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THE EU DIRECTIVE AT A CROSSROADS REGULATORY DILUTION AND THE DEVELOPMENT OF THE LEGALLY BINDING INSTRUMENT ON BUSINESS AND HUMAN RIGHTS



**BRAZILIAN
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List of Abbreviations and Acronyms

Abbreviation	Full name
CS3D/CSDDD	Corporate Sustainability Due Diligence Directive
CSR	Corporate Sustainability Reporting Directive
ECCJ	European Coalition for Corporate Justice
EU	European Union
HRDD	Human Rights Due Diligence
LBI	Legally Binding Instrument
LkSG	Lieferkettensorgfaltspflichtengesetz (German Supply Chain Due Diligence Act)
OECD	Organisation for Economic Co-operation and Development
OEIGWG	Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights
TNCs	Transnational Corporations
UN	United Nation
BDI	Bundesverband der Deutschen Industrie (Federation of German Industries)
COM	European Commission document designation
HOMA	Homa- Brazilian Human Rights and Business Institute
ILO	International Labour Organization
MEDEF	Mouvement des Entreprises de France
UNGPs	United Nations Guiding Principles on Business and Human Rights

TABLE OF CONTENTS

1. INTRODUCTION.....	1
2. PROCESS, LEGITIMACY AND REVERSIBILITY.....	6
2.1 Between Regulation and Corporate Capture: The Process of Weakening the CS3D.....	8
2.2 The Treaty as a Contested Space.....	16
3. TERMINOLOGICAL AND CONCEPTUAL ARCHITECTURE.....	20
4. FORMAL AND MATERIAL SCOPE.....	26
5. OBLIGATIONS AND CONTENT OF THE DUTY.....	34
6. CORPORATE GOVERNANCE.....	41
7. CLIMATE DIMENSION.....	42
8. PARTICIPATION OF AFFECTED PERSONS AND COMMUNITIES.....	50
9. ACCESS TO JUSTICE AND REPARATION.....	53
10. LIABILITY AND JURISDICTION.....	63
11. COOPERATION AND LEGAL ASSISTANCE.....	71
12. SUPERVISION, MONITORING AND SANCTIONS.....	76
13. NORMATIVE PRIMACY AND COHERENCE WITH OTHER REGIMES.....	80
14. FINAL CONSIDERATIONS.....	84
15. REFERENCES.....	89

1. INTRODUCTION

Directive (EU) 2024/1760 on Corporate Sustainability Due Diligence (Corporate Sustainability Due Diligence Directive - CS3D or CSDDD) was presented, upon its adoption in April 2024, as a milestone in the European Union's attempt to establish obligations for companies in the field of Human Rights and environmental protection. The instrument was preceded by national legislative experiences, particularly French Law No. 2017-399 of 27 March 2017 on the duty of vigilance (Loi relative au devoir de vigilance) and the German Supply Chain Due Diligence Act (Lieferkettensorgfaltspflichtengesetz - LkSG), adopted in 2021 and applicable since 2023, both of which had a direct and acknowledged influence on its formulation. Building on these developments, the Directive brought the regulatory trend of due diligence from the national level into the EU legal order, establishing a regime aimed at the identification, assessment, prevention, mitigation, cessation and minimisation of "adverse impacts" related to companies own operations, the activities of their subsidiaries and, within the limits established by the instrument, the operations of their business partners within their chains of activities. Its scope extends beyond the territorial boundaries of the EU, reaching economic relationships, suppliers, workers and communities located in different parts of the world.

Its trajectory was marked by successive restrictions. From the outset, its limitations were already apparent. The proposal presented by the European Commission in February 2022, COM(2022) 71, covered only a limited share of companies, assigned a significant role to contractual assurances and private verification mechanisms, provided incomplete coverage of the financial sector, and offered insufficient responses to procedural obstacles historically faced by affected persons and communities affected by violations perpetrated through business activity, particularly with regard to access to corporate documents, the allocation of the burden of proof, litigation costs, and access to reparation.

The subsequent legislative process preserved this progress, but progressively reduced part of the scope originally envisaged. When adopted in 2024, the Directive raised the general application thresholds, eliminated the specific category for sectors considered to have a high impact, replaced the broader notion of value chain with that of "chain of activities", excluded a significant share of downstream activities, maintained limited coverage of the financial sector, and removed the

specific obligations imposed on directors that had been provided for in Articles 25 and 26 of the Commission proposal.

Even with these limitations, the version of the CS3D adopted in 2024 established a more protective regime: it provided for a mandatory due diligence cycle; mechanisms for stakeholder participation throughout the process and a specific complaints procedure accessible to affected persons, representatives, trade unions, civil society organisations and Human Rights defenders; the establishment of a climate transition plan; and a harmonised civil liability regime, accompanied by safeguards aimed at reducing barriers to access to justice. This was accompanied by enforcement mechanisms: national supervisory authorities endowed with powers to investigate and impose sanctions, and a regime of pecuniary penalties whose maximum limit, to be established by the Member States, could not be lower than 5% of the company's net worldwide turnover, representing an advance in comparison with the German and French legislation¹.

This architecture was not even fully tested. On 26 February 2025, the European Commission presented the first sustainability *Omnibus* package, as part of a broader regulatory simplification agenda. Initially, Directive (EU) 2025/794, known as the Stop-the-Clock Directive, postponed the deadlines related to the transposition and application of the CS3D. Subsequently, Directive (EU) 2026/470 introduced substantive changes to the Directive's regime and therefore forms part of the CS3D framework currently in force, which constitutes the object of this report.

This reform must be understood in the context of a broader shift in the European Union's regulatory priorities. The debate surrounding *Omnibus I* began to frame sustainability requirements in terms of their potential effects on regulatory costs and the Union's economic capacity in relation to other major markets. In this context, regulatory simplification and the reduction of conformity burdens came to be presented as conditions for restoring competitiveness, partially shifting the focus of the debate, so that the question ceased to be solely how to make business

¹ In France, the text originally adopted by Parliament provided for a civil fine of up to €10 million for failure to comply with the duty of vigilance, which could be increased to €30 million when such failure resulted in damage; these provisions, however, were declared unconstitutional by the *Conseil constitutionnel* before the law was promulgated and, therefore, do not form part of the regime currently in force. In Germany, the law has applied, since 1 January 2024, to companies employing at least 1,000 workers in Germany and provides, depending on the infringement, for administrative fines of up to €100,000, €500,000 or €800,000; for certain infringements committed by companies with an average annual turnover exceeding €400 million, the penalty may amount to up to 2% of the average annual worldwide turnover.

activity compatible with the protection of Human Rights and the environment and increasingly came to include, more explicitly, how much of this regulation would be compatible with European economic competitiveness.

This shift is also apparent in the discussion surrounding so-called *gold-plating*, an expression used, in general terms, to designate the adoption by Member States of national requirements that go beyond or differ from the standard established by European legislation. The argument against this practice is based on concerns regarding fragmentation of the internal market, on the grounds that different national rules may increase conformity costs and make it more difficult for companies simultaneously subject to multiple regimes to operate.

However, when applied to the regulation of Business and Human Rights, the debate has an extremely serious consequence. Limiting gold-plating may mean restricting the ability of Member States to adopt national standards that are more protective than those defined by the Union. The issue therefore comes to involve the very function of harmonisation: whether the European standard should constitute a common floor of protection, which States remain free to exceed, or also a regulatory ceiling that limits that possibility. In this sense, the reform did not bring about a uniform reduction in regulatory fragmentation but, in certain respects, expanded harmonisation and restricted the possibility of national differentiation; in others, such as civil liability, it removed common European rules and returned the matter to national legal systems.

The reform also raised the application thresholds to more than five thousand workers and a worldwide net turnover exceeding €1.5 billion, reduced the frequency of monitoring, restricted stakeholder participation, removed the obligation relating to the implementation of the climate transition plan, weakened the sanctions regime and expanded restrictions on the adoption of certain more protective national rules. These measures affect different dimensions of the instrument but result in a weakening of its effectiveness, altering its capacity for prevention, supervision, accountability and reparation.

It is important to emphasise that these changes were not preceded by any empirical assessment of how the previously adopted regime operated. This is because the CS3D was reopened before it had been fully transposed and before companies, supervisory authorities, courts, workers and affected communities could develop experience regarding the effectiveness of its mechanisms. Accordingly, the

changes cannot be treated as corrections based on accumulated experience with its implementation but, rather, as a political process that sought to diminish the responsive and protective potential of the norm, situated within a broader deregulation agenda (AMNESTY INTERNATIONAL, 2025).

One element that undoubtedly provided the backdrop for the weakening of the European Directive was the publication of the Mario Draghi Report on the Future of European Competitiveness in 2024². This development reveals the reconfiguration of a debate that is far from new: the perceived tension between high human rights standards and economic development. This debate has now acquired a renewed geopolitical dimension, particularly in the context of competition between the United States and China for markets in the Global South, especially Latin America. Within this framework, European initiatives aimed at regulating corporate due diligence, particularly those with an environmental focus, are portrayed as regulatory measures that could undermine the European Union's competitiveness vis-à-vis these other global powers. A reformulated narrative of "sustainability versus competitiveness" has thus emerged, gaining considerable traction, particularly among far-right political movements.

Beyond the limitations arising from the specific provisions of the CS3D and its subsequent weakening, it is necessary to consider the problems associated with the very structure of Human Rights Due Diligence (HRDD) as a model for regulating business activity. HRDD structures the protection of Human Rights fundamentally around a preventive and procedural logic, requiring companies to identify risks and impacts, adopt measures aimed at preventing or mitigating them, monitor the results and demonstrate how they conducted this process. It is therefore predominantly an obligation of means, in which legal assessment tends to focus on the measures adopted by the company to identify and address risks, rather than necessarily on the imposition of an obligation of result consisting in the non-occurrence of the violation. This structure creates a fundamental distinction between requiring a company to demonstrate that it has adequately carried out prevention procedures and establishing direct obligations whose breach arises from the Human Rights violation itself. Thus, a company may demonstrate that it has fulfilled the stages of HRDD without this meaning that violations have effectively ceased to occur (LARA; ROLAND; WÜNSCH, 2024, p. 4).

² Available at:

https://commission.europa.eu/topics/competitiveness/draghi-report_en

The central role assigned to due diligence in regulation leaves companies themselves with the power to produce the information that will be used to assess their conduct, identify the damage perpetrated by their activities, define priorities and demonstrate fulfilment of the obligations imposed upon them. Therefore, making HRDD mandatory does not, in itself, amount to building a comprehensive system of corporate accountability (ROLAND; SENA; WÜNSCH, 2024, p. 4).

The European experience thus makes it possible to identify two issues that should not be conflated. On the one hand, there are the endogenous limitations of an accountability architecture strongly structured around corporate due diligence: the centrality of corporate procedures, informational asymmetry between companies and affected persons, dependence on internal mechanisms for identifying and managing impacts, and the incomplete connection between prevention, liability and reparation. On the other hand, there is an exogenous vulnerability related to the political reduction of the safeguards built into the regime.

The magnitude and speed of the European rollback demonstrate the urgency of a multilateral floor for corporate protection and accountability, capable of placing the rights of affected persons and affected communities at the centre of regulation and responding to the structural asymmetries that permeate relations between the Global North and Global South. Through this counterpoint, we do not seek to minimise the importance of HRDD as an instrument for the protection of Human Rights, but rather to recognise its limits when it is positioned as the principal or sole axis for regulating this relationship. These limits arise not only from existing regulatory frameworks, such as the European Directive, but also from the very logic of due diligence, which is essentially preventive and procedural. For this reason, even if strengthened, it is not capable, on its own, of addressing issues that are fundamental to corporate accountability, and there must therefore be a comprehensive architecture aimed at ensuring the due protection of Human Rights in the face of corporate activity.

From this perspective, this report revisits the process of developing the Legally Binding Instrument on Business and Human Rights (LBI), undertaken within the Open-ended Intergovernmental Working Group established by the United Nations Human Rights Council through Resolution 26/9 of 2014. The process of developing an international legally binding instrument arose from the understanding, supported by different States and civil society organisations, that

the transnational dimension of business activity creates problems that cannot be satisfactorily addressed through exclusively national/regional or voluntary responses.

From the earliest sessions of the Working Group, demands were raised concerning the accountability of TNCs, effective access to justice, the overcoming of jurisdictional obstacles, and the creation of mechanisms capable of addressing the legal fragmentation that accompanies the transnational organisation of economic activity. At the same time, the process was marked by disagreements among States, social organisations, business entities and other actors regarding the very design of the future instrument, its scope and the density of the obligations it should establish (HOMA, 2025, p. 5-7).

The negotiations surrounding the International Legally Binding Instrument on Business and Human Rights have also provided a forum for advocating environmental protection and sustainability, in accordance with the highest standards established by both the Inter-American Human Rights System and the universal human rights protection system. In this regard, particular attention should be drawn to the pioneering recognition by the Inter-American Court of Human Rights, in 2017, through Advisory Opinion OC-23/17, of the right to a healthy environment as an autonomous right, that is, a right recognised as an independent legally protected interest, capable of giving rise to specific legal obligations. The Advisory Opinion was issued in response to a request submitted by the Colombian State.

