies respect the environment. This will contribute to sustainable development and help promote a high level of environmental protection, EU objectives outlined in Article 3(3) and (5) and Article 21(2)(d) and (f) of the Treaty of the European Union (TEU).

Article 11 of the Treaty on the Functioning of the European Union (TFEU) and Article 37 of the EU Charter of Fundamental Rights further require integration of environmental protection into EU policies and the upcoming directive must reflect that. Deep connections between the environment and human rights have increasingly been recognised by governments, courts, international organisations and societies. This is clear in the case of Shell in Nigeria, for instance, where devastating oil spills have caused large-scale, continued contamination of the groundwater and soil,

harming the vegetation and fauna in the area and causing a multitude of human rights impacts including harms to health and the livelihoods of local communities.<sup>1,2</sup>

This is also demonstrated by the unique and disproportionate ways in which climate change and other forms of environmental damage impact vulnerable and marginalised groups. In addition, for many environmental defenders, human rights and environmental concerns are unavoidably interlinked given the violent retaliation they often face for their environmental work.

The full enjoyment of many rights such as the right to food, the right to water, the right to a healthy standard of living and the rights of indigenous peoples are directly connected to the environment. There is also a growing recognition globally of the need to enshrine the right to a healthy environment as a universal right.<sup>3</sup>

The upcoming directive must recognise these connections between human rights and environmental protection. This requires an integrated approach to standards, processes, enforcement and liability.

However, approaching environment protection in the future directive solely through the lens of human rights would leave an important gap in the regulatory framework. Environmental damage can occur without constituting a clear violation of human rights, or without entailing direct or immediate harm to human beings. Both human rights and the environment deserve protection in and of themselves. Therefore, it is critical that the future directive provides specific requirements for environmental protection and covers all potential or actual adverse impacts on the environment. These must be included alongside mechanisms to deal with instances where environmental harm is linked to human rights abuses.

## Approach to environmental due diligence

Human rights and environmental due diligence should be defined as the obligation of companies to take all necessary, adequate and effective measures to identify and assess their actual and potential adverse impacts; prevent, mitigate or cease these impacts; track and monitor the effectiveness of the actions taken; and account for the adverse impacts in their operations, subsidiaries and business relationships throughout their entire value chains. Companies must also be required to remedy harms that have occurred.

The upcoming directive should, at the very least, be in line with the international standards set out in, among other instruments, the United Nations (UN) Guiding Principles on Business and Human Rights as well as in the Organisation for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises.

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<sup>1</sup> Amnesty International, Environmental Rights Action/Friends of the Earth Nigeria, Friends of the Earth Europe, and Milieudefensie/Friends of the Earth Netherlands, [No Clean Up. No Justice](#), June 2020.

<sup>2</sup> In January 2021, [Shell Nigeria was ruled by The Hague Court of Appeals as liable for damages from pipeline leaks in the Niger Delta](#). For the first time, the court held the Dutch parent company accountable for its duty of care abroad and ordered both the Nigerian subsidiary and the Dutch parent company to build better warning systems.

<sup>3</sup> See Article 4 of the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (the Escazu Agreement); Article 24 of the African Charter on Human and People's Rights; and [Joint Statement of United Nations entities on the right to a healthy environment](#).

By introducing similar due diligence requirements for both human rights and environmental impacts, the directive will provide consistency and legal clarity, allowing businesses to take comprehensive, effective and adaptable due diligence action to address their impacts.

## Defining adverse environmental impacts

The EU must provide definitions of the adverse impacts which should be addressed by environmental due diligence. This is necessary to ensure legal certainty, since there is not a comprehensive body of internationally recognised environmental standards covering all environmental impacts, unlike in the field of human rights.

Environmental impacts should be defined by reference to international agreements, where these exist, and complemented by a non-exhaustive catalogue of adverse environmental impacts. When defining environmental impacts, the EU will have to take into consideration the specificities of environmental law.

### (I) Applicable standards

As a starting point, the EU should refer to the principles and normative standards of international environmental agreements, and require companies to ensure respect with those standards in addition to the applicable domestic environmental law.

The future directive should refer to key principles of international and EU environmental law, such as the prevention, precautionary, rectification-at-source and polluter-pays principles (Article 192(2) TFEU), which will be essential in defining these obligations.

International environmental agreements should also be included, such as the Paris Agreement and the Convention on Biodiversity.<sup>4</sup> Though often addressed to states, environmental objectives can and should be translated into concrete obligations for companies.<sup>5</sup> In this regard, the future directive should set out clear requirements for companies to align with the goals and objectives set out in these international environmental agreements.

Nevertheless, the current fragmented patchwork of international instruments does not provide for sufficient coverage of impacts against which companies should conduct environmental due diligence. This regulatory gap should be filled by listing the adverse environmental impacts companies should address, as set out in the next section.

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<sup>4</sup> An illustrative non-exhaustive list of the most relevant international environmental agreements to which the EU is already a Party or a Signatory is available [here](#).

<sup>5</sup> For instance, the Dutch National Contact Point for the OECD Guidelines for Multinational Enterprises has argued that the Paris Agreement can and should translate into business obligations ([Oxfam Novib u.a. versus ING, final statement 19 April 2019](#)), making it clear that banks must formulate concrete climate goals for their financial services, in line with the Paris Agreement.

## (II) Non-exhaustive list of environmental impacts

Adverse environmental impacts should be defined using a broad yet non-exhaustive list of impacts. This will help to inform company responses and action under the directive.

What constitutes an environmental impact must be well defined in order to provide legal clarity and legal certainty. At the same time, the definition must cover the widest range of environmental impacts that can take place across global operations, value chains and investments. Indeed, an overly narrow or selective approach would otherwise leave out certain environmental impacts.<sup>6</sup>

The list of environmental impacts should include but not be limited to direct and indirect impacts related to: climate change (including greenhouse gas emissions), air, soil, water and noise pollution (including through disposal of chemicals), hazardous substances and production of waste, loss of and damage to forests and natural ecosystems, loss of biodiversity, and loss of habitats and species.<sup>7</sup>

It will be key for the EU to develop and regularly review this list in consultation with stakeholders, including civil society representatives, communities affected by corporate activities and land and environmental defenders. It should be integrated into the future directive and further elaborated, as necessary, in delegated legislation and guidelines.

The combination of references within the directive to agreed international standards and EU environmental law, and a non-exhaustive list of environmental impacts will help to provide clarity for companies when conducting their due diligence.

New EU legislation should enforce obligations on companies to reduce and account for their climate change impacts, including but not limited to their own emissions and their indirect greenhouse gas emissions through their global value chains.<sup>8</sup> For instance, the Dutch OECD National Contact Point has interpreted the OECD Guidelines to affirm that the urgency and global impact of climate change necessitates that companies address indirect contributions, which in many sectors make up a significant share of emissions.

EU legislation should specify criteria for corporate climate targets and ensure that companies set concrete goals and targets to bring them in line with the 1.5-degree target scenario of the Paris Agreement. This may include, where appropriate, the cessation of activities or investments that are disproportionately contributing to climate change.

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<sup>6</sup> For example, the [Environmental Liability Directive](#) contains a very restricted definition of what constitutes environmental damage and expressly refers to four EU environmental legislation. Its scope is limited to cases of damages to biodiversity, water and land, and thus fails to cover wider adverse impacts on the environment.

<sup>7</sup> This list reflects recent approaches adopted under the [EU Taxonomy Regulation](#) and the [proposal for a Corporate Sustainability Reporting Directive](#), but attempts to be more comprehensive.

<sup>8</sup> The upcoming directive should therefore cover all three scopes defined by the Greenhouse Gas Protocol: Scope 1 (direct emissions from company-owned and controlled resources), Scope 2 (indirect emissions from the generation of purchased energy) and Scope 3 emissions (all indirect emissions not included in Scope 2 that occur in the value chain of the company).

## Enforcement of environmental protection

An optimal mix of civil, administrative and criminal liability of companies would enhance incentives for companies to prevent environmental harm and provide remedies for victims. This should apply whether the environmental harm has human rights implications or not.

### (I) Administrative and criminal liability

It is key that the upcoming directive provides for national competent authorities, with sufficient human, technical and financial resources as well as expertise, to be responsible for investigating, monitoring and sanctioning non-compliance with the due diligence duty. Competent authorities should be responsible for pursuing companies for failing to comply with their due diligence duties, both on their own initiative and in response to a complaint submitted by third parties.

Members of the public, including non-governmental organisations (NGOs) acting in the public interest, affected communities and environmental defenders, must be empowered to bring complaints against companies before national competent authorities.

Criminal law enforcement would be appropriate for large and/or egregious cases of environmental harms and for certain illegal activities.

### (II) Civil liability

It is also necessary to ensure that companies can be held liable for environmental harms in their global operations and value chains and investments that could have been prevented.<sup>9</sup> Fulfilment of due diligence obligations should not automatically absolve companies of their liability for harm.

Victims of those harms must have access to effective remedies, including accessible procedures for group claims before EU courts, and potential victims must have the possibility to request injunctive relief before environmental harm occurs.

In addition, members of the public, including NGOs, should also have access to justice to hold companies accountable in cases of environmental damage, in line with Article 9(3) of the Aarhus Convention. It is particularly important to expand the scope of potential claimants in cases of harm to the environment, as there can be limited incentives for individuals to bring legal action. In cases involving both environmental and human rights harms, it is important that litigation for environmental harm does not preclude victims from bringing a case on human rights grounds or vice versa.

The civil liability regime should include strong provisions to facilitate access to justice in the EU for victims of corporate abuses under this law, whether harm occurred inside or outside the EU. These must include a fairer distribution of the burden of proof for all evidentiary elements and longer time limitations for victims' transnational claims, particularly taking into account that environmental impacts may only be discovered long after they occurred and their effects may manifest only after a long delay.

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<sup>9</sup> The European Parliament resolutions of 22 October 2020 with recommendations on an EU legal framework to halt and reverse EU-driven global deforestation ([2020/2006\(INL\)](#)) and of 10 March 2021 with recommendations on corporate due diligence and corporate accountability ([2020/2129\(INL\)](#)), and the Committee on Legal Affairs report on the liability of companies for environmental damage ([2020/2027\(INI\)](#)) all call for a civil liability regime.

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