

## **Including Human Rights Defenders in the EU Directive on mandatory human rights and environmental due diligence for companies: key points and practical examples**

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### **Who are human rights defenders?**

Human rights defenders (HRDs) are people who take peaceful action to promote and protect the human rights of others. The right of all people to do so, individually or collectively, was recognised by all UN Member States with the adoption of the UN Declaration on Human Rights Defenders by consensus at the UN General Assembly in December 1998. Support for HRDs is a long-established component of EU foreign policy, as most prominently exemplified in the EU Guidelines on Human Rights Defenders and ProtectDefenders.eu, the EU's support mechanism for human rights defenders.

### **What nexus is there between human rights defenders, companies headquartered in the EU and those accessing its internal market?**

Human rights defenders are vital to ensuring corporate respect for human rights and the healthy environment that many rights rely on. They document negative human rights and environmental impacts of business activities; bring risks of violations and harms to the attention of the States and private actors involved; identify factors, including domestic law and policies, which contribute to such risks and impacts; propose solutions to these contributing factors and support affected communities seeking remedy and justice in cases where negative human rights and environmental impacts have occurred along company value chains.

However, human rights defenders all over the world, including women and indigenous human rights defenders, face retaliation when raising human rights and environmental concerns connected with corporate activity, including within the value chains of EU companies. This has been documented in great detail by international, regional, and national level human rights bodies, including in a report by my predecessor on the mandate, as well as by civil society organisations and human rights defenders themselves. Those defenders most often targeted emerge from communities directly affected by the negative human rights and environmental impact of corporate activities. They take a stand for human rights and the environment outside of any structure that might offer them access to pre-existing protection or support mechanisms, such as trade unions or non-governmental organisations.

The risks at hand are severe. As I stated in my report to the General Assembly in December 2020, of the 281 killings of human rights defenders documented by the Office of the High Commissioner for Human Rights (OHCHR) in 2019, half were working on the intersecting issues of land and environment, poverty, the rights of indigenous and afrodescendent peoples and other minorities, and the impact of business activities. In a report published last year, the NGO Global Witness documented the killing of 227 land and environmental defenders in 2020, around 30% of which were alleged to be linked to logging, mining, large-scale agribusiness, hydroelectric dams and other infrastructure projects.

Retaliation may also take the form of smear campaigns, verbal or physical intimidation and violence, surveillance online and offline, criminalisation, destruction of property and discrimination in employment.

**Why are human rights defenders particularly important to include in the proposed EU directive on mandatory human rights and environmental due diligence for companies?**

Human rights defenders will be vital partners for the EU and its Member States in monitoring compliance with the proposed EU Directive and thereby ensuring its effectiveness. However, HRDs, and in particular those from communities directly affected or at risk of being affected by the negative human rights or environmental impacts of business activities, are among the stakeholders who will run the highest risk of retaliation when raising concerns about these same negative impacts.

As human rights defenders are exposed to retaliation when voicing concerns as to the negative environmental and human rights impacts and risks of business activities, they stand to see their security greatly improved if businesses are obliged to take into account any potential negative risks for persons defending human rights that they might contribute to through their activities and business relationships.

With these points in mind, I strongly believe the proposed Directive would be greatly strengthened by the inclusion of the following vital provisions:

- 1) **The inclusion of human rights defenders as named stakeholders** with whom EU companies and those accessing the internal market be obliged to consult in the exercise of their due diligence duty;
- 2) **A negative obligation on EU companies and those accessing the internal market to refrain from retaliation of any sort against human rights defenders and others raising concerns as to the negative human rights and environmental impact, or risk thereof, arising from their business activities and/or business relationships**, either within the context of a company's due diligence engagement, or when HRDs are pursuing remedy for negative impacts caused by a company's failure to comply with its obligations under the proposed Directive;
- 3) **A positive obligation on EU companies and those accessing the internal market to prevent retaliation against human rights defenders and others raising concerns about the negative human rights and environmental impact, or risk thereof, arising from their activities and/or business relationships**, to be realised through the identification, assessment, prevention and/or mitigation of risks of retaliation against human rights defenders as part of a company's due diligence obligations. This process should be carried out with a gender lens applied, and any action required in response to any identified risks of a serious nature, for example, criminalisation, threats or other risk of physical violence, should be prioritised, with steps needed to mitigate risks designed in collaboration with the human rights defenders affected;
- 4) **The provision of criminal liability in cases where EU companies and those accessing the internal market have caused, or can reasonably be deemed to have contributed to, severe retaliation against human rights defenders** raising concerns about a company's negative human rights and environmental impact, or the risk thereof, with the burden of proof in discharging claims of retaliation resting with the company in question. Examples of severe retaliation would include killings and serious cases of assault. This provision should extend to include possible criminal liability for a company's failure to prevent, through the full and proper exercise of its due diligence duty, retaliation against human rights defenders raising concerns related to its activities and/or business relationships;

5) **The provision of civil liability for damages** in cases where human rights defenders have suffered retaliation, of any level of severity, in such circumstances as laid out in points 2 and 3 above.

6) **The request for Member States to extend legal protection for sources, as already afforded to journalists in many jurisdictions<sup>1</sup>, to human rights defenders bringing legal actions on behalf of affected communities and individuals under the provisions of the Directive**, to the effect that they would not be obliged to disclose the names of those affected in the course of their action, and thereby avoid potentially exposing them to retaliation.

If the preparation of thematic and/or sector specific guidance is foreseen to support the effective implementation of the Directive, I also believe that **guidance on managing risks of retaliation against those raising concerns in relation to the provisions of the Directive, including against human rights defenders**, would be of great value in ensuring the Directive meets its purposes of fostering respect for human rights and the environment by companies and providing access to remedy for victims, including human rights defenders, where their rights have been seen to be violated.

#### *Do similar provisions already exist in EU law or other sources?*

Provisions and possible models for the inclusion of such clauses concerning the prevention of retaliation against human rights defenders in the proposed Directive can be found in a several instruments at the international, EU and national levels.

- *At the international level*

*The UN Guiding Principles on Business and Human Rights*: In the official Commentary to Guiding Principle 18, it is stated that businesses should consider **consulting with human rights defenders** when assessing the human rights impacts connected to their activities or their business relationships. In the Commentary concerning Guiding Principle 26, relating to access to remedy through State-based judicial mechanisms, it is stated that **States should ensure that the legitimate and peaceful activities of human rights defenders are not obstructed**.

*The OECD Guidelines for Multinational Enterprises*: In its 2018 General Due Diligence Guidance on Responsible Business Conduct, produced by the OECD to provide practical support to multinational enterprises on the implementation of the Guidelines, **consultation with human rights defenders**, along with other groups, to gather information on adverse impacts and risks was specifically mandated as part of the due diligence process (*OECD General Guidance, para 2.2 (h)*). The Guidance also provides that in assessing impacts related to human rights, enterprises should pay attention to **potential adverse impacts on individuals from groups with a heightened risk of vulnerability or marginalization** (*Guidance, para 2.2 (i)*). The demonstrable vulnerability of human rights defenders, who often come from marginalized groups, strongly warrants their inclusion among those to be considered within the scope of this guidance. This argument is strengthened by the inclusion of **reprisals against human rights defenders** who speak out about the negative human rights impacts of business projects as an example of an adverse impact covered by the Guidelines (*OECD Guidance, p.38*). In addition, the OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector (2017), includes recommendations related to the risk of retaliation against trade unionists and workers engaging with companies in their due diligence processes and when reporting wrongdoing, including through operational-level

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<sup>1</sup>See A/70/361 paras. 14 to 16. Accessible at: <https://www.undocs.org/A/70/361>.

grievance mechanisms (*OECD Garment and Footwear Sector Guidance*, p. 56, 96).

- *At the EU level*

*EU Guidelines on Human Rights Defenders*: The EU Guidelines underline the **importance of consulting with human rights defenders**, highlighting their role in helping to draft legislation and developing strategies on human rights (*para. 5*). They also acknowledge that in spite of their vital work ensuring protection for victims of human rights violations, they themselves have increasingly become **targets of attacks** (*para. 6*). The Guidelines require EU Heads of Missions to address the situation of human rights defenders in their reporting, and stresses that **a variety of factors can have a major impact on the ability of human rights defenders to carry out their work, including retaliation** (*para. 8*).

*Directive 2019/1937 - On the protection of persons who report breaches of Union law*: Directive 2019/1937 acknowledges that persons reporting breaches of EU law that are harmful to the public interest play **a key role in exposing such breaches** and safeguarding the welfare of society, and states that such whistleblowers are at **need of protection given their fears of retaliation** for doing so (*para. 1*).

The Directive adds that lack of confidence in the effectiveness of reporting is one of the main factors discouraging potential whistleblowers (*para. 63*) and that **where retaliation goes undeterred and unpunished, a chilling effect is spread** (*para. 88*). As such, the Directive states that **protection should be granted to persons who have privileged access to information on breaches of Union law that it would be in the public interest to report and who may suffer retaliation for doing so** (*para. 37*).

The Directive further stresses the role of **protection against retaliation as a means of safeguarding freedom of expression**, as enshrined in article 19 of the ICCPR, article 11 of the EU Charter of Fundamental Rights, and article 10 of the European Convention on Human Rights (*para. 45*), and that **criminal, civil and administrative penalties** are necessary to ensure the effectiveness of the provisions of the Directive (*para. 102*). **Where the person speaking out presents a prima facie case of retaliation following disclosure in the public interest, the burden of proof should shift to the party alleged to have retaliated against them** (*para. 93*).

*Directive 2019/633 - On Unfair Trading Practices*: In acknowledging the significant imbalances of bargaining power that exist between suppliers and buyers in the agricultural and food supply chain, the Directive seeks to create a minimum standard of protection against unfair trading practices and safeguard the standard of living of agricultural communities. In doing so, it acknowledges **fear of retaliation against complainants as a factor limiting access to redress in practice** (*para. 8*), and seeks to address this limitation through a number of provisions designed to mitigate the possibility of retaliation against complainants. These provisions include the requirement for Member States to ensure that those raising grievances may have their **identities protected while making complaints**, in order to ensure access to remedy in cases where reprisals are feared (*art. 5*). While the Directive is concerned with commercial retaliation in this regard, it provides a useful model to draw upon in seeking to mitigate the risk of reprisals against human rights defenders and others.

- *At the national level*

*The French Duty of Vigilance Law (Loi no. 2017-399 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre)*: The French Duty of Vigilance Law, in article 1, provides that all companies to whom the Law applies shall establish and implement an effective

vigilance plan to identify risks of severe violations of human rights and fundamental freedoms, or environmental damage, directly or indirectly resulting from its operations and those of its subsidiaries, as well as subcontractors and suppliers with whom it maintains an established business relationship. **This plan should be drafted in collaboration with the company's stakeholders.**

*The US Dodd-Frank Wall Street Reform and Consumer Protection Act (2010)*: The Act, designed in the aftermath of the 2008 financial crisis to, among other aims, improve accountability and transparency in the US financial system, expanded pre-existing whistleblower protection in the State. Section 922, amending the Securities Exchange Act (1934), provided a **direct prohibition of retaliation**, stating that “No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower” in accordance with the Act (*sec. 922 (h)(1)(A)*). The Act mandated the US Securities and Exchange Commission to take **legal action** against employers seen to have retaliated against whistleblowers.

### *Are there examples of such provisions in practice?*

Yes. While overall the current non-binding framework designed to encourage respect for human rights and the environment by businesses has proved roundly ineffective, there are a number of actors who have approached their responsibilities in a proactive way, including in their engagement attempts to mitigate risks of retaliation against human rights defenders.

One of the clearest ways in which the business community has contributed to preventing retaliation against human rights defenders speaking out about negative human rights or environmental impacts connected to their operations has been through **issuing public positions of zero-tolerance to any such form of retaliation and communicating this position to their subsidiaries, suppliers and subcontractors**. Examples of such proactive action can be found among the investor community. IDB Invest, the private-sector arm of the Inter-American Development Bank, has included a section on reprisals in its Social and Environmental Sustainability Policy (*p. 8, para. 20*), and the International Finance Corporation, part of the World Bank Group, in its own position paper states: “IFC does not tolerate any action by an IFC client that amounts to retaliation – including threats, intimidation, harassment, or violence – against those who voice their opinion regarding the activities of IFC or our clients. We take seriously any credible allegations of reprisals.” Together, IDB Invest and the IFC have produced guidance on managing risks of retaliation that could provide a model for similar guidance if it were to be produced by the Commission to support the implementation of the Directive.

In further examples, the European Bank for Reconstruction and Development (ERBD) has also issued a statement on retaliation, and has developed **internal guidelines on the handling of allegations of retaliation**, while committing to **awareness raising** among its staff in order to see these guidelines properly implemented, both of which are important steps to ensure that policies and positions prove effective in preventing retaliation in practice. Similar positions and mechanisms have also been developed by the Finnish Development Bank and the Dutch Development Bank. In FinnFund’s human rights management system, risks for human rights defenders is one of the specific criteria examined to decide whether a project warrants further human rights risk evaluation.

Aside from investors, some companies have also taken such positive steps. The adidas Group, which supports mandatory human rights and environmental due diligence at the EU level, has declared that it will **raise cases of human rights defenders facing retaliation with governments** where there are credible reports of a human rights defender being threatened, intimidated or detained by the police or by government officials. It also established a **third-party complaint**

**mechanism** that can be used by human rights defenders whose rights have been impacted upon by the adidas Group or its business partners. Examples of the company implementing its policy in practice can be found here (*p. 3*). Wilmar has also recently published a policy on human rights defenders, while Unilever has identified human rights defenders as a key stakeholder and has pledged to work with others to “seek the effective implementation of protections, and speak up for those who put their lives in danger in support of human rights” (*p. 57*).