This recognition is particularly significant for the Business and Human Rights agenda, especially in the context of the Global South, where some of the most serious human rights violations associated with transnational corporate activities occur, frequently exceeding the effective protective capacity of States and involving irreversible environmental harm. It is also in these regions that many of the so-called “sacrifice zones” are concentrated. This situation results not only from the transnational nature of economic activities, which requires mechanisms of extraterritorial cooperation, but also from the structural dynamics of the international division of labour. Historically, these dynamics have enabled predatory corporate practices to operate with the acquiescence of States seeking to attract foreign direct investment and sustain commodity exports. Such practices are therefore shielded by what Juan Hernández Zubizarreta (2017) describes as the “architecture of impunity.”

Against this background, a significant step forward was achieved with United Nations General Assembly Resolution A/76/L.75, subsequently adopted as Resolution A/RES/76/300 on 28 July 2022³, which formally recognised the right to a clean, healthy and sustainable environment as a universal human right. This recognition has also reached the negotiations on the International Legally Binding Instrument on Business and Human Rights. During the three most recent negotiating sessions, it has been invoked particularly by Global South countries and civil society organisations in support of explicitly including the environment as a human right within the scope of protection afforded by the Treaty. Remarkably, however, several States in which transnational corporations are headquartered, alongside business representatives such as the International Organisation of Employers, have continued to oppose such recognition, arguing that it is not “legally binding” or does not reflect an established international consensus.

The LBI and the CS3D are based on distinct legal architectures, and this difference allows us to understand what each architecture is capable of achieving, as well as its potential and its gaps. In this sense, an international instrument may, at least potentially, establish common standards for issues that the very nature of the CS3D does not allow it to resolve fully. This is particularly significant for persons and communities located outside the main economic and decision-making centres of TNCs, for whom the existence of formally recognised rights may have little significance if there are no mechanisms capable of overcoming the territorial, procedural, economic and evidentiary barriers that condition their effective enforceability.

The multilateral character of the LBI, in turn, does not in itself ensure a necessarily more protective outcome. On the contrary, its development likewise constitutes a space of political and legal dispute. Since the establishment of the Working Group, different positions have been put forward regarding the scope, nature and extent of the obligations, rules on liability, jurisdictional criteria, cooperation mechanisms, safeguards for access to justice, and the institutional architecture itself intended to oversee its implementation. The analyses produced by Homa on successive versions of the text have also identified setbacks in the negotiation process, demonstrating that the weakening of the norm is not a

³ This recognition was further strengthened on 23 July 2025, when the International Court of Justice (ICJ) issued a landmark Advisory Opinion affirming that the right to a clean, healthy and sustainable environment is a human right inherent to the enjoyment of other fundamental rights.

possibility exclusive to the European experience (HOMA, 2025, p. 5-7; HOMA; JUSTIÇA GLOBAL, 2025, p. 29-36). It is therefore also necessary to critically examine what kind of Treaty is being constructed, which problems it effectively addresses, which responses have been preserved or weakened throughout the negotiations, and to what extent its architecture can overcome or reproduce limitations observed in other models. It is also for this reason that the comparison proposed in this report will be conducted from the perspective of rights holders (affected persons and affected communities) and the asymmetries that permeate the global economy. The analytical criterion focuses on the concrete capacity of each architecture to shift the costs of prevention, information production, accountability and reparation from affected persons to the economic actors that organise and benefit from business activities.

2. PROCESS, LEGITIMACY AND REVERSIBILITY

Due diligence has occupied an increasingly central position in the relationship between Human Rights and business, moving beyond the realm of voluntary practices to become incorporated into national legislation and, in the case of the European Directive, regional legislation. Its progressive legalisation responded to one of the historical shortcomings of the agenda: the excessive reliance on voluntary commitments undertaken by corporations themselves.

Its relevance cannot be minimised. HRDD constitutes a positive instrument of prevention, insofar as it requires companies to identify impacts and adopt measures aimed at preventing and mitigating them. The criticism developed in this report is not directed at the existence of HRDD, but at treating it as a sufficient response for regulating this relationship. In this sense, this centrality has also produced a shift within the agenda itself, which has become structured around a predominantly preventive logic, without the consolidation of this paradigm being accompanied by equivalent advances in the development of mechanisms capable of addressing, more broadly, the obstacles historically associated with accountability, with the result that a necessary instrument of prevention has often been transformed into the horizon of regulation itself.

In this context, the CS3D and the LBI cannot be analysed exclusively on the basis of their normative texts. Their provisions and structure result from political processes marked by different conceptions of how the relationship between economic power and the protection of Human Rights should be regulated, which interests should prevail in situations of conflict, and how far the law should go in

imposing obligations and responsibilities on companies. Before constituting a discussion about the best regulatory mechanisms, the Business and Human Rights agenda is, above all, a space of dispute over the very definition of the problem that is to be regulated.

If the central issue is formulated as the need to make business activities compatible with the protection of Human Rights, the starting point tends to be the existence of rights whose effectiveness cannot be subordinated to companies' organisational choices or to the economic costs arising from their fulfilment. The question then becomes how to prevent violations, control corporate power, attribute responsibility, and ensure that affected persons and communities have access to justice and reparation. If, by contrast, the problem is presented primarily as the need to reconcile the protection of Human Rights with the preservation of favourable conditions for investment, the centre of gravity of regulation also shifts. The protection of rights then becomes subject to constant balancing against the costs that their realisation may impose on companies.

Thus, the terminology used to describe the field is not (and has never been) neutral. The internationally consolidated expression used to refer to the agenda, "Business and Human Rights", has contributed to structuring a field that seeks to make the protection of Human Rights compatible with the functioning of existing business structures. The Human Rights and Business perspective adopted by Homa, on the other hand, seeks to undertake a methodological inversion in which economic activity must be examined from the perspective of Human Rights, with their primacy, questioning the very legal, economic and political structures that allow for the dissociation between economic power and responsibility.

From this perspective, the company ceases to constitute the starting point of the analysis, and the protection of affected persons and communities, as well as the capacity of the legal order to prevent violations, limit the exercise of economic power, hold the actors involved accountable, and ensure due reparation, becomes the parameter. The conflict between these rationalities reappears in seemingly technical questions: which companies should be covered; how far responsibility should extend along global chains; who should produce the evidence; which persons should participate in decision-making processes; what consequences should arise from a violation; which courts may exercise jurisdiction; and who should bear the economic costs of prevention and reparation.

For this reason, the analysis of the documents requires an understanding of the processes that guide their construction and transformation. This becomes particularly relevant in the development of *Omnibus I*, which was accompanied by intense mobilisation by business associations. Reports by civil society organisations documented the intense corporate activity during the reopening of the legislation and identified convergences between business demands put forward during this period and amendments subsequently incorporated into the proposal (ECCJ, 2026, p. 11-12).

2.1 Between Regulation and Corporate Capture: The Process of Weakening the CS3D

From the outset, the European Directive was marked by a dispute over the extent of the responsibility that could be attributed to companies. National experiences, particularly in France and Germany, had already incorporated HRDD obligations into domestic law, with different designs and degrees of stringency, and had revealed a progressive fragmentation of the regulatory framework on the matter within the European Union, resulting in the coexistence of widely differing requirements for companies operating within a deeply integrated economic area. The development of a common framework at the EU level thus responded to the need to provide greater uniformity to the conditions applicable to companies in the internal market, establishing a common standard, particularly in light of business chains whose economic organisation extends far beyond the borders of the Member States.

It was in this context that the European Commission initiated the process that would culminate in the proposed Directive. The preparatory phase was extensive. The Commission conducted studies, an impact assessment and a large-scale public consultation in 2020, which received approximately half a million contributions and involved the participation of companies, business associations, civil society organisations and actors from the Global South, providing the basis for building an evidence base on the risks and damage existing in global chains. Among the possibilities examined was, for example, a more restrictive approach that would concentrate due diligence obligations on direct business partners. This alternative was analysed and rejected during the preparation of the proposal because it was considered insufficient to adequately address risks and damage distributed throughout business chains (ECCJ, 2026, p. 8-9).

The Commission formally presented its proposal in February 2022. This was followed by more than two years of negotiations among the Commission, Parliament and Council, during which virtually every element capable of determining the substance of the future Directive became a matter of dispute: which companies would be covered, how far the chain of activities would extend, which impacts should be identified and addressed, how stakeholder participation would operate, what the climate obligations would be, what consequences could arise from non-compliance, and under what conditions affected persons and affected communities could seek accountability and reparation.

Throughout this process, organised business interests were deeply involved, concentrating their efforts on the elements capable of giving greater substance to the Directive. A Social LobbyMap survey shows that these associations acted more intensively than individual companies in pressing for positions favourable to reducing the instrument's requirements and, as a result, their positions gained greater space and visibility throughout the negotiations (SOCIAL LOBBYMAP, 2025, p. 7-8).

This pressure was not distributed randomly or equally across the different components of the CS3D, but focused primarily on civil liability, remediation and the extent of the value chain, precisely because these are central issues for the effectiveness of the regulation, addressing the legal consequences arising from non-compliance and the possibility of ensuring that obligations follow the economic organisation of business chains beyond immediate contractual relationships (SOCIAL LOBBYMAP, 2025, p. 7-8). The dispute surrounding these provisions reveals the tension that accompanied the instrument throughout its subsequent trajectory. While obligations essentially related to due diligence (aimed at identifying, preventing and managing risks) found greater space within the CS3D, there was intense resistance to mechanisms that could generate concrete consequences for companies and give effect to these obligations.

This business activity forms part of a broader phenomenon of corporate capture, which goes beyond companies' participation in the debate and their defence of their interests before public institutions, and rests on the asymmetry of power that allows them to exert disproportionate influence over political processes and over the very production of the rules intended to regulate them (BERRÓN, 2014, p. 127-128). Capture manifests itself in the ability to gain privileged access to decision-makers, determine the issues to be addressed, give greater weight to

certain arguments, and directly influence the limits and intensity of regulation itself. This dynamic places at stake the capacity of public authorities to impose limits precisely on those actors that possess the greatest power to influence the very shaping of the rules to which they will be subject, meaning that capture is not external to the regulatory process, but rather a dimension of the very dispute over the shaping of regulation.

The evolution of the text during the negotiations clearly reveals this dispute. From the outset, one of the most controversial points was the range of companies covered. Various private actors advocated raising the application thresholds, arguing particularly on the basis of the burdens that the legislation could impose. During the final renegotiation phase in 2024, an increase in the threshold to companies with 5,000 employees was even discussed, although the text ultimately adopted a lower threshold. There was also strong pressure regarding the extent of the value chain. Business actors argued that chains composed of multiple suppliers, sub-suppliers and contractors would be excessively complex to allow for more comprehensive due diligence, while the financial sector particularly opposed the inclusion of its downstream activities. The latter position prevailed, and downstream financial activities were excluded from the scope of the Directive as adopted.

Another example concerned the obligations imposed on directors. The Commission's original proposal contained specific corporate governance provisions that disappeared from the final text. Among the entities examined by Social LobbyMap, approximately 60% were opposed or only weakly supportive of these requirements. Civil liability, on the other hand, despite also facing strong opposition, survived the 2024 negotiations, as did the complaints mechanisms. The Directive was adopted after significant concessions in favour of the corporate sector, including the raising of the application threshold, the reduction of aspects of the chain's scope, the exclusion of downstream financial activities, and the removal of specific obligations for directors (SOCIAL LOBBYMAP, 2025, p. 6, 8).

The intensity of lobbying followed the moments when the political outcome was more open to change, with peaks during the consultations, a significant increase when the Council and Parliament defined their positions in 2023, and another at the end of the trilogue. The most intense period outside the consultations occurred between January and April 2024, after Germany announced that it would no longer support the Directive and would abstain in the Council, a move accompanied by growing resistance from other governments. For private actors seeking to reduce the scope of the CS3D, the renewed political uncertainty

provided a new opportunity to press for additional concessions (SOCIAL LOBBYMAP, 2025, p. 10).

Even so, the adoption of the CS3D did not bring this dispute to an end, and *Omnibus I* provided a second opportunity to re-examine elements that had been debated for years and that, in some cases, had survived the pressure exerted during the original legislative process. According to a subsequent Social LobbyMap study, the continuity between the two moments was clear, as almost half of the entities previously analysed also acted in relation to *Omnibus I*, and their positions remained consistent with those presented during the original negotiations (SOCIAL LOBBYMAP, 2025, p. 6-7).

What changed profoundly were the conditions under which this influence came to operate. The CS3D entered into force in July 2024, but when preparations for its reopening began, no Member State had completed its transposition and no company had been subjected to the new obligations. There were therefore no data on the administrative costs actually produced by the Directive, its concrete difficulties of application, or its results. An *ex post* assessment was simply impossible. Even so, less than four months after its entry into force, the review had already been set in motion, without a new impact assessment equivalent to the one conducted during the original drafting process accompanying the decision to reopen the legislation (ECCJ, 2026, p. 9-10).

As discussed above, the original Directive had been developed over several years and preceded by studies, an impact assessment, a broad public consultation, the examination of different regulatory alternatives, and negotiations. To reopen it, however, no practical evidence was used to justify reducing its obligations. Concerns relating to costs, complexity, competitiveness and administrative burdens gained traction before the experience of applying the Directive itself could demonstrate whether these problems would actually occur, and on the scale alleged.

The Draghi Report on competitiveness presented the “simplification” of the rules as essential to the European economy and described aspects of the sustainability framework as excessively burdensome. This approach was incorporated into the Budapest Declaration of 8 November 2024, which established a commitment to a “simplification revolution” and to reducing *reporting* obligations by at least 25%. On the same day, Ursula von der Leyen, President of the European

Commission, announced the preparation of *Omnibus I*, conceived to jointly review the CS3D, the CSRD and the Taxonomy Regulation (SOCIAL LOBBYMAP, 2025, p. 9).

The language of “simplification” used in the process shifts the centre of the debate from the protection of Human Rights to the costs of business regulation, reversing the logic according to which economic activity must be brought into conformity with the requirements of rights protection (the “Business and Human Rights” agenda). In this respect, the presentation of amendments aimed at “reducing burdens” in fact results in the weakening of substantive elements of the CS3D, causing choices concerning the degree of protection ensured to be addressed in terms of their impacts on business activity.

Within this framework, the costs of regulation for companies are directly identified and incorporated into the debate, while far less visible are the costs produced by the weakening of that regulation, borne by workers, communities and territories affected by business activities. Reducing burdens on companies, in this context, does not necessarily mean eliminating costs, but deciding who will bear them. When reducing the requirements imposed on companies corresponds to reducing mechanisms for prevention, accountability and reparation, part of that cost is transferred precisely to those with less capacity to influence the regulatory process.

For the preparation of *Omnibus I*, selective meetings were organised, closed to the public and by invitation only. On 5 and 6 February 2025, the *Reality Check Roundtable on Sustainability Reporting* and the *Roundtable on Simplification* were held. According to a report presented by the European Coalition for Corporate Justice (ECCJ), the first meeting was reportedly limited to industry representatives; the second brought together companies, civil society organisations and trade unions in a profoundly unequal proportion. The initial list mentioned in the complaint subsequently submitted to the European Ombudsman contained 58 representatives of business interests, 10 non-governmental organisations and only 2 trade unions. Some of the large companies invited were, at that time, involved in legal proceedings related to Human Rights violations. Basic information about the purpose, participants and agenda of the meetings was not initially made public and only became public after the agenda was leaked to the press. Moreover, no agenda, list of participants or minutes were published in advance, and some of the selected civil society organisations received their invitations less than a week beforehand, thereby reducing even their capacity to prepare for a discussion intended to reopen highly complex legislation (ECCJ, 2026, p. 10).

According to the ECCJ, the Commission presented the so-called *reality checks* as instruments intended to obtain information from companies about the practical application of the legislation and the administrative burdens arising from existing rules. However, in addition to the fact that this mechanism had been announced in the same month in which it began to be used and was not provided for in the *Better Regulation Guidelines* as a substitute for formal consultation procedures, its use in the context of the CS3D made no sense, since it sought to gather perceptions about the practical application of legislation that had not yet been applied (ECCJ, 2026, p. 10-11).

The results of these meetings reproduced precisely the problems that had already been placed at the centre of the business discourse. Some participants argued that potential difficulties could be addressed through implementation guidance, without reopening the legislative text; the majority, however, suggested suspending the application of the Directive. Representatives of the financial and energy sectors pointed to *reporting* costs and the complexity of the obligations and advocated, among other measures, narrowing the scope of the value chain and greater harmonisation (SOCIAL LOBBYMAP, 2025, p. 10).

In the months preceding the announcement of the package, Members of the European Parliament recorded 68 meetings on the issue since 2 December 2024, mostly with private actors. Social LobbyMap identified hundreds of additional meetings during the development of the process, showing that *Omnibus I* rapidly became one of the central focuses of corporate lobbying activity. The study also identifies particularly intense participation by business associations and records, among individual actors, multiple meetings between major companies in the energy and fossil fuel sectors and Members of the European Parliament (SOCIAL LOBBYMAP, 2025, p. 10-11).

The asymmetry becomes even clearer when we examine access to the Commission's political core. According to data compiled by the ECCJ, of the 37 actors identified as having met with Executive Vice-President Stéphane Séjourné during the preparation of the package, 36 represented corporate interests. None of the 37 represented environmental organisations, Human Rights organisations or trade unions. The same pattern was repeated within his cabinet: of the 190 meetings held during the preparatory phase, 165 were with companies or private groups, compared with 25 meetings with non-profit actors, only eight of which were

non-governmental organisations. During the first ten months of his mandate, more than 88% of the cabinet's meetings were held with business representatives, and Séjourné reportedly did not hold a single individual meeting exclusively with non-governmental organisations during this period (ECCJ, 2026, p. 17).

While “conformity costs” reach the offices of European institutions directly through organised business structures, the costs of the violations that the CS3D seeks to prevent fall upon affected persons and affected communities without any comparable possibility of direct dialogue with the Commission. This inequality is even more significant when dealing with transnational chains. TNCs operate across different jurisdictions and are able to participate in an organised manner in the European process through their own departments and business coalitions, while persons affected by their activities do not have the same institutional mobility. Economic power is organised transnationally, but the participation of affected persons remains fragmented, unequal and frequently dependent on mediation by civil society organisations, which themselves also have far more limited access to decision-making spaces.

Such organisations face increasing difficulties in gaining access. In addition to the quantitative inequality in meetings, the centre of decision-making shifted from the technical services of the Directorates-General, which had followed the preparation of the CS3D for years, to the Commission's political cabinets. This forced organisations to redirect their activities towards more restricted and less accessible spaces. The ECCJ links this process to questions concerning the funding and legitimacy of non-governmental organisations and to the weakening of legal mechanisms through which civil society participates in oversight and corporate accountability (ECCJ, 2026, p. 17-18).

The difference in access occurred precisely as the process became more political and less technical. The services that had accumulated knowledge over years of preparing and negotiating the CS3D ceased to constitute the sole or principal arena of dispute, while fundamental decisions came to be taken within the cabinets of Commissioners and Executive Vice-Presidents. For civil society, this meant contesting an accelerated reform in spaces to which its access was more limited; for business actors equipped with permanent structures of political representation, it meant the possibility of taking their demands directly to the levels at which the overall direction of the review was being defined (ECCJ, 2026, p. 18).

Business pressure also took forms of coordination that went beyond traditional associations. The ECCJ reports the activities of a coalition of eleven multinational corporations called the *Competitiveness Roundtable*, dominated by major US corporations in the fossil fuel and industrial sectors, including ExxonMobil, Chevron and Koch. According to documents analysed by the organisation, the coalition developed a strategy aimed at simultaneously influencing the Commission, Parliament and Council, which included exploiting disagreements among Member States, increasing pressure at the Commission's political level, and favouring the formation of a more right-leaning parliamentary majority capable of approving more extensive amendments (ECCJ, 2026, p. 11).

At the same time, major European business associations presented detailed proposals for amending the CS3D and other rules covered by the package. The comparative analysis conducted by the ECCJ identified a high degree of correspondence between the demands formulated by organisations such as MEDEF, BDI and Confindustria and the content subsequently presented by the Commission, even identifying similarities in the structure and sequence of the amendments. According to the organisation, almost all significant revisions proposed for the CS3D and the CSRD corresponded to changes previously requested by these associations and other business groups (ECCJ, 2026, p. 11-12).

This issue ceased to be merely a criticism raised by civil society and subsequently became the subject of an investigation by the European Ombudsman. The investigation examined the absence of an impact assessment, the lack of public consultation and other derogations from the ordinary *Better Regulation* procedures. In November 2025, the Ombudsman concluded that there was a set of procedural shortcomings amounting to “maladministration”.

This trajectory shows how the definition of the scope of business regulation cannot be dissociated from the political conditions under which that regulation is produced. Regulatory achievements remain subject to reversal, and this reversibility does not occur under equal conditions of participation.

2.2 The Treaty as a Contested Space

The process of developing the *Legally Binding Instrument on Business and Human Rights* (LBI) must be understood in light of the disputes that have accompanied the agenda since its inception. The establishment of the Open-ended

Intergovernmental Working Group (OEIGWG) in 2014, through Human Rights Council Resolution 26/9, resulted from earlier mobilisation for the development of international mechanisms capable of addressing the limitations of national regulation in the face of the transnational activities of companies. The resolution was adopted by 20 votes in favour, 14 against and 13 abstentions, a division that already revealed significant disagreements among States over whether to move towards a binding instrument. From that point onwards, the discussion shifted from the need to regulate business activity to the question of what kind of regulation would be capable of effectively addressing obstacles to accountability.

From the outset, the Treaty has been an object of dispute. On the one hand, different States and civil society organisations have advocated an instrument capable of addressing problems arising specifically from the transnational character of business activity, strengthening the rights of affected persons, access to justice, responsibility, jurisdiction and cooperation among States. On the other hand, there are positions that preserve a greater centrality for domestic legal systems and resist the creation of international mechanisms that would substantially expand the possibilities for corporate accountability. This tension runs through the successive versions of the instrument and explains why central issues remain unresolved after more than a decade of negotiations. As Homa, we have followed this process in its entirety, analysing each version of the document, identifying its advances and setbacks, and actively participating in every session of the Intergovernmental Working Group.

The division among States in the negotiations cannot itself be dissociated from the positions they occupy in the international division of labour. While countries, particularly in the Global North, that host the headquarters and decision-making centres of major TNCs have shown greater resistance to more effective international mechanisms of accountability, countries in the Global South, where significant shares of productive activities and the damage associated with them are concentrated, have been among the main advocates of more stringent international regulation.

Even so, the process is more complex than a homogeneous opposition between North and South, insofar as developing countries face dependence on foreign investment and other economic vulnerabilities that condition their positions. What remains is a structural asymmetry between States occupying different positions in global chains and which, for that reason, also face the

economic and legal consequences of international regulation of TNCs in different ways.

This dispute is clearly reflected in the evolution of the drafts themselves. The *Zero Draft*, presented in 2018, was strongly criticised by civil society organisations because of the generality of its provisions and the weakness of its accountability mechanisms (GUAMÁN, 2018, p. 6-7). The first *Revised Draft*, from 2019, did not resolve this problem and introduced a particularly controversial change by broadening the scope to all business activities, moving away from the specific focus on TNCs that had guided Resolution 26/9 (ROLAND et al., 2019, p. 5-6). The *Second Revised Draft*, from 2020, developed provisions on victims' rights, prevention, responsibility and international cooperation, but maintained an architecture fundamentally dependent on regulatory action by States and failed to provide satisfactory answers to issues that are decisive for transnational accountability, particularly with regard to jurisdiction, the burden of proof and the relationship with domestic legal systems (HOMA, 2021, p. 4-6). The *Third Revised Draft*, from 2021, further developed some of these provisions and expanded safeguards related to access to justice and reparation, but did not break with the main limitations accumulated in previous versions.

At the ninth session, in 2023, the disagreements ceased to concern only substantive proposals and also extended to the manner in which the process was conducted. The so-called *chair-suggested proposals* consisted of alternative formulations for certain articles of the Treaty drafted and presented by the Chair-Rapporteur of the OEIGWG. Although they did not formally constitute a new version of the Treaty and had not been previously negotiated and approved by States, these proposals came to serve as a parallel reference alongside the *Third Revised Draft*, raising questions about the transparency of the process, the criteria used to select and reformulate the contributions submitted, and the consistency of the new formulations with the mandate established by Resolution 26/9 (HOMA, 2024, p. 4-5).

As seen in the process of weakening the CS3D, the power to influence a norm is exercised not only through the approval or rejection of a particular proposal, but also through agenda-setting and the selection of the wording that remains in the document. The organisation of the procedure materially affects the range of solutions that remain available throughout the negotiations.

In this context, we must emphasise the presence of business actors in the process, as recorded in the OEIGWG's own official documents. In 2023, for example, the *International Organisation of Employers*, *Business at OECD* and *BusinessEurope* presented a joint position on the Chair's proposals, a document that also identifies the participation of the *United States Council for International Business*. The business position focused precisely on articles with greater potential to give effect to accountability and reparation. Thus, the economic actors potentially covered by the future regime participate directly in discussions on the provisions that will define the scope of their accountability.

Moreover, economic inequality among the actors translates into an asymmetry in participation. TNCs have permanent representation structures, financial resources, specialised advisory support and the capacity to follow negotiations that extend over many years, while civil society faces very different conditions in maintaining a continuous presence in Geneva and in intersessional spaces. This disparity is converted into a disproportionate capacity for access and influence over the rules intended to discipline corporate power itself.

The events of the tenth session reinforced these concerns. The postponement of the negotiations from October to December 2024 made it more difficult for civil society organisations and some delegations, particularly those from the Global South, to reorganise their schedules and resources, while the change in the facilities used for the discussions was perceived by actors following the process as a reduction in the conditions of access and visibility. The same period was marked by growing concerns about the presence of business representatives and by convergence between some corporate and State positions.

In the same year, Decision 56/116 established a cycle of intersessional consultations supported by legal experts, aimed at examining thematic groups of articles in greater depth. Official documents show that the programme of work began to refer part of the more extensive discussions to these consultations and established very limited time for stakeholder interventions during the formal sessions. The new format may facilitate more in-depth technical consideration of complex matters, while increasing the importance of conditions of access to intersessional spaces, the selection of experts, and transparency regarding the manner in which their contributions will be incorporated into the text.

In this context, numerous questions arise regarding the criteria used to select the "*experts*" participating in these consultations. The report published by Homa in

2024 records criticism concerning the transparency of the process and allegations of potential conflicts of interest arising from the links of some experts with business sectors or corporate-funded institutions. The more the negotiations are shifted towards technical spaces, the more important it becomes to ensure plurality, independence and transparency in the production of the expertise that will guide normative choices.

Following the intersessional consultations, the eleventh session of the OEIGWG, held from 20 to 24 October 2025, continued the negotiations on the text, leaving unresolved the disagreements over the main elements of the instrument that determine its effectiveness. This has direct implications for the twelfth session, scheduled for 12 to 16 October 2026. More than accelerating the conclusion of a process that began over a decade ago, what remains at stake is the capacity to preserve and strengthen the elements capable of giving effectiveness to the instrument, particularly in the face of pressure for more flexible formulations, greater reliance on domestic law, and a reduction in the substance of its accountability mechanisms.

For this reason, 2026 is likely to constitute a decisive stage in determining what kind of Treaty will be produced, that is, whether the process will succeed in constructing mechanisms capable of addressing the transnational accountability gaps that justified its creation, or whether the pursuit of consensus will ultimately accommodate some of those same limitations in its final text. Concern regarding the quality of the instrument is, moreover, already apparent in civil society statements preceding the twelfth session, which have argued that concluding the negotiations should not be prioritised at the expense of the effectiveness of the future regime.

Against this background, the following sections analyse the main elements of the Directive in order to understand its normative design from a comparative perspective with the LBI.

3. TERMINOLOGICAL AND CONCEPTUAL ARCHITECTURE

This section addresses the terminological and conceptual architecture of the CS3D, since the choice of terms used in a legal instrument is not merely a semantic matter. On the contrary, such choices establish the basis for understanding the text and the extent of its subsequent applicability; in other words, they contribute to

delimiting the material scope of the obligations, defining who may be considered a victim, establishing the links of corporate responsibility, and determining the legal parameters according to which mechanisms of prevention, accountability and reparation will be applied.

In Article 1 itself, the CS3D defines its subject matter: to establish companies' obligations regarding adverse Human Rights and environmental impacts. The expression "adverse impacts" on Human Rights makes it possible to frame the issue through a process of risk assessment and management, in which the company identifies potential negative consequences, adopts preventive measures and seeks to mitigate the risks identified; in other words, it is an expression linked to the very concept of *due diligence*.

The OECD Due Diligence Guidance for Responsible Business Conduct presents the concept of corporate due diligence as a set of interrelated processes to identify adverse impacts, prevent and mitigate them, monitor implementation and results, and communicate how adverse impacts are addressed in relation to the company's own operations, its supply chains and other business relationships (OECD, 2000). Thus, due diligence does not transfer responsibilities but, on the contrary, recommends that each company assume its own responsibility for the damage caused.

Due diligence may lead a company to decide whether to continue, modify or, as a last resort, terminate a particular operation or business relationship in light of the magnitude of the risk or the inadequacy of mitigation measures. This structure therefore favours a model of risk management and prevention, in which impact assessments, mitigation measures, continuous monitoring and complaints mechanisms constitute central elements, as can be observed in Article 5 of the Directive. At the same time, within this logic, the degree of discretion retained by companies in deciding whether to assume a risk remains relevant.

A comparison between the CS3D and the textual proposals presented by States during the ninth session of the Open-ended Intergovernmental Working Group (OEIGWG), established to develop a UN Binding Treaty on Transnational Corporations (TNCs), reveals significant differences not only in the content of the obligations established, but also in the conceptual architecture used to define the phenomena being regulated. One of the main points of contrast lies precisely in the use of the expression "adverse human rights impacts" by the CS3D, whereas the draft Treaty adopts the notion of "human rights violation" as its central category.

As HOMA (2024, p. 23) points out, the use of the expression “human rights violation” presents a conceptually distinct alternative to that proposed by the Directive, since “violation” would be more appropriate because it reflects the nature of a clear and direct infringement of Human Rights, in accordance with the terminology traditionally employed in International Law. This difference is particularly significant because it shifts the focus of the analysis from corporate risk management (due diligence) to the legal position of affected persons and communities.

While the language of “adverse human rights impacts” tends to frame the problem through the corporate logic of identifying, preventing and mitigating business risks, the language of “human rights violation” takes as its starting point the existence of an infringement of legally recognised rights and, consequently, places the position of the victim and the need for accountability and reparation at the forefront.

This difference can be observed in the proposals presented during the negotiations on the legally binding instrument. Among the textual proposals analysed is the definition submitted by Cameroon for Article 1.3, according to which a “human rights violation” would encompass any direct or indirect harm, in the context of business activities, arising from acts or omissions against a person or group of persons that prevent the full enjoyment of internationally recognised Human Rights and fundamental freedoms, including the right to a safe, clean, healthy and sustainable environment (HOMA, 2024, p. 11). The formulation therefore broadens the substantive perspective of protection by expressly linking the violation of these rights to the consequences arising from corporate acts or omissions.

Furthermore, the Directive defines “adverse human rights impact” as an impact resulting from an “abuse” of selected Human Rights enumerated in an annex, and of other Human Rights enshrined in a list of international instruments, provided that: (a) the Human Right can be violated by a company; (b) the violation of that Human Right directly impairs a legal interest protected under the relevant Human

Rights instrument; and (c) the company could reasonably have foreseen the risk that such a Human Right would be affected ⁴ (HOLLY, 2024, p. 10).

This terminological choice is significant because the concept of “abuse” may establish a different legal threshold from that associated with the notion of “violation”. Holly (2024, p. 10-11) draws attention to the fact that the use of the term “abuse” may inadvertently raise the threshold required for a particular violation to fall within the due diligence regime. This criticism also appears in HOMA’s analysis (2024, p. 23), according to which the use of the expression “abuse” shifts the focus away from the concrete situation of victims, who suffer violations of their rights, rather than merely “abuses”. Furthermore, the expression could minimise the gravity of the acts and create difficulties for legal analysis in situations where the responsibilities of private and State actors coexist.

This characteristic also has implications for reparation: when a violation of rights occurs, the duty to provide reparation is immediately triggered. By contrast, the term “abuse” depends on how the company conducted its due diligence before the “abuse” in order to determine the extent of its responsibility for reparation (Ruggie; Sherman, 2017). Where a particular adverse impact was neither directly caused by the company nor contributed to by it, but is directly linked to its activities, operations, products or services through a business relationship, the corporate responsibility to respect Human Rights does not necessarily entail a direct obligation to repair the damage, although the company may play a role in the reparation process. This distinction between causing, contributing to and being

⁴ ‘adverse human rights impact’ means an impact on persons resulting from:

(i) an abuse of one of the human rights listed in Part I, Section 1, of the Annex to this Directive, as those human rights are enshrined in the international instruments listed in Part I, Section 2, of the Annex to this Directive;

(ii) an abuse of a human right not listed in Part I, Section 1, of the Annex to this Directive, but enshrined in the human rights instruments listed in Part I, Section 2, of the Annex to this Directive, provided that:

- the human right can be abused by a company or legal entity;
- the human right abuse directly impairs a legal interest protected in the human rights instruments listed in Part I, Section 2, of the Annex to this Directive; and
- the company could have reasonably foreseen the risk that such human right may be affected, taking into account the circumstances of the specific case, including the nature and extent of the company’s business operations and its chain of activities, the characteristics of the economic sector and the geographical and operational context;

directly linked to an impact is fundamental to understanding the allocation of responsibilities within business chains.

Therefore, this terminological difference should not be interpreted as a simple opposition between equivalent words, but rather as a dispute over the very legal meaning of corporate responsibility in a globalised economy. The choice between “impact” and “violation”, as well as between “abuse” and “violation”, has consequences for the normative structure of each instrument. In this sense, an adverse impact is understood primarily in terms of an obligation to manage and mitigate risks, or as part of a broader regime for the prevention of, accountability for and reparation of Human Rights violations. The expression “human rights violation”, by contrast, is grounded in a legal category that presupposes the existence of a recognised right and an infringement of that right, placing the person or community holding the right, and the mechanisms necessary for its protection and reparation, at the centre of the analysis.

The centrality of terminology is also evident in the definition of “affected persons” (affected person or persons, communities or environment) used by the Directive, in contrast to the term “victims” (victim) used in the proposed Treaty. The term “victims” retains the appropriate terminology as a consequence of the use of “violation” to define acts and omissions committed by companies against Human Rights; in other words, it has a legal character and is associated with reparation. The text presented during the ninth session establishes that a “victim” would be any person, group of persons or community that has suffered a Human Rights abuse or violation in the context of business activities as a result of acts or omissions (HOMA, 2024, p. 23). “Affected persons”, by contrast, has a preventive and mitigative character. It refers to any individual or group placed in a position of vulnerability or risk as a result of a company’s activities. On the other hand, the express inclusion of “affected communities” in the Directive is relevant to situations involving collective damage and impacts on territories and communities, where the identification of the injured rights holder is not limited to the individual person.

Another central element of the comparison is the extent of corporate responsibility throughout the chain of activities. The choice of the term “chain of activities” is one of the most important and also most controversial elements of the Directive, since it adopts a narrower conception than the notion of “value chain” found even in soft law instruments, such as the UN Guiding Principles and the OECD Guidelines. The language used in the Treaty debate, by contrast, emphasises the

breadth of terms such as “global value chain”. With regard to the “global value chain”:

The “global value chain” consists of a group of companies coordinated by a transnational corporation that contribute to the operations of the transnational corporation - from the provision of material, services and funds to the delivery of products for the end user. The global value chain includes affiliates, contractors, subcontractors or suppliers with whom the transnational corporation carries on established business relations. The TNC may exercise influence over a global value chain company depending on the circumstances. (Homa, 2021, pág. 09)

Furthermore, the proposals presented during the ninth session of the Open-ended Intergovernmental Working Group (OEIGWG), established to develop a UN Binding Treaty on Transnational Corporations (TNCs), seek to establish a broad definition of “business activities”, encompassing economic or other activities related to the manufacturing, production, transport, distribution, marketing, advertising and retailing of goods and services. The proposal supported by several States, including Côte d'Ivoire on behalf of the African Group, Ghana, South Africa, Egypt, Colombia, Cameroon, Malawi, Bolivia and Honduras, also includes financial institutions, investment funds and joint ventures, as well as activities conducted through electronic means.

The term “business activities” refers to any relationship between natural or legal persons, including State and non-State entities, intended for the conduct of business activities, encompassing affiliates, subsidiaries, agents, suppliers, partnerships, joint ventures, beneficial owners, financial institutions and other structures or relationships, including those operating along the “value chain” and through electronic means. The choice of this formulation is significant because it seeks to prevent corporate responsibility from being limited to direct contractual relationships or operations immediately controlled by the company, incorporating the complex production and financing structures characteristic of contemporary transnational corporations.

The broad definition of “business activities”, particularly when associated with the possibility of accountability throughout the value chain, seeks precisely to address the transnational characteristics of companies and the fragmentation of global production, financing and marketing chains. On the other hand, when the Directive establishes the responsibility of its “business partners” within the scope of

companies in their “chain of activities”, both direct partners (Article 3(1)(g)(i)) and indirect partners (Article 3(1)(g)(ii)) are included; however:

the chain of activities primarily covers activities of upstream business partners related to the production of goods and the provision of services of the in-scope company-namely, the supply chain. Contrary to the soft law instruments, the CSDDD covers only a small section of downstream activities (ATAMER, Yeşim M; WITTUM, Patrick , 2025).

In other words, the definition excludes relevant stages of the economic life cycle of products. One of the most problematic aspects is the exclusion of disposal. Recital 25 of the Directive’s preamble explicitly states that the “chain of activities” should not encompass the disposal of the product. This choice may create a significant gap in protection. Certain environmental and Human Rights impacts may occur precisely after the product is no longer under the company’s direct economic control.

This exclusion is particularly significant, since, under the Directive, the due diligence obligation in relation to the activities of “business partners”

downstream activities of the company relating to the distribution, transport and storage of a product of that company, where the business partners carry out those activities for or on behalf of the company, excluding the distribution, transport and storage of a product subject to export controls under Regulation (EU) 2021/821 or to export controls relating to arms, ammunition or war materials, once the export of the product has been authorised (DIRECTIVE (EU) 2024/1760, 2024)

Thus, if the purpose of HRDD is to identify and prevent adverse impacts associated with business activity, imposing a delimitation based exclusively on the contractual or logistical position of the actors may not correspond to the locations where the impacts actually occur. Consequently, the responsibility owed does not necessarily follow the product throughout its entire economic trajectory. Beyond a certain point, activities carried out by distributors, traders, consumers or other actors cease to form part of the “chain of activities” for the purposes of the Directive. The discussion concerning the chain of activities will be examined in greater depth in the following section, when addressing the scope of the Directive. For now, the choice of the term “chain of activities” constitutes a legal and normative delimitation of the value chain relevant for due diligence purposes, since it does not encompass the entire economic chain of production and consumption.

Finally, the comparison between the two models (the Treaty and the Directive) demonstrates that conceptual architecture is not a secondary aspect of instruments regulating business activity, but reflects two distinct regulatory rationalities. The categories used to define damage, the victim, business activity, the business relationship and due diligence determine, to a considerable extent, who will be subject to obligations, which conduct may fall within their scope, which risks must be identified, which damage may give rise to liability, and which mechanisms will be available to affected persons and communities.

4. FORMAL AND MATERIAL SCOPE

An analysis of the formal and material scope of the Corporate Sustainability Due Diligence Directive (CS3D) reveals a regulatory approach that establishes significant limits on the extent of protection. These limits arise primarily from the combination of economic criteria for determining which companies are directly subject to obligations and a restricted conception of the activities and business relationships that must be included in the due diligence process.

Regarding its formal scope, the Directive adopts a model of applicability based predominantly on objective criteria relating to the number of employees and turnover. In the case of the CS3D, its application was structured in a phased manner, according to the economic size of companies. Initially, the Directive would apply to companies with more than 5,000 employees and turnover exceeding €1.5 billion; subsequently, to companies with more than 3,000 employees and turnover exceeding €900 million; and, finally, to companies with more than 1,000 employees and turnover exceeding €450 million. The Directive also covers certain companies incorporated outside the European Union that conduct activities in the European market and meet the established turnover threshold, irrespective of their number of employees, subjecting them to the same due diligence obligations applicable to European companies. These companies must also designate a representative in the European Union to facilitate communication with supervisory authorities and the possible imposition of sanctions (Recital 30). The table below illustrates the phased application of the Directive:

Table - Phased Application of the CS3D

Company category	Minimum net turnover	Number of employees	Application date
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The EU Directive at a Crossroads Regulatory Dilution and the Negotiation of the Legally Binding Instrument on Business and Human Rights

EU companies	€1.5 billion (worldwide)	5.000	26 July 2027
	€900 million (worldwide)	3.000	26 July 2028
	€450 million (worldwide)	1.000	26 July 2029
Third-country companies (non-EU)	€1.5 billion (in the EU)	Not applicable	26 July 2027
	€900 million (in the EU)	Not applicable	26 July 2028
	€450 million (in the EU)	Not applicable	26 July 2029
EU franchisors/licensors	€80 million in worldwide turnover and €22.5 million in worldwide royalties	Not applicable	26 July 2029
Third-country franchisors/licensors	€80 million in EU turnover and €22.5 million in EU royalties	Not applicable	26 July 2029

Source: Connellan *et al.* (2024).

The current configuration of the CS3D represents a significant reduction in scope compared with the legislative proposal initially discussed. The original text covered companies with more than 500 employees and global turnover exceeding €150 million, and also provided for the inclusion of companies with more than 250 employees and turnover exceeding €40 million operating in sectors considered

high-risk, such as textiles, agriculture and mineral extraction. The justification for including these sectors was linked to their association with significant risks of socio-environmental impacts and Human Rights violations (GRABOSCH, 2024, p. 6). These sectors, however, were excluded from the final version analysed in the material.

The amendments introduced by the so-called Omnibus I Package, by prioritising the simplification and flexibilisation of due diligence obligations and restricting in-depth assessments of certain segments of the chain, may reduce the capacity to identify risks preventively at levels further removed from direct business relationships. This is particularly significant in sectors where many environmental and social problems arise at earlier stages, such as raw material extraction or production processes involving intensive use of water and chemicals.

As a consequence of these amendments, the scope of application of the CS3D was considerably restricted. According to the European Coalition for Corporate Justice (ECCJ), approximately 70% of the 13,000 companies originally covered would have been excluded, meaning that the regulation would apply to only around 0.05% of companies operating in the European Union (ECCJ, 2024). Although small and medium-sized enterprises are not directly covered by the Directive, they may be indirectly affected when they form part of the supply chains of companies subject to due diligence obligations. The Directive itself provides for support mechanisms for small and medium-sized enterprises through information and assistance platforms and portals, as well as the possibility of financial support from Member States.

This indirect application reveals one of the structural characteristics of the CS3D: although small and medium-sized enterprises are formally excluded from its personal scope, their contractual relationships with larger companies may result in certain due diligence requirements being transferred along production chains. However, support mechanisms for small and medium-sized enterprises do not fully resolve the problem of transferring responsibilities to economic actors with less bargaining power. As the analysis presented observes, large companies may use their economic and contractual position to shift responsibilities relating to due diligence onto smaller companies within their production chains. Furthermore, the extent of this “chain of activities” is itself open to question, as will be examined below.

A comparison with the debate surrounding the International Treaty reveals a difference in regulatory rationale. While HRDD legislation tends to use objective

criteria, such as the number of employees and turnover, to determine which companies fall within its scope, from this perspective, the protection of Human Rights should not be limited by economic criteria, even though specific instruments may establish differentiated obligations for TNCs on account of their structure, size and capacity to generate extraterritorial impacts.

Current discussions surrounding the international instrument are marked by a tension between maintaining a specific focus on companies of a transnational character and expanding its scope to cover “all businesses”. This issue is directly related to the controversy within the negotiation process of the international instrument. United Nations Human Rights Council Resolution 26/9 established the objective of the process as the development of a legally binding instrument to regulate, under International Human Rights Law, the activities of TNCs and other business enterprises of a transnational character. An important change during the negotiation process concerns the expansion of its personal scope to “all businesses”. According to HOMA's analysis, this expansion received support from delegations of the Global North and would represent a tension with the mandate originally established by Resolution 26/9, which was directed towards the regulation of TNCs (HOMA, 2024, pp. 2–3).

The CS3D has a significant extraterritorial dimension, since companies incorporated outside the European Union may be subject to the Directive when they meet the required turnover threshold and must comply with obligations equivalent to those imposed on European companies. Furthermore, its due diligence obligations may extend to chains of activities associated with products manufactured and marketed outside Europe. Evidently, the basis for its application remains linked to economic criteria and the company's connection with the European market, rather than necessarily to the transnational nature of the company as a specific legal category.

Another fundamental axis of comparison concerns the material scope of due diligence. The CS3D introduces the concept of the “chain of activities”, which corresponds, in general terms, to activities related to the production of goods and the provision of services by a company. This concept encompasses different stages of the production chain, from initial production to subsequent activities, including distribution, transport and storage. However, the Directive's very formulation of the “chain of activities” demonstrates this limitation. In the downstream segment, the

concept is centred on products rather than services, as can be seen in the following recitals:

(25) The chain of activities should cover the activities of a company's upstream business partners related to the production of goods or the provision of services by the company, including the design, extraction, sourcing, manufacture, transport, storage and supply of raw materials, products or parts of products and the development of the product or service, as well as the activities of a company's downstream business partners related to the distribution, transport and storage of the product, where the business partners carry out those activities for or on behalf of the company. **This Directive should not cover the disposal of the product.**

(26) The definition of the term "chain of activities" **should not include the activities of a company's downstream business partners related to the company's services. In the case of regulated financial undertakings, the definition of the term "chain of activities" should not include downstream business partners that receive their services and products.** (emphasis added)

Recital 26 excludes certain activities of downstream business partners related to the company's services and establishes an even broader exclusion for regulated financial institutions, whose downstream business partners receiving their services and products are not covered. This distinction reveals an important conceptual difficulty: in contemporary economic models, the separation between products and services does not always correspond to the way in which social and environmental impacts actually occur.

Thus, the concept of "chain of activities" represents a significant departure from a broader conception of the "value chain". Holly (2024) observes that the CS3D departs from the comprehensive value chain approach found in the United Nations Guiding Principles on Business and Human Rights and other international frameworks. According to the author, the concept adopted by the Directive does not expressly include certain activities and relationships that may be relevant to identifying Human Rights impacts, such as the design, sale, marketing, composition, commercialisation, use and disposal of products or services.

This limitation becomes particularly significant in the case of financial institutions. According to Grabosch's analysis (2024), financial institutions covered by the Directive are subject to HRDD obligations only at certain initial stages of their business chains. Holly (2024), in turn, highlights that financial institutions are not required, under the CS3D, to comprehensively consider the impacts associated with investments, loans, insurance or other financial services, but instead concentrate

their obligations on their own operations and respective supply chains. This choice is particularly significant because, in the financial sector, the social and environmental effects associated with business activity may arise precisely through the resources made available to third parties. The exclusion of certain downstream relationships, as currently formulated, may therefore limit the Directive's capacity to address impacts which, although they do not occur directly within the financial institution, are linked to the economic decisions it makes.

This delimitation contrasts with a due diligence approach based on the comprehensive identification of impacts associated with business activities and business relationships. In this regard, the debate surrounding the legally binding international instrument forms part of a broader discussion on the need to address transnational structures through obligations capable of moving beyond a narrow understanding of relationships immediately connected to production.

Another critical aspect concerns the substantive content of Human Rights protection itself. International standards on Business and Human Rights generally adopt a broad material scope and do not restrict protection to a closed list of rights or legal instruments. In this regard, United Nations Guiding Principle No. 12 establishes that internationally recognised Human Rights include, at a minimum, those set out in the International Bill of Human Rights and the principles concerning fundamental rights enshrined in the International Labour Organization (ILO) Declaration on Fundamental Principles and Rights at Work.

Similarly, the Organisation for Economic Co-operation and Development (OECD) Guidelines provide an illustrative and non-exhaustive list of large-scale "adverse environmental impacts" frequently associated with business activities, including climate change, biodiversity loss, degradation of terrestrial, marine and freshwater ecosystems, deforestation, air, water and soil pollution, and inadequate waste management, including hazardous substances (OECD, 2023).

In contrast to this comprehensive approach, the Directive establishes a more restrictive material scope by delimiting the relevant Human Rights and obligations through a specific list set out in its Annex. Since the lists provided for in the CS3D do not encompass all internationally recognised Human Rights or all instruments relevant to their protection, they may result in fragmented coverage of adverse impacts, making it more difficult for companies and other stakeholders to identify

the situations effectively covered by due diligence obligations (ECCJ SECRETARIAT, 2026, p. 28).

According to Holly (2024), the main omissions include the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of All Forms of Discrimination against Women, and the International Convention on the Elimination of All Forms of Racial Discrimination. Furthermore, the CS3D Annexes make no express reference to fundamental European instruments, such as the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union. The author draws attention to the risk of an approach excessively oriented towards formal conformity with the rights expressly enumerated in the Directive, at the expense of a broader assessment of business impacts.

In addition to the omissions already identified, the delimitation of the CS3D Annex also raises concerns regarding the rights of Indigenous Peoples and climate change. In this regard, particular attention should be drawn to the absence of express reference to ILO Convention No. 169 concerning Indigenous and Tribal Peoples and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). These instruments are particularly relevant to identifying impacts on Indigenous Peoples, including those concerning the protection of their territories, resources, cultures and ways of life, especially when considered alongside the exclusion of sectors regarded as high-risk, such as textiles, agriculture and mineral extraction, from direct coverage.

Likewise, the omission of the Paris Agreement from the Directive's Annex reveals a disconnect between HRDD obligations and the principal international legal framework for addressing climate change, since compliance with the Agreement also depends on companies undertaking sustainability commitments.

This restriction is reinforced by the Directive's own definition of adverse Human Rights impacts, which makes the recognition of certain violations conditional upon the fulfilment of three additional requirements, as set out in Article 3(1).

(c) 'Adverse human rights impact' means an impact on persons resulting from:

(i) an abuse of one of the human rights listed in Part I, Section 1, of the Annex to this Directive, as those human rights are enshrined in the international instruments listed in Part I, Section 2, of the Annex to this Directive;

(ii) an abuse of a human right not listed in Part I, Section 1, of the Annex to this Directive but included in the human rights instruments listed in Part I, Section 2, of the Annex to this Directive, provided that:

- the human right can be abused by a company or legal entity;
- the abuse of the human right directly impairs a legal interest protected under the human rights instruments listed in Part I, Section 2, of the Annex to this Directive; and
- the company could reasonably have foreseen the risk that such a human right might be affected, taking into account the circumstances of the specific case, including the nature and extent of the company's business operations and its chain of activities, the characteristics of the economic sector, and the geographical and operational context. (emphasis added)

The introduction of these conditions may restrict the interpretation of the scope of corporate obligations and create obstacles to identifying violations which, although relevant under international Human Rights standards, do not readily fall within the specific criteria established by the Directive. The adoption of additional requirements of this nature therefore raises questions concerning the clarity, comprehensiveness and effectiveness of the protection regime, since it may generate interpretative ambiguities and require complex legal analyses by legislators, companies, stakeholders, regulatory authorities and judicial bodies.

When the subject matter of the due diligence assessment is delimited by specific lists of rights, activities and business relationships, there is a risk that companies may transform HRDD into a predominantly formal exercise in regulatory conformity. In this scenario, matters not expressly covered by the text of the Directive may be interpreted as falling outside the immediate scope of the obligation, even where they may represent a significant risk to Human Rights.

Finally, the formal and material scope of the CS3D reveals a regulatory model characterised by a dual restriction. At the formal level, the direct obligation is reserved for companies that meet certain economic thresholds; at the material level, due diligence is subject to the legal delimitation of the "chain of activities" and the rights and impacts covered by the Directive. This combination may reduce the instrument's capacity to address situations in which the existence of risk does not correspond to the size of the company or to the activities expressly included within its normative scope.

5. OBLIGATIONS AND CONTENT OF THE DUTY

Defining the content of the obligations is one of the points at which the difference between the CS3D and the LBI becomes most evident. The CS3D establishes a relatively detailed HRDD duty, organised as a continuous process of identification, assessment, prioritisation, prevention, mitigation, cessation, reparation, participation, monitoring and communication. Article 6 of the LBI, in turn, initially situates prevention within the sphere of State obligations: States are required to effectively regulate companies subject to their jurisdiction or control, adopt appropriate measures to prevent their involvement in violations, and establish legally binding due diligence requirements. While the Directive seeks to specify how a company should organise its decision-making process in order to identify and address its impacts, the Treaty seeks to define what the State must ensure, through regulation, so that the protection of Human Rights does not remain dependent on corporate self-monitoring.

The CS3D was initially structured as a cycle integrated into the company's policies and management systems. In substantive terms, this cycle comprises the integration of due diligence into corporate policies; the identification and assessment of actual and potential adverse impacts; their prioritisation when they cannot be addressed simultaneously; the prevention and mitigation of potential impacts; the cessation or minimisation of actual impacts; reparation in the circumstances provided for; stakeholder engagement; notification and complaints mechanisms; monitoring the effectiveness of the measures adopted; and public communication.

Due diligence does not amount to an obligation to guarantee that violations will not occur, but rather requires the company to organise its activities in a manner compatible with the risks it creates, contributes to, or is connected with. Accordingly, the more the duty is formulated in procedural terms, the greater the risk that its assessment will focus on the formal existence of policies, assessments, audits and contractual clauses, rather than examining whether these instruments have actually been capable of changing the conditions that produce the violations.

Omnibus I alters this architecture, and Article 8 now establishes a two-stage identification process. In the first stage, the company carries out a general mapping exercise (*scoping exercise*), based on reasonably available information and the relevant risk factors, in order to identify the areas of its own operations, those of its subsidiaries, and its chain of activities where impacts are most likely to occur and to be most severe. Only in the second stage does it conduct an in-depth assessment of the areas selected through the *scoping exercise*. The logic thus ceases to require

the same investigative intensity throughout the entire chain and instead concentrates due diligence resources on areas previously classified as priorities.

The adoption of an initial screening stage is not necessarily problematic. The difficulty, however, lies in the fact that the outcome of this initial analysis determines which parts of the chain will be investigated in greater depth. If a particular sector, region or partner is considered low-risk in the *scoping exercise*, it will receive less attention in subsequent stages. The effectiveness of the model therefore depends directly on the quality of this initial assessment, since screening based on insufficient information may result in relevant risks never reaching the in-depth investigation stage and, consequently, remaining without adequate preventive measures.

The company needs information in order to identify where the greatest risks lie, but it uses the outcome of this initial assessment to decide where it will seek further information. In chains characterised by low transparency, informality, successive subcontracting or weak public oversight, a lack of information may not indicate low risk; it may be precisely a characteristic of the environment in which violations remain invisible. The danger is that a lack of knowledge may inadvertently be converted into an apparent absence of risk.

The document recognises that identification may draw on diverse sources, including independent reports, digital solutions, sectoral and multi-stakeholder initiatives, and information obtained through notification and complaints mechanisms. This makes the participation of workers, trade unions, communities and local organisations decisive. In contexts of significant information asymmetry, these actors are not merely *stakeholders* to be consulted after the problem has been identified, but essential sources for the problem to be identified in the first place.

The reform also restricts requests for information addressed to business partners. In the in-depth assessment, the information requested must be necessary and, where the partner has fewer than 5,000 workers, the company may request such information only when it cannot reasonably be obtained by other means. Furthermore, where the same information can be obtained from different partners, the company must, where reasonable, prioritise those in whose activities the impact is most likely to occur.

The Directive also provides that, where it is not possible to prevent, mitigate, cease or minimise all identified impacts simultaneously, the company may establish an order of action based fundamentally on their severity and likelihood. In this sense, prioritising cannot be equivalent to excluding. The objective should be to establish the sequence in which the damage will be addressed, rather than to create a category of violations that may remain indefinitely without a response.

Omnibus I makes this distinction more problematic by establishing that, where prioritisation has been carried out in accordance with Article 9⁵, the mere fact that the company has not yet addressed a less significant “impact” cannot subject it to the sanctions provided for in Article 27. This shifts a considerable part of the Directive’s protective function to the prioritisation methodology. The greater the protection afforded to the decision to prioritise, the more important it becomes to scrutinise how that decision was made, what information supported it, who participated in it, and how long non-prioritised impacts may remain unaddressed.

The new framework also allows, in situations where the damage is considered equally likely or equally severe, the assessment of areas involving direct business partners to be prioritised. This approach introduces into the assessment a criterion related to the contractual structure of the chain. Contractual proximity does not necessarily correspond to the location of the “most severe impacts”. Global chains are frequently organised through successive tiers of contracting and subcontracting, and the further a stage of production is from the lead company, the greater the degree of informality may be, the weaker the institutional capacity for

⁵ Article 9 - Prioritisation of identified actual and potential adverse impacts

1. Member States shall ensure that, where it is not feasible to prevent, mitigate, bring to an end or minimise all identified adverse impacts at the same time and to their full extent, companies prioritise adverse impacts identified pursuant to Article 8 in order to fulfil the obligations laid down in Article 10 or 11.

2. The prioritisation referred to in paragraph 1 shall be based on the severity and likelihood of the adverse impacts.

3. Once the most severe and most likely adverse impacts are addressed in accordance with Article 10 or 11 within a reasonable time, the company shall address less severe and less likely adverse impacts.

4. Where prioritisation decisions are made in accordance with this Article, the mere fact of not having addressed a less significant adverse impact shall not expose the company to penalties pursuant to Article 27.

oversight, and the more vulnerable the workers and communities involved (PISTELLI; CAFAGGI, 2026, p. 57-68).

Human Rights oriented due diligence should be guided primarily by the severity of the risk to rights holders, rather than by the legal architecture through which the company organises its business relationships. Pistelli and Cafaggi identify, in the redesign introduced by *Omnibus I*, a weakening of HRDD by bringing it excessively close to direct business partners and reducing its capacity to reach more distant relationships within the chain (PISTELLI; CAFAGGI, 2026, p. 57-68).

The Directive also relies on contractual assurances as an instrument of HRDD, allowing the company to require its business partners to commit to complying with the measures provided for and, where necessary, to extend them to other tiers of the chain. Contracts can contribute to incorporating Human Rights standards into relationships between legally independent companies and, in this sense, function as an instrument for operationalising HRDD (DADUSH; SCHÖNFELDER; STREIBELT, 2025, p. 245-293). The problem arises when contractual assurances begin to substitute for the company's preventive action. Including clauses requiring respect for Human Rights does not mean that damage is being effectively prevented, particularly when the contracting company itself maintains commercial practices, such as low prices, excessive deadlines or unpredictable changes to orders, that contribute to producing or aggravating these risks. In this scenario, the contract may function as a mechanism for transferring responsibility to the weaker links in the chain.

The version adopted in 2024 provided that prevention should not be limited to contractual assurances. The company could also be required to make investments, adapt processes and strategies, modify purchasing practices, and provide financial or technical support to smaller business partners. HRDD cannot simply transfer to suppliers responsibility for risks that also arise from the commercial conditions imposed by the lead company. The greater the power of the parent company to determine prices, deadlines, volumes and other conditions of the business relationship, the greater its responsibility to review its own practices when they contribute to the damage. In this sense, contractual clauses, audits and commitments to conformity are insufficient if the company preserves the economic conditions that favour the occurrence of violations.

The previous text also provided, under certain conditions, for the possibility of temporary suspension and, as a last resort, termination of the business

relationship where the “impacts” could not be adequately prevented or mitigated. Omnibus I removed the obligation to terminate the relationship, while preserving suspension as a possible measure.

The LBI offers an important counterpoint because it shifts the starting point: instead of beginning with the company and directly enumerating all the stages of its internal system, it establishes that States Parties must effectively regulate the activities of companies situated within their territory, under their jurisdiction, or otherwise under their control. They must adopt legislative, regulatory and other measures aimed at preventing business involvement in violations, ensuring respect for internationally recognised Human Rights, ensuring the practice of due diligence, and promoting the active and meaningful participation of trade unions, civil society, Indigenous Peoples and community organisations in the development and implementation of preventive measures. Article 6.4⁶ further requires due diligence requirements and the auxiliary measures necessary to ensure their implementation.

Prevention appears at two interconnected levels. At the first, there is a State obligation to establish and ensure the functioning of a regulatory framework capable of preventing business-related violations. At the second, this framework must impose legally binding HRDD duties on companies. This architecture seeks, at least conceptually, to prevent the protection of Human Rights from being reduced to the quality of internal *compliance* programmes. Companies must conduct HRDD,

⁶ 6.4. Measures to achieve the ends referred to in Article 6.2 shall include legally enforceable requirements for business enterprises to undertake human rights due diligence as well as such supporting or ancillary measures as may be needed to ensure that business enterprises while carrying out human rights due diligence:

(a) undertake and publish on a regular basis human rights impact assessments prior and throughout their operations;

(b) integrate a gender and age perspective, and takes full and proper account of the differentiated human rights-related risks and adverse human rights impacts experienced by women and girls;

(c) take particular account of the needs of those who may be at heightened risks of vulnerability or marginalization;

(d) meaningful consult with potentially affected groups and other relevant stakeholders;

(e) protect the safety of human rights defenders, journalists, workers, members of indigenous peoples, among others, as well as those who may be subject to retaliation; and

(f) insofar as engagement with indigenous peoples takes place, undertake such process in accordance with the internationally recognized standards of free, prior, and informed consent.

but it is the State that must establish the normative, institutional and supervisory conditions capable of making such due diligence effective.

Article 6.4 further provides that due diligence must incorporate periodic and public impact assessments before and during operations, a gender and age perspective, specific consideration of persons exposed to greater risks of vulnerability or marginalisation, meaningful consultation with potentially affected groups, protection against retaliation and, with regard to Indigenous Peoples, observance of internationally recognised standards of free, prior and informed consent.

In traditional business risk management models, information tends to flow vertically: the company requests data from suppliers, commissions audits, produces indicators and decides which risks it considers material. Human Rights-oriented due diligence requires a different approach. Workers, trade unions, communities, Indigenous Peoples, defenders and local organisations are not merely recipients of protection or supplementary sources of information, but rights holders whose experience is indispensable for identifying the nature, severity and distribution of violations.

The prevention provided for in the article is broader than the imposition of a due diligence duty. The LBI takes as its starting point the duty of States to effectively regulate business activities and to adopt legislative, regulatory and institutional measures aimed at preventing Human Rights violations. Accordingly, the State must establish a normative and institutional framework capable of preventing violations, overseeing business conduct and responding to breaches of the obligations established.

It also requires the independence of the competent authorities and protection against undue influence. Prevention depends on the existence of authorities endowed with independence, resources and the institutional capacity to enforce these obligations.

From the perspective of companies, it is necessary to distinguish between respect for Human Rights, prevention and accountability. HRDD belongs primarily to the preventive dimension: companies must identify risks and impacts and adopt measures to prevent or address them. However, the LBI model does not allow the conclusion that the proper performance of this procedure exhausts their

responsibilities. Companies remain subject to the rules established by the State and may be held legally accountable when their conduct causes or contributes to violations.

This is important because complying with HRDD procedures is not equivalent to respecting Human Rights. A company may have a Human Rights policy, impact assessments, audits, contractual clauses and monitoring systems and still engage in practices that are incompatible with protected rights. The existence of these procedures may be relevant when assessing its conduct, but should never automatically operate as a justification or immunity from accountability. HRDD must serve the prevention of violations rather than replace the assessment of the company's own conduct.

This dimension becomes clearer when Article 6 is read together with the remainder of the LBI. The Treaty is not limited to prevention, but seeks to construct a sequence encompassing the protection of victims, access to justice, reparation, legal liability, jurisdiction, limitation periods, applicable law and international cooperation. Article 8, in particular, requires States to establish liability systems capable of producing legal consequences for business actors in the circumstances provided for. Therefore, when prevention fails and a violation occurs, the legal response does not end with the finding that the HRDD procedure was inadequate: the questions of liability and reparation also arise. HRDD thus constitutes an important instrument within the system, but remains within the preventive dimension of a broader architecture for the protection of Human Rights and corporate accountability.

6. CORPORATE GOVERNANCE

Corporate governance operates at the point where the obligations imposed on companies intersect with the internal structures through which their power is exercised. It is therefore understood as the organisation of decision-making power within the company, encompassing the distribution of powers and responsibilities among its governing bodies, the definition and oversight of corporate strategy, and the incentives guiding those involved in such decisions (FUCHS, 2007, pp. 63-64; 103-104). For the Business and Human Rights agenda, what is particularly relevant is the extent to which Human Rights permeate these processes and begin to shape the decisions that organise economic activity, especially when it is recognised that companies are not merely subjects of regulation but also exercise power in the production and implementation of rules.

Initially, the original CS3D proposal presented by the European Commission, in Articles 25 and 26, linked company directors to the harm arising from corporate decisions affecting Human Rights, the environment and the climate, while also assigning them responsibility for overseeing due diligence and its integration:

Article 25 - Directors' Duty of Care

1. Member States shall ensure that, when fulfilling their duty to act in the best interests of the company, directors of companies referred to in Article 2(1) take into account the consequences of their decisions for sustainability matters, including, where applicable, consequences for Human Rights, climate change and the environment, including in the short, medium and long term.
2. Member States shall ensure that their laws, regulations and administrative provisions concerning breaches of directors' duties also apply to the provisions of this Article.

Article 26 - Setting Up and Overseeing Due Diligence

1. Member States shall ensure that directors are responsible for establishing and overseeing due diligence measures, in particular the due diligence policy, taking due account of relevant input from stakeholders and civil society organisations. Directors shall report to the board of directors in this regard.
2. Member States shall ensure that directors take measures to adapt the corporate strategy, taking into account the actual and potential adverse impacts identified and the measures adopted to address them.

Article 15(3) linked directors' variable remuneration to compliance with obligations relating to the climate transition plan where such remuneration was already linked to corporate strategy, long-term interests and sustainability. It thus sought to ensure that the information generated through HRDD would have implications for the governing bodies and processes responsible for corporate decision-making.

Article 15(3)

Member States shall ensure that companies duly take into account the fulfilment of the obligations referred to in paragraphs 1 and 2 when setting variable remuneration, where such remuneration is linked to a director's contribution to the company's business strategy and long-term interests and sustainability.

During the legislative process, all these provisions were removed, meaning that the Directive regulates the harm caused by business activities without addressing, in any way, the decision-making power that produces it. The LBI likewise does not establish specific rules on corporate governance, although it proposes a broader framework for the protection of Human Rights.

7. CLIMATE DIMENSION

Since the proposal presented in 2022, the climate dimension has been present in the Directive, although initially separate from the general due diligence process. Article 15 provided that certain companies should adopt a plan aimed at ensuring the compatibility of their business model and strategy with the transition to a sustainable economy and with limiting global warming to 1.5°C, in line with the Paris Agreement. Where climate change was identified, the plan was required to include emission reduction targets.

Climate and the environment were subject to distinct regimes under the Directive. While environmental damage was covered by the obligations set out in the Annex and was therefore subject to due diligence duties, climate change was placed under a separate regime structured around the transition plan. The Paris Agreement was not incorporated into the set of international instruments defining the material scope of the CS3D and, consequently, corporate contributions to climate change did not constitute harm subject to the same framework applicable to Human Rights and environmental violations.

This separation creates a parallel climate obligation, oriented towards planning the corporate transition, without addressing questions concerning the identification of corporate contributions to the climate crisis, their prevention and cessation, and the legal consequences of the damage caused. This stands in contrast to the role played by TNCs in the climate crisis itself. Certain sectors contribute directly to its emergence and intensification through decisions that organise the extraction, financing, production, transport and consumption associated with carbon-intensive activities. Amnesty International (2021, p. 125) identifies, in this regard, the responsibility of the fossil fuel industry, large-scale agribusiness and the financial institutions that sustain these activities. Oil, gas and coal producers are among the principal historical contributors to emissions; banks, asset managers and insurers also play a significant role when they finance fossil fuel companies and activities associated with deforestation without imposing climate-related conditions (AMNESTY INTERNATIONAL, 2021, p. 125).

The progressive replacement of fossil fuels does not resolve the problem, since the climate transition reorganises production chains, investment flows and demand for natural resources, thereby creating new spaces for corporate expansion. The need to rapidly expand renewable energy generation simultaneously increases demand for copper, lithium, nickel, cobalt and other minerals required for low-carbon technologies. If the chains necessary for the transition remain structured around the concentration of decision-making centres and economic benefits, and the transfer of environmental and social costs to territories and communities with less capacity to influence those decisions, the transition may alter its technological basis without breaking with the asymmetries that characterise the transnational economy. It is in this sense that the discussion of a just transition extends beyond the choice between fossil and renewable energy sources to encompass the political, economic and legal conditions under which the transition itself takes place.

The concept of “climate commodities” (ALMEIDA, 2026) seeks to demonstrate that the minerals required for low-carbon technologies cannot be understood solely in terms of their climate-related function, precisely because of their incorporation into these new spaces of corporate expansion. These minerals thus acquire a climate dimension, because they enable technologies necessary for reducing emissions; an economic dimension, because they form part of production chains, investments and commercial relationships; and a geoeconomic dimension, insofar as access to and control over them assume a strategic position in relations between States and markets (ALMEIDA, 2026, pp. 70–71). In this way, the transition reorganises transnational economic relations and redefines resources and spaces for accumulation.

This reorganisation takes place within an international economy already characterised by profound asymmetries. The geographical distribution of natural resources, the damage resulting from their exploitation, technological capacity and the economic benefits generated by new supply chains do not necessarily coincide. There is therefore a risk that growing demand for these minerals will deepen the dependence of Global South economies heavily reliant on extractive activities, concentrating the associated social, labour, environmental and climate costs in these economies and leaving them to bear those costs. As access to such resources becomes a prerequisite for the development of low-carbon technologies, their availability consequently begins to influence the positions occupied by States and

companies within emerging technological chains. A form of “resource diplomacy” emerges (ALMEIDA, 2026, pp. 235; 241-242), through which securing access to these resources is incorporated into governmental strategies for economic security and technological competition, while the transition reorganises power relations around control over the conditions necessary for its implementation.

In the European context, the decarbonisation of the economy depends on transnational raw material chains whose various stages are distributed beyond the territory of the Union. This gives rise to concerns about external dependence at different stages of critical mineral supply chains and international competition for control over their extraction, processing and supply (ALMEIDA, 2026, pp. 236-238). The more this process depends on resources, suppliers and activities located in other jurisdictions, the more important it becomes to establish mechanisms capable of addressing environmental damage and Human Rights violations occurring throughout these chains. A climate policy that reduces emissions associated with the European economy while allowing the material costs of this transformation to be transferred to other territories preserves precisely the separation between climate objectives, environmental protection and Human Rights that transnational regulation should seek to address.

The conflicts already arising from this transformation demonstrate that the issue is not merely hypothetical. In 2025, the Business & Human Rights Resource Centre (2025, pp. 1-2) identified 95 legal cases related to projects associated with the energy transition. More than 70% involved the mining of transition minerals; Indigenous Peoples had initiated 47% of the cases; environmental impacts featured in 70%, and water-related issues in 56%. These proceedings encompass activities ranging from mineral extraction to wind, solar and hydroelectric projects and involve allegations of environmental degradation, threats to livelihoods, violations of territorial rights, lack of free, prior and informed consultation, and impacts on protected areas (BHRRRC, 2025, pp. 1-2).

ESCR-Net (2025) also identifies conflicts arising from the exploitation of critical minerals and the implementation of renewable energy projects in the Global South, associated with land appropriation, displacement and environmental degradation, warning of the possibility that historical patterns of exploitation may be reproduced under the justification of the climate transition. Climate, the environment and Human Rights constitute interdependent dimensions of the same economic process and are inseparable from business activity. Climate change results from economic processes that affect ecosystems and territories while

simultaneously producing concrete consequences for the exercise of rights. A single corporate decision may contribute to increased emissions, cause localised environmental degradation and undermine rights to health, water, food, housing, territory and culture. This relationship is also evident within the transition itself: activities intended to mitigate climate change may reduce emissions while simultaneously generating new environmental pressures and Human Rights violations in the territories where they take place.

This understanding is also supported by the report of the United Nations Secretary-General's Panel on Critical Energy Transition Minerals, which proceeds from the recognition that the expansion of these chains cannot be guided exclusively by the need to secure the supply of resources necessary for decarbonisation. The seven principles formulated by the Panel place Human Rights at the centre of critical mineral value chains and connect their protection with environmental integrity and biodiversity, justice and equity, benefit-sharing, local value addition and economic diversification, as well as responsibility in investment, financing and trade, transparency, accountability and international cooperation (UNITED NATIONS, 2024, pp. 4; 10-22).

This interconnection shifts the discussion towards the conditions under which the chains necessary for the transition are organised, and emissions reduction ceases to be regarded as an objective capable of overriding other legal requirements. The transition must simultaneously protect Human Rights and the environment, distribute the economic benefits arising from resource exploitation more equitably, and ensure accountability mechanisms throughout mineral supply chains.

This also prevents the climate transition from being conflated with a just transition. The issue is not simply to question the need to reduce emissions, but to reject the notion that the climate-related purpose attributed to an activity is sufficient to legitimise it. In this regard, according to the BHRRC (2025, pp. 1-2), the identified litigation does not represent a rejection of climate action, but rather demands that the energy transformation be carried out with Human Rights protection, effective participation and fair distribution. In 65% of the cases analysed, rights holders sought the temporary or permanent suspension of projects in response to alleged violations. The report therefore argues that due diligence must extend throughout the entire value chain and be accompanied by access to

reparation, consultation, respect for free, prior and informed consent, and models for distributing the benefits of the transition (BHRRC, 2025, p. 3).

Despite the separation between corporate contributions to climate change and the general HRDD regime applicable to Human Rights and environmental violations, Article 22⁷ of the Directive adopted in 2024 represented a historic advance by linking companies' business models to climate objectives, albeit in a limited and forward-looking manner. This was entirely removed by Omnibus I, diluting the progress achieved and leaving unresolved the questions that the

⁷ Article 22

Combating Climate Change

1. Member States shall ensure that companies referred to in Article 2(1), points (a), (b) and (c), and Article 2(2), points (a), (b) and (c), adopt and put into effect a transition plan for climate change mitigation which aims to ensure, through best efforts, that the business model and strategy of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5°C in line with the Paris Agreement and the objective of achieving climate neutrality as established in Regulation (EU) 2021/1119, including its intermediate targets and its climate neutrality target for 2050, and, where relevant, the exposure of the company to coal-, oil- and gas-related activities.

The design of the transition plan for climate change mitigation referred to in the first subparagraph shall include:

(a) Time-bound targets related to climate change for 2030 and in five-year steps up to 2050, based on conclusive scientific evidence and, where appropriate, absolute emission reduction targets for greenhouse gas emissions for Scopes 1, 2 and 3, for each significant category;

(b) A description of the decarbonisation levers identified and the key actions planned to reach the targets referred to in point (a), including, where appropriate, changes in the company's product and service portfolio and the adoption of new technologies;

(c) An explanation and quantification of the investments and funding supporting the implementation of the transition plan for climate change mitigation; and

(d) A description of the role of the administrative, management and supervisory bodies with regard to the transition plan for climate change mitigation.

2. Companies that report a transition plan for climate change mitigation in accordance with Article 19a, 29a or 40a, as applicable, of Directive 2013/34/EU shall be deemed to have complied with the obligation to adopt a transition plan for climate change mitigation referred to in paragraph 1 of this Article.

Companies that are included in the transition plan for climate change mitigation of their parent undertaking, reported in accordance with Article 29a or 40a, as applicable, of Directive 2013/34/EU, shall be deemed to have complied with the obligation to adopt a transition plan for climate change mitigation referred to in paragraph 1 of this Article.

3. Member States shall ensure that the transition plan for climate change mitigation referred to in paragraph 1 is updated every 12 months and contains a description of the progress made by the company towards achieving the targets referred to in paragraph 1, second subparagraph, point (a).

original approach had failed to address: how to legally address corporate contributions to the climate crisis; how to connect them to the environmental impacts and Human Rights violations arising from the same activities and chains; and how to prevent the transformation of the energy matrix from reproducing, within the chains established to enable it, forms of environmental degradation, territorial displacement and unequal distribution of risks and benefits. Consequently, the obligation to adopt and implement a climate transition plan ceased to exist under the Directive, while the 2030-2050 targets, references to Scopes 1, 2 and 3, decarbonisation measures, necessary investments and the express connection between the climate transition and administrative, management and supervisory bodies were also removed from this regime.

The removal of the climate dimension from the CS3D takes place at a particularly contradictory moment in International Law. While the European Union removes from the Directive the specific obligation to adopt and implement climate transition plans, recent developments in international jurisprudence are moving towards a more substantive recognition of the relationship between climate protection, the environment and Human Rights, including the duty of States to regulate private activities that contribute to environmental degradation and climate change.

On 23 July 2025, the International Court of Justice recognised that States have obligations, arising from both treaties and customary International Law, to protect the climate system and other parts of the environment against significant harm resulting from anthropogenic greenhouse gas emissions. The Court treated HRDD as a standard of conduct applicable to the obligation of prevention and affirmed that this obligation extends to the regulation of activities undertaken by private actors. The ICJ further stated that State omissions concerning the production and consumption of fossil fuels, the granting of exploration licences or the provision of subsidies may, depending on the circumstances, constitute internationally wrongful acts. It also recognised that breaches of climate obligations may give rise to the general consequences of international responsibility, including cessation, guarantees of non-repetition and full reparation (INTERNATIONAL COURT OF JUSTICE, 2025).

The Advisory Opinion breaks with a narrow understanding of climate responsibility focused exclusively on conduct directly generating emissions. The Court itself recognised the right to a clean, healthy and sustainable environment in

its analysis of international Human Rights obligations relating to climate change (INTERNATIONAL COURT OF JUSTICE, 2025).

The Inter-American Court of Human Rights went even further in establishing this connection. In Advisory Opinion OC-32/25, adopted on 29 May and notified on 3 July 2025, the Court recognised the Human Right to a healthy climate as an autonomous right derived from the right to a healthy environment, understanding it as the protection of a climate system free from dangerous interference affecting human beings and nature. The climate system thus becomes a specific object of protection within the Inter-American system, rather than merely a condition for the exercise of other rights (INTER-AMERICAN COURT OF HUMAN RIGHTS, 2025).

These developments, published before Omnibus I, make the trajectory followed by the CS3D even more problematic. At a time when international courts are making the duty of States to regulate private activities contributing to the climate emergency increasingly explicit, the principal European initiative for regulating transnational business activity removes its obligations concerning this issue.

At the international level, the LBI has not developed a corporate climate obligation comparable to the transition plan that was once included in the Directive. The climate issue enters the Treaty development process through a different route, namely through the definition of the material scope of the Human Rights protected and the possibility that damage caused by business activities to the climate and the environment may fall within the obligations established by the instrument.

However, even this possibility remains contested. The proposals analysed by HOMA had already argued that the definition of a Human Rights violation should encompass harm arising from corporate acts or omissions that prevent the exercise of internationally recognised rights, expressly including the right to a safe, clean, healthy and sustainable environment (HOMA, 2024, p. 11). The inclusion of this right has consequences extending beyond environmental protection in the strict sense. By legally recognising the interdependence between environmental degradation and the exercise of Human Rights, it becomes possible for harm associated with business activities to be treated, within the Treaty itself, as violations capable of triggering its mechanisms of prevention, accountability and reparation, rather than merely as externalities subject to parallel environmental regimes.

The tenth session of the OEIGWG, held in 2024, made this dispute even more evident. The express inclusion of the right to a clean, healthy and sustainable

environment encountered resistance from the United States and representatives of the North American business sector, in a context also marked by growing corporate participation in the process. This definition also has implications for the climate dimension of the Treaty, insofar as climate change, environmental degradation and Human Rights violations frequently arise from the same economic activities and produce legally interdependent effects.

At the eleventh session of the OEIGWG, in October 2025, this dimension re-emerged in a significantly different context. The session focused State negotiations on Articles 12 to 24 and revisited the outcomes of the intersessional consultations held throughout 2025 on victims' rights, protection, prevention, access to reparation, legal liability, jurisdiction, limitation periods and applicable law. Although climate and the environment did not constitute a separate focus of this stage of the negotiations, the issue resurfaced in discussions concerning the material scope and coherence of the future instrument.

At the opening of the session, the European Union, expressly referring to the International Court of Justice's Advisory Opinion of July 2025, advocated an integrated approach within the LBI. Civil society organisations, in turn, called for the express reinstatement of the right to a clean, healthy and sustainable environment, arguing that its absence would reduce the instrument's capacity to address corporate harm simultaneously affecting people, territories, ecosystems and the climate system. During the session itself, ESCR-Net stated that references to this right had been progressively weakened and noted that several delegations had advocated its reinstatement.

8. PARTICIPATION OF AFFECTED PERSONS AND COMMUNITIES

Human Rights violations associated with business activities disproportionately affect groups and communities that have historically occupied positions of greater vulnerability, including Indigenous Peoples, Black populations, workers and local communities. In this context, incorporating effective participation mechanisms into due diligence processes is fundamental to ensuring that the perspectives, demands and claims of those potentially affected are taken into account. The participation of affected persons and communities should therefore not be understood merely as a consultative mechanism, but as a component of the

effectiveness of HRDD itself, insofar as it can contribute to identifying impacts, defining preventive and mitigation measures, and monitoring the responses adopted by companies.

Accordingly, this section examines how the Directive incorporates the participation of affected persons and communities into its HRDD model. Within the Directive's regulatory framework, their participation is, in principle, realised through the mechanism of meaningful engagement with stakeholders, as established in Article 13.

The definition of "stakeholders" is set out in Article 3 of the Directive and broadly encompasses employees of the company and its subsidiaries; trade unions and workers' representatives; consumers; and other individuals, groups, communities or entities whose rights or interests are or may be affected by the products, services and operations of the company, its subsidiaries and its business partners. The definition includes national Human Rights and environmental institutions, civil society organisations whose objectives include environmental protection, and the legitimate representatives of those individuals, groups, communities or entities.

According to the ECCJ (2026, pp. 56-57), this revised definition is considerably more restrictive than that of the original CS3D, and key actors, including national Human Rights and environmental institutions, are no longer expressly included. Furthermore, the Directive should clarify the definition of stakeholders by explicitly including "workers throughout the chain of activities", to ensure that workers within the "chain of activities", informal workers, home-based workers and other workers in non-standard forms of employment are covered.

Furthermore, in this regard, it is important to examine the very language employed by the Directive: "stakeholders". This terminology reflects the use of a corporate management vocabulary that places investors, suppliers and populations suffering rights violations within the same category of "interested parties", obscuring the severe asymmetry of power between them. From this perspective, it is argued that terminology consistent with the protection of Human Rights would instead refer to "affected persons and communities".

Article 13 establishes that meaningful engagement with stakeholders must take place at specific stages, including the collection of information intended to prioritise findings concerning adverse impacts; the development of preventive and corrective action plans; decisions to suspend or terminate business relationships;

the adoption of reparation measures; and the development of qualitative and quantitative monitoring indicators for the purpose of monitoring periodic assessments of companies' own operations and measures.

However, this same architecture ultimately weakens the effectiveness of participation by restricting the scope of consultation - limiting it to specific stages of the process and excluding consultations concerning the due diligence policy or alternative measures (HOLLY, 2024, pp. 14-15). As a consequence of this restriction, affected persons and communities are excluded from central discussions concerning appropriate alternative measures beyond those formally established within the mechanism, as well as the due diligence policy itself. This excludes, for example, stakeholder consultation on "appropriate measures" other than prevention and corrective action plans, remediation measures, or the due diligence policy provided for in Article 5. It should be emphasised that the UN Guiding Principles (UNGPs) and the OECD Guidelines provide that meaningful engagement with rights holders and other stakeholders should be required throughout the entire due diligence process.

Furthermore, the Directive provides that companies may also use multi-stakeholder initiatives and industry initiatives to facilitate stakeholder consultation (Article 13(6)). Such initiatives cannot replace consultation with the companies' own employees, but potentially allow greater flexibility in consultations with other affected stakeholders. The possibility of companies relying on sector-specific and multi-stakeholder initiatives to fulfil these obligations may ultimately dilute the control and effective voice of local communities. This scenario is aggravated by systematic changes to the frequency of oversight, as demonstrated by the extension of periodic monitoring from annually to every five years and the postponement of reporting and transparency requirements until 2030/2031, as reformulated by the Omnibus I Package (ECCJ, 2026, p. 34).

Moreover, there is a clear need for guidance on effective stakeholder engagement, particularly when such engagement takes place through industry mechanisms or associations, especially in a context characterised by asymmetries of corporate influence. In this regard, the ECCJ (2026) highlights that the Directive fails to distinguish between a company's duty to conduct meaningful stakeholder engagement under Article 13 and the State's duty to obtain Free, Prior and Informed Consent (FPIC) before approving projects affecting Indigenous Peoples' lands, resources or cultural heritage.

Another particularly critical provision is Article 13(4), which establishes that, where it is not reasonably possible to carry out effective engagement with stakeholders to the extent necessary to comply with the requirements of the Directive, companies must additionally consult experts capable of providing credible information on actual or potential adverse impacts. At first glance, this provision appears pragmatic, since it recognises that situations may arise in which the direct participation of affected persons is difficult or unfeasible.

However, according to Deva (2023), HRDD laws generally present operational limitations precisely because they fail to adequately address the asymmetries of power, information and resources that exist between companies and affected communities. From this perspective, by similarly failing to address these asymmetries, the Directive also authorises the replacement of rights holders' voices with technical expertise. Yet an expert may provide relevant technical information for identifying or assessing an impact without necessarily reflecting the experiences, interests, priorities or perspectives of those who directly bear its consequences.

From this perspective, the expression "where it is not reasonably possible" deserves particular attention. The Directive does not establish consultation with experts as an equivalent alternative to stakeholder participation; nevertheless, it allows companies to rely on experts when they consider that effective engagement is not reasonably possible. The risk, identified through Deva's critique (2023), is that a clause of this nature may be interpreted with excessive flexibility, turning practical difficulties of engagement - costs, distance, conflicts, the absence of institutional mechanisms or even resistance on the part of the company - into justifications for replacing rights holders with experts.

Thus, recognising that victims are, in most cases, members of social groups excluded from participation in decision-making processes through various mechanisms, it is necessary to create greater opportunities for these groups to participate in order to strengthen their relative bargaining power. Otherwise, as Surya Deva (2023) warns, due diligence mechanisms may operate in practice as instruments of social legitimation, institutionally protecting these TNCs. The author (2023, p. 399) illustrates this dynamic through the case of the Jindal Steel Works (JSW) steel plant in Odisha, India, where public consultations and compensation and employment packages were directed towards legitimising corporate expansion onto the lands of farmers who opposed the project, without effectively addressing their demands.

Finally, it is argued that the leading role and participation of affected persons and communities should constitute a central and cross-cutting element, as this would place victims' suffering at the centre of the mechanism, rather than treating their participation as merely another stage of the due diligence process.

9. ACCESS TO JUSTICE AND REPARATION

In the business context, there is a profound gap between recognising a rights violation and obtaining adequate reparation for it. Litigation of this nature frequently places affected persons and communities in opposition to corporate groups whose activities are distributed across different legal entities, contracts and jurisdictions, while information concerning corporate decisions, control relationships, risk assessments, audits, internal communications and the organisation of the chain remains under the control of the companies themselves. These difficulties are compounded by high costs, lengthy proceedings, challenges in identifying the legally responsible defendant, risks of retaliation, obstacles to collective representation, issues of jurisdiction and applicable law and, in transnational cases, the need to obtain evidence or enforce judgments in another jurisdiction. The greater the distance between the territory where the damage materialises, the location where corporate decisions are made, the jurisdiction where evidence is held and the jurisdiction where assets capable of satisfying a judgment are located, the greater the number of obstacles that victims must overcome before liability can produce concrete consequences.

The Directive, in Article 12⁸, incorporates reparation into the HRDD cycle, establishing that where a company causes or jointly causes an "actual adverse impact", it must provide reparation; where the impact is caused solely by a business partner, the company is not subject to the same obligation. The extent of the duty to provide reparation therefore depends on the nature of the company's involvement,

⁸ Article 12 - Remediation of actual adverse impacts

1. Member States shall ensure that, where a company has caused or jointly caused an actual adverse impact, the company provides remediation.

2. Where the actual adverse impact is caused only by the company's business partner, voluntary remediation may be provided by the company. The company may also use its ability to influence the business partner that is causing the adverse impact to provide remediation.

making its determination decisive in establishing whether such an obligation exists, precisely in contexts where relationships between parent companies, subsidiaries and business partners make it difficult to reconstruct each actor's contribution to the harm.

The Directive establishes a minimum limitation period of five years, which cannot begin to run before the violation has ceased and the injured person has reasonably become aware of the information necessary to bring proceedings. It also requires that litigation costs should not be "prohibitively expensive", allows for injunctive measures and introduces a rule on access to evidence whereby, in the presence of a "plausible claim" and an indication that additional evidence is under the company's control, the court may order its disclosure, including where confidential information is involved.

In litigation of this nature, costs operate as a mechanism determining which violations will ultimately be brought before the courts. Prolonged proceedings have different consequences for the parties, since large companies possess the financial resources and legal structures necessary to sustain lengthy litigation, whereas, for affected persons and communities, the continuation of proceedings may become economically unviable. The very possibility of initiating and sustaining litigation may be undermined by the costs of legal proceedings, difficulties in obtaining specialised legal assistance, the complexity and duration of procedures, the costs of expert evidence, translation and travel, the inadequacy of collective representation mechanisms, