

## Comments on the EU Commission proposal for a Corporate Sustainability Due Diligence Directive (CSDDD)

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GLOBAL CSR appreciates for the opportunity to provide feedback on the proposed Corporate Sustainability Due Diligence Directive (CSDDD). During our 26 years of practice in business and human rights we appreciate that business need a level playing field to ensure that commercial activity do not hamper, but contributes to, social sustainability. In the current climate and bio-diversity crisis it is equally important that businesses diligently manage their adverse impacts on environmental sustainability and contribute to finding sustainable solutions. Finally, having a global financial system building on market economies require that business activities are undertaken in a manner that do not harm economic sustainability. This last element appears not to be part of the CSDDD.

Having worked closely with businesses over decades, GLOBAL CSR realises that voluntary initiatives may enable some change; however, obviously not in a scale that will enable sustainable development. To date few businesses have taken the lead and have made the necessary investments in systems and capacity development to demonstrate – and document - responsible business conduct. Before 2011 businesses yearned for solid ground for their efforts in achieving their social license to operate. Hence, when the former UN Secretary General's Special Representative on Business and Human Rights, late Prof. John G. Ruggie, from 2005 to 2011 solved the gordian knot of defining a global authoritative minimum management standard for how business should respect human rights, this work was not only unanimously endorsed in the UN, but highly appreciated by businesses.

The UN Guiding Principles on Business and Human Rights (the UNGPs) from 2011 represented the first globally agreed corporate management standard from the UN ever. As highlighted by Prof. Ruggie during his mandate human rights forms the bedrock of *social sustainability*; and his mandate was restricted to cover social sustainability only. When the OECD in late 2010, based on the draft of the UNGPs, decided to update the OECD Guidelines for Multinational Enterprises (hereinafter referred to as the OECD), the organisation turned to Prof. Ruggie, who wisely advised to apply the carefully drafted UNGPs, Pillar 2, word by word for the OECD update. Hence, the UNGPs forms the source of the OECD, although the OECD update chose to apply the carefully drafted system for managing impacts on the key elements of social sustainability to include adverse impacts on environmental and economic sustainability as well.

Whereas the OECD are voluntary by nature, the UNGPs, as a new construct in international law, is more ambiguous. UNGPs Pillar I, the State Duty to Protect, represents the authoritative interpretation by the UN of existing hard law obligations on member states. Hence, when it is argued that UNGPs are 'soft law' there is an important caveat to this proposition; that member states under existing international human rights hard law obligations are bound by the authoritative interpretation of such obligations offered by the UNGPs. UNGPs Pillar I clearly expect states to regulate businesses with their jurisdiction or territories the 'respect human rights' as defined by Pillar II.

With the proposed 'Corporate Sustainability Due Diligence Directive' (the CSDDD) the European Union has taken laudable steps to ensure that member states meet their existing obligations under international human rights law. Appreciating the Green Deal and the urgency in addressing environmental degradation, not least in relation to climate change and biodiversity, it is applauded that the CSDDD also set out to establish mandatory environmental due diligence requirements as defined by the OECD. However, GLOBAL CSR is curious, why the EU, in regulation that deals with sustainability, refrained from including economic sustainability, i.e., the requirement to establish management to prevent or mitigate risks of adverse impacts to economic sustainability (anti-corruption, anti-trust, fraud, embezzlement, tax evasion).

Considering that the UNGPs form the global minimum standard for responsible business conduct, the initiative by the EU Commission holds promising perspectives considering the economic importance of the EU market and its corporations. However, it is equally important for the EU to fulfil such potential, that the EU does not deviate too drastically from the globally agreed standard. Whereas all states have agreed to the definitions and requirements to businesses to respect human right as outlined by the UNGPs, the EU may well short circuit the positive, although nascent, developments that we have noticed internationally, if the EU seek to push or alter the definitions and scope envisioned by the UNGPs. Furthermore, deviations may have severe consequences for the 'principled pragmatism' under which the UNGPs were presented by Prof. Ruggie in 2011.

In our analysis of the proposal for a CSDDD, GLOBAL CSR is pleased to ascertain that the businesses, that we have advised in implementing the UNGPs/OECD over the past ten years will be able to document both governance and due diligence as expected by the CSDDD up to 90%. The remaining 10% represent elements where the EU, in our opinion, propose formal requirements that extend beyond the requirements of the UNGPs/OECD and that may represent a host of legal uncertainties for businesses. In brief, these areas are

foremost: Extraterritorial civil liability, where businesses are merely linked to adverse impacts; requirements to list 'established business relationships'; requirements to contract clauses with such business relationships; and requirements to the 'Due Diligence Policy'.

GLOBAL CSR has followed closely UNGPs implementation efforts by both large and medium-sized companies over the past decade. Whereas many companies claim to implement the UNGPs, we find that many such companies may have some way to go still. The requirements from the UNGPs to conduct and document regular operational-level human rights impact assessments is met by very few companies only.

The practice observed with many multinational enterprises to conduct bi- or even tri-annual human rights assessments, whereby the companies seek to identify the 'salient' human rights risks across all their global operations and value chains, may enable such companies to deal with some inherent risks to their business model. GLOBAL CSR appreciates that in the early years following the global endorsement of the UNGPs, such assessments could serve the purpose of making the companies aware that human rights were relevant to their business. However, it should be underlined that such assessments do not fulfil the requirements for human rights due diligence under the UNGPs.

Should the EU Commission find interest in engaging with companies that display best practices in conducting regular operational-level social, environmental, and economic sustainability due diligence (internally) and require due diligence from their business relationships, the EU Commission is welcome to reach out to the Nordic companies mentioned in Annex A, below.

GLOBAL CSR is particularly pleased that the EU Commission in the CSDDD proposal abandoned the challenging approach that was represented in the EU Parliament's draft directive, that businesses should map and/or disclose their full value chain. Such requirement would represent a major waste of resources and threat to economic sustainability for SMEs forming part of value chains, confer our recent [discussion paper](#) on the subject.

Overall GLOBAL CSR in brief applauds the following features of the CSDDD:

- Claims full alignment with the UNGPs/OECD
- Requires Due Diligence – also internally - for all companies in scope
- Has abandoned 'mapping the value chain'
- Establishes accountability measures:
  - Penalties proportionate to turnover

- Civil liability for impacts

As addressed above and in line with the comments from several other experts in the field GLOBAL CSR strongly recommends that the CSDDD is further aligned with the text and intentions of the UNGPs. For this purpose, GLOBAL CSR notes that the terminology and definitions applied by the CSDDD in central areas deviate from the UNGPs.

Our comments, that shall not be viewed as exhaustive, centre on seven such deviations:

1. The Scope is very limited: >500 employees and > 150 MEUR turnover
  - a. (4 years) >250 / > 40 MEUR – high impact sectors  
(textiles/agriculture/extractives)
2. Conflates own due diligence (cause/contribute to) with due diligence in business relationships
3. Conflates UNGPs Policy Commitment requirements with Due Diligence Policy requirements, including challenges in relation the concrete requirements to such 'Due Diligence Policy'
4. Terminology:
  - a. Has no clear use of adverse impacts, severe adverse impacts, gross adverse impacts as defined by the UNGPs.
  - b. Introduces that business (beyond contributing to gross impacts) can 'violate' human rights.
  - c. These deviations lead to the challenge that the CSDDD conflates due diligence (management process) with legal compliance.
5. Introduces responsibility to provide access to remedy, where a company is merely 'linked to' adverse impacts and adds civil liability.
  - a. Sect. 58 leaves the challenge of dealing with liability, where companies are merely linked to adverse impact to national law.
6. Misses the explicit requirements from the UNGPs for communication of the results of due diligence to, at minimum, impacted stakeholders, and business relationships.
7. Introduces the term 'Established Business Relationships' departing from the UNGPs terminology of crucial- and non-crucial business relationships.

## Comments:

### Re. 1. The Scope of the proposed CSDDD is very limited: >500 employees / >150 MEUR turnover

GLOBAL CSR notes that the basic idea presented by the UNGPs contained the basic assumption that *all* businesses should respect human rights. It was based on the clear, and documented, assumption that all businesses are at risk of causing adverse impacts on human rights. Through our practice, GLOBAL CSR found that this is indeed the case. All businesses with more than one employee will be at risk of adversely impacting no less than 15 of the 48 human rights referenced in the International Bill of Human Rights, that forms the minimum that any company should assess risks against, confer UNGPs Foundational Principle 12.

Prof. Ruggie, who also had dialogue with representatives of SMEs associations during his mandate, was aware that many SMEs would not have the same financial and/or management capacity as larger businesses. Hence, he chose to make clear in the UNGPs that *“(h)uman rights due diligence” “(w)ill vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations”*, thus allowing SMEs to apply less formal management systems.

In 2012 the EU Commission commissioned GLOBAL CSR to develop a guideline to respect human rights for SMEs. The guideline was translated to 25 languages and Prof. Ruggie with the organisation he chaired, Shift, graciously provided for input and guidance to develop the guideline. Subsequently, Prof. Ruggie informed GLOBAL CSR, that he used the guideline in his classes at Harvard. The guideline(s) can be retrieved [here](#).

#### a. (4 years) >250 / >40 MEUR)– high impact sectors (textiles/agriculture/extractives)

Limiting the scope of the CSDDD to some companies only, apparently prompted the EU Commission to lower the threshold for a few sectors, that, according to the EU, are considered per definition to have more significant adverse impacts on sustainability than other sectors. GLOBAL CSR guesses that the selection of these sectors reflects considerations of environmental impacts only. Here the energy-, and transportation sectors a.o. are missing. In addition, if social impacts were included, sectors like the pharmaceutical, the defence- and security, the ICT, the legal, etc. would be obvious to include as well. It shall be noted that this exercise could be completely avoided, had the EU Commission aligned the CSDDD proposal fully with the UNGPs/OECD, and included all companies.

**Consequences – not exhaustive:**

- i. The CSDDD will not assist member states fully fulfil their obligations under international human rights law.
- ii. The CSDDD will dissuade companies outside the scope to conduct due diligence. Companies outside the scope may get the impression, that they should not respect human rights, or indeed, that it is too difficult. This is a strong warning signal, that the EU Commission by deviating from the definitions in the UNGPs end up in a situation, whereby the ‘principled pragmatism’ apparently is lost.
- iii. The CSDDD incentivizes companies within the scope to create business relationships with other companies, that are also within the scope, thereby creating assurance that the business relationships meet their responsibility to respect human rights. This will decrease competitiveness of SMEs in value chains.
- iv. Interestingly, the CSDDD does require the companies ‘in scope’ to require from their busy relationships of all sizes to conduct due diligence. It may lead to a range of unnecessary discussions and conflicts between business relationships, that, on the one hand, companies outside the scope will be required by business relationships to conduct due diligence, and on the other hand, the regulator found it to ‘overwhelming’ for such entities to meet the minimum standard.

**Re. 2: The proposed CSDDD conflates own due diligence (cause/contribute to) with due diligence in business relationships**

Through the entire proposal the EU Commission conflates due diligence in own operations with due diligence in business relationships, e.g., Art. 6 (1): *“Member States shall ensure that companies take appropriate measures to identify actual and potential adverse human rights impacts and adverse environmental impacts arising from their own operations or those of their subsidiaries and, where related to their value chains, from their established business relationships”*.

GLOBAL CSR strongly recommends that the CSDDD will define more clearly the difference between conducting own due diligence (own operations, that naturally includes subsidiaries) and conducting due diligence in business relationships. Here the application of the three options defined by the UNGPs, on how companies can be involved with adverse human rights impacts, are very important, yet absent from the proposal. Companies may *cause, contribute to, or be linked to* adverse impacts.

The UNGPs make explicit that companies are responsible, not liable, for adverse impacts in their full value chain. However, foundational principle 13 clearly outlines that the responsibility consists of two management streams:

- a) where the company may cause or contribute to adverse impacts on human rights, it shall act to prevent or mitigate such impacts, and
- b) where the company is merely linked to adverse impacts through its business relationships, it shall *seek* to prevent or mitigate the impacts.

Litra (a) is relatively straight forward. The regular operational-level impact assessments, that a company shall undertake as part of its own due diligence, will reveal where the company (or subsidiary) is at risk of *causing or contributing to* adverse impacts on human rights, concretely for that part of the company. It is advised to go by geographic locations considering that risk patterns differ from one context to the next.

The company then needs to outline, what it does to prevent or mitigate the identified risks of impacts, and how it measures effectiveness of its actions. According to the UNGPs the company, at a minimum, shall be able to disclose this assessment to persons, who may experience adverse impacts, and to its business relationships.<sup>1</sup>

Hence, to document proper human rights due diligence for own operations to supervisory bodies under the CSDDD mechanism for accountability, and to impacted stakeholders and business relationships under the UNGPs, the company should be able to produce and submit adequate information on:

1. Risks of and actual impacts identified,
2. Potentially and actually impacted stakeholders,
3. Actions to prevent or mitigate,
4. How impacted stakeholders are engaged,
5. Indicators to measure effectiveness of actions,
6. Who is responsible for carrying through the actions, and
7. Resources set aside,

all as outlined by the UNGPs.

It shall be noted that the exemption clause in UNGPs principle 24, where companies can prioritise actions to prevent or mitigate to address the most severe impacts, rarely applies for this part of the company's due diligence activity. GLOBAL CSR has not yet conducted an

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<sup>1</sup> This requirement is the core transparency requirement in the UNGPs. When applied to environmental impacts through the OECD the transparency requirement exceeds that of, e.g., an EMAS or an ISO 14001 certification. These certification schemes provide for assurance that a management system – like the one described in the OECD – exists. However, business relationships will have no insight into the actual impacts, how they are managed in concrete, and, not least, the indicators to measure effectiveness of the actions.

operational-level human rights impact assessment, where the company had to refrain from acting on identified impacts due to resource restraints.

### **UNGPs foundational principle 13 (b)**

A different reality meets a company, when it must establish its due diligence system in business relationships, confer UNGPs foundational principle 13 (b). The company can rest assured that any of its business relationships would identify risks of adverse impacts on at least 15 of the 48 human rights from the International Bill Human Rights. Deciding where to direct the company's resources to meet the requirement to *"seek to prevent or mitigate adverse human rights impacts"* will require the company to prioritise its activities as outlined in principle 24.

### **Applying the UNGPs in business relationships**

In 2013 GLOBAL CSR had the opportunity to outline how the UNGPs could be applied as part of 'responsible supply chain management' in a report prepared for the Danish Ministry of Industry, Business and Financial Affairs and Danish Shipowners, an industry association. Prof. John Ruggie courteously reviewed the draft report and added valuable insights to the proposed application of the UNGPs to managing a company's responsibility vis á vis the upstream value chain. At that time responsible supply chain management had enjoyed major focus from many companies around the world already since the mid-nineties. In brief the report concluded, that the globally unanimously endorsed minimum standard for responsible conduct, the UNGPs, require that all companies:

1. Require from their corporate relationships, that they meet the minimum standard (Policy Commitment, Due Diligence, Access to Remedy).
2. Engage with known severe impacts anywhere in the value chain, where necessary.
  - a. Engagement with potential severe impacts will be relatively rare insofar that the company's businessrelationships are required to implement the UNGPs and hence officially communicate, how they address risks of severe impacts. Where a company is – or should be – aware of certain risks of severe impacts, e.g. the risk of buying conflict minerals; the risk of forced labour, child labour or other rights in a certain country at a certain time (as was the case with: cotton from Uzbekistan; poor construction of buildings in Bangladesh; exploitative child labour in the cocoa industry; palm oil industry; coal mining in Colombia; privacy and political affairs for SoMe platforms, etc.) the company should raise the need for increased due diligence in relation to such impacts in the relevant parts of the value chain.
  - b. Engagement with actual severe impacts in the value chains may require more resources. A company may face criticism for such impacts that suddenly arise



even though the company has required due diligence to take place, and therefore should expect that this requirement has moved down or up the chain to cover all business entities in the chain. Such impacts would clearly indicate that the chain has broken; that cascading of responsibility did not work. The causing entity has obviously failed to prevent or mitigate the impact. According to the UNGPs, and here in particular the response that Prof. John Ruggie forwarded to the OECD<sup>2</sup>, outlining what to do in these situations, engagement will be in the form of using the company's leverage over the causing entity. This is done to make the entity stop the impact, and make sure it does not re-occur, i.e., that the entity in question will conduct proper due diligence. If the company has no leverage over the entity the company is expected to build its leverage. The company could for this purpose engage other business relationships, business associations or even governments. The company could also seek to incentivise the causing entity, e.g., by assisting or promising a long-term business relationship. Historically, investors call this activity 'active ownership'.

### **The key: Documenting Due Diligence in value chains**

As mentioned, the key to transparency and accountability is embedded in the UNGPs due diligence requirements. According to the UNGPs, principle 21, every company should be able to disclose to impacted persons and any other business relationship the results of the company's internal human rights (environmental, and economic) due diligence<sup>3</sup>.

This requirement also holds the key to rapid global scaling up of 'respect for human rights', as intended by the UNGPs.

From the perspective of more traditional responsible supply chain management initiatives, companies will no longer require their suppliers to live up to some pre-defined indicators on a few labour rights; they will require suppliers to do their own due diligence in alignment with the UNGPs and to push this requirement to the suppliers' business relationships. Every buyer company would be able to share its most recent impact assessment with its suppliers, and thereby inspire and enable such suppliers to make their own impact assessments, covering where they may cause or contribute to adverse impacts.

Where all concerned parties used to rely on audits, even third-party, the requirements for *self-declaration* embedded in the UNGPs due diligence requirements may considerably

<sup>2</sup> <https://www.oecd.org/investment/mne/45535896.pdf>

<sup>3</sup> Commentary to UNGPs principle 21: "Showing involves communication, providing a measure of transparency and accountability to individuals or groups who may be impacted and to other relevant stakeholders, including investors". It should be obvious, that supervisory bodies to be appointed according to the CSDDD will become relevant stakeholders.

reduce the need for such practices. Proper implementation of UNGPs and the scaling up of respect for human rights holds the promise of bringing an end to ‘audit fatigue’. With the CSDDD it is required that companies can *document due diligence*; and soon companies will also need to be able to document due diligence to the supervisory bodies. The big question that will need to be answered will be the ‘quality’ of such documentation.

Trying to define a due diligence process, that shall be pragmatic, greater alignment with the UNPGs definitions are required. With the CSDDD definition companies will have the obligation to “*identify ... potential adverse ... impacts ... from their established business relationships*”. Considering that all companies, no matter where they operate or what they do, are at risk of impacting no less than 15 human rights, such requirement is impossible to fulfil, and not pragmatic. All companies need to identify and manage risks of causing or contributing to adverse human rights impacts in own operations and to communicate what they do to their business relationships, as required by the UNGPs.

**Consequences – not exhaustive:**

- i. The CSDDD may confuse companies in scope and their value chains. Are the companies equally responsible for adverse impacts that they cause, contribute to, or are linked to? Should the due diligence systems be established as a one-string management system; or will proper due diligence require different engagement, depending on whether the company in question, and its subsidiaries, are at risk of *causing or contributing to*, or at risk of being linked to adverse impacts?
- ii. The CSDDD may support the notion observed with many European companies, that they do not find management of risks of causing or contributing to adverse impacts from own operations necessary although the UNGPs and the preparatory work made clear that all corporations, no matter where they operate or what they do are at risk of causing or contributing to adverse impacts on human rights.
- iii. Thus, the CSDDD may be viewed by non-EU states NOT to seek to create a global level playing field for respecting human rights by businesses, but rather to reinforce the perceptions that were held by many business representatives before the UNGPs; that dealing with human rights impacts were relevant outside the EU only.

**Re. 3.: Conflates UNGPs Policy Commitment requirements with Due Diligence Policy requirements, including challenges in relation the concrete requirements to such ‘Due Diligence Policy’**

GLOBAL CSR recommends that the ‘governance’ requirements under the proposed CSDDD are closely aligned with the UNGPs.

The requirements to a Policy Commitment to respect human rights is clearly defined in principle 16. The proposed CSDDD in Article 5 require states to make sure “*that companies integrate due diligence into all their corporate policies and have in place a due diligence policy*”. The UNGPs principle 16 require an overarching commitment to ‘respect human rights’, that, by definition, includes a commitment to conduct due diligence. One of the five bespoke requirements to the policy commitment is that it is ‘embedded’ in all other policies and procedures of the company.

The CSDDD requirement to a ‘due diligence’ policy pose several challenges compared to the to UNGPs requirements:

1. Should the DD policy exist next to the overall policy commitment (as required by the UNGPs to respect human rights)?
2. Will the CSDDD disregard other requirements from UNGPs principle 16 (a)-(e)? (Most senior level approval; informed by relevant expertise; describe, at minimum, expectations of employees and business relationships, publication, and communication of commitment; embedding in operational policies and procedures).

From our vast experience in formulating policy commitments that meet the requirements under UNGPs principle 16, we have realized that company governance systems need to be kept as tight as possible. Typically, policies are expected to be read and understood by all employees, whereas procedures shall be targeted those employees, who in their job position need to act in relation to the policy. By dictating a lengthy *policy* document, the CSDDD conflates the UNGPs requirement to an overall policy commitment with the operational procedures to implement such commitment<sup>4</sup>.

**Re. Article 5 (a) and (c):** In addition to the remarks above, GLOBAL CSR notes, that lengthy descriptions of processes and measures adds very little value and may well become a desk exercise. GLOBAL CSR recommends that the EU will rather emphasize the need for companies to document *the outcome of the due diligence processes*, i.e., the regular operational level impact assessments and communications to business relationships.

**Re. Article 5 (b) and (c):**

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<sup>4</sup> See examples of Policy Commitments in alignment with the UNGPs/OECD: Molslinjen: <https://www.molslinjen.dk/kontakt/om-selskabet/csr-policy-commitment>; Aalborg Forsyning: <https://aalborgforsyning.dk/media/z0ggnc/policy-on-corporate-social-responsibility.pdf>; Polaris Private Equity: <http://polarisequity.dk/wp-content/uploads/2021/03/Polaris-Sustainability-Commitment-2021.pdf>; and Contour Design: <https://contour-design.co.uk/wp-content/uploads/2022/05/Contour-Design-Sustainability-Policy.pdf>. For a bespoke human rights policy, see Arla: <https://www.arla.com/49b360/globalassets/arla-global/company--overview/responsibility/human-rights/2020/human-rights-policy-may-2020.pdf>

*Subsidiaries:* GLOBAL CSR notes that most corporate policies will apply to both the mother company and its subsidiaries. It should not be necessary to create a ‘*code of conduct for ... subsidiaries*’ as required by the CSDDD; but merely make clear that a policy commitment shall apply to all majority owned entities.

*Employees:* According to the UNGPs the overarching policy commitment shall state, what the company expects from its employees. Some companies, although it is not required by the UNGPs/OECD, choose to elaborate on this passus from the policy commitment, and develop a bespoke ‘code of conduct for employees’, that would typically highlight the expected behaviour of the company’s employees; both in general vis á vis sustainability and, *in particular, where the company has identified risks of adverse impacts on social, environmental and economic sustainability.* This latter part, where the company has identified risks of impacts and what the company does to prevent or mitigate such impacts, is unique to the individual company activities and its context. It would make very little sense “to extend its (i.e., the code of conduct for employees and subsidiaries) application to established business relationships”, considering that all such business relationships would have their own unique risks of impacts and actions to prevent or mitigate such impacts, all depending on their activities and context.

Also, according to the UNGPs, the overarching policy commitment shall state, what the company expects from its business relationships. Some companies, although it is not required by the UNGPs/OECD, choose to elaborate on this passus from the policy commitment, and develop a bespoke ‘Code of Conduct for Business Relationship’<sup>5</sup>, where the company elaborates on the brief expectation to business relationships as described in the policy commitment. As established above (confer paragraphs under Re. 2), the company shall, at minimum, require from its business relationships to meet the internationally agreed management standard, the UNGPs/OECD, as well. GLOBAL CSR is pleased to note that more traditional supplier codes of conduct, that would focus on one end of the value chain, a few labour rights only and that would fail to require compliance with the UNGPs, are being substituted by ‘Codes of Conduct for Business Relationships’.<sup>6</sup>

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<sup>5</sup> It should be noted that a Code of Conduct for Suppliers indicate that the company in question does not meet the requirements from the UNGPs, where the responsibility, similarly to the CSDDD, extends to both ends of the value chain and not upstream only.

<sup>6</sup> A few best practices, with two FAQs are highlighted here. More samples can be forwarded upon request: See Codes of Conduct - <https://prodata.dk/media/CoC.pdf>; <https://www.terma.com/media/higcrx1/business-relationship-code-of-conduct-final.pdf>; [https://presscloud.com/file/39/395636171608727/MENU\\_code\\_of\\_conduct.pdf](https://presscloud.com/file/39/395636171608727/MENU_code_of_conduct.pdf); <https://aalborgforsyning.dk/media/wrddrd12/business-relationships-code-of-conduct.pdf>; <https://www.molslinjen.dk/media/504911/molslinjens-code-of-conduct-for-business-relationships-2020.pdf>. See FAQs: <https://contour-design.co.uk/wp-content/uploads/2022/05/FAQ-Code-of-Conduct-for-Business-Relationships-English.pdf>; and <https://www.molslinjen.dk/kontakt/om-selskabet/faq-en>.

**Consequences – not exhaustive:**

- i. The CSDDD may confuse companies, while conflicting with ordinary corporate practices in establishing and maintaining corporate governance systems. The CSDDD appear to require the company write up a lengthy policy commitment (due diligence policy) that not only describes the approach to due diligence, short- and long term, the processes to implement due diligence, measures to verify compliance with the code of conduct (which must be the code of conduct for employees and subsidiaries), and measures to extend it to established business relationships. Should the policy appear next to the policy commitment required under the UNGPs/OECD? If the CSDDD endeavours to set requirements for EU based companies that goes beyond the requirements of the UNGPs/OECD, GLOBAL CSR recommends that the policy commitment requirements from the UNGPs/OECD are replicated into the CSDDD, and, if necessary, complemented with requirements for bespoke codes of conduct - one for employees and one for business relationships. This could be parred with requirements for *documenting due diligence for own operations* (confer Re. 2 – about foundational principle 13 litra (a)) and *documenting due diligence in business relationships* (confer Re. 2 – about foundational principle 13 (b)).
- ii. Deviating from the UNGPs/OECD to the extent presented in the proposed CSDDD, imposing additional unnecessary and not strictly logical formal requirements, may lead a situation, where other jurisdictions seeking to meet their obligations under UNGPs pillar I, may align more closely with the standard creating a situation, where EU companies are not in compliance, when operating in such jurisdictions, despite compliance with the CSDDD.

**Re. 4.: Terminology:**

- a. The CSDDD has no clear use of adverse impacts, severe adverse impacts, gross adverse impacts as defined by the UNGPs.
- b. Introduces that business (beyond contributing to gross impacts) can ‘violate’ human rights.
- c. These deviations lead to the challenge that the CSDDD conflates due diligence (management process) with legal compliance.

The UNGPs had to define new terminology concerning businesses respect for human rights that made it clear that such responsibility is different from states obligations to respect, protect and fulfil human rights under international human rights law, that was written for states. In the early discussions, before Prof. John Ruggie’s mandate, states were very keen

to ensure that states obligations differed from the responsibilities of businesses. The UNGPs are very clear in this respect and Prof. John Ruggie spend a full report explaining that the corporate responsibility to *respect* human rights by no means is to be confused with the states obligations to *respect* human rights. By defining corporate responsibility to respect human rights by a management system, known to businesses, and with the intention of preventing or mitigating risks of impact, rather than providing remedy, when things have gone wrong, Prof. Ruggie came up with the term 'adverse impacts' signalling, that businesses need to identify risks of impacts, and manage them, before they turn into severe or even gross impacts. The CSDDD does not apply the distinctions between adverse human rights impacts, severe human rights impacts and gross human rights abuses.

"The Corporate Responsibility to Respect Human Rights: An Interpretative Guide" clearly defines an adverse human rights impact on page 5: "*An "adverse human rights impact" occurs when an action removes or reduces the ability of an individual to enjoy his or her human rights*". UNGPs foundational principle 12 cleverly outlined that the minimum range of rights to be assessed against would be those outlined by the globally agreed 'International Bill of Human Rights'.

In comparison the CSDDD in art. 3 litra (c) applies the definition: "*adverse human rights impact' means and adverse impact on protected persons resulting from the violation of one of the rights or prohibitions listed in the Annex, Part I Section 1, as enshrined in the international conventions listed in the Annex, Part I, Section 2*". With this the CSDDD introduces, that businesses can *violate* human rights, bringing the discourse back to square one and the 'name and shame' era; disregarding the carefully drafted opportunity for a 'know and show' era of business and human rights as provided for by the UNGPs.

It shall be noted that the very loose definitions in the Annex, Part I, Section 1, by no means, will create legal clarity for businesses, on the contrary. E.g., would periodic overwork required from the company's employees lead to violations of human rights? Confer Annex, Part I, Section 1, litra 7: "*Violation of the right to enjoy just and favourable conditions of work, including ... reasonable limitation of working in accordance with Article 7 of the International Covenant on Economic, Social and Cultural Rights*". If this becomes the reality for EU based companies, we can be certain that they will refrain from even identifying the risk of adverse impacts on the right to rest, leisure and paid holidays; although it is a given risk for all businesses with employees, and a risk that both the authorities and business relationships would like to rest assured that any business manages well.

The UNGPs carefully avoided this pitfall of conflating states risk of *violating* human rights law, because they are bound by human rights law, and companies risks of adversely impacting on peoples' human rights. The only exemption in the UNGPs appear in principle 23, litra (c), where business enterprises should: *"Treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate"*. This is the exemption to the general rule in the UNGPs, confer the commentary to foundational principle 12: *"The responsibility of business enterprises to respect human rights is distinct from issues of legal liability and enforcement, which remain defined largely by national law provisions in relevant jurisdictions."*

**Consequences – not exhaustive:**

- i. The attempt of CSDDD to define corporate *violations* of human rights will carry along a host of legal implications and challenges that will find their way to courtrooms all over EU, if pursued. The EU member states should also be aware that every time an actual adverse human rights impact (violation) by a company is found, this would also amount to a violation of the states' duties to protect human rights.

GLOBAL CSR regrets that we did not find time to comment on the remaining identified differences between the CSDDD and the definitions in the UNGPs. Also, we did not find time to edit comments above, and apologize for spelling, language, grammatical, and other challenges.

The EU institutions are welcome to contact GLOBAL CSR to discuss both the comments above and our remaining challenges to the CSDDD:

Re. 5.: The CSDDD introduces responsibility to provide access to remedy, where a company is merely 'linked to' adverse impacts and adds civil liability.

- a) Sect. 58 leaves the challenge of dealing with liability, where companies are merely linked to adverse impact to national law.

Re. 6.: The CSDDD misses the explicit requirements from the UNGPs for communication of the results of due diligence to, at minimum, impacted stakeholders, and business relationships.

Re. 7.: The CSDDD introduces the term 'Established Business Relationships' departing from the UNGPs terminology of crucial- and non-crucial business relationships.

GLOBAL CSR is also confident that the companies listed in Annex A would be pleased to share their experiences in implementing the UNGPs/OECD for own operations and in business relationships.

**Annex A:**

**For contact persons and contact details for representatives of the mentioned businesses, please contact GLOBAL CSR at [info@globalcsr.net](mailto:info@globalcsr.net).**

1. Public utility:
  - a. Aalborg Forsyning
2. SME - Large:
  - a. Contour Design
  - b. Configit
  - c. RelyOn Nutec
  - d. Sinful
3. Large:
  - a. Molslinjen
4. Capital Fund:
  - a. Polaris Private Equity
5. Business Associations:
  - a. Danmarks Restauranter og Caféer (REGA initiative) - 16 members of REGA are implementing sustainability due diligence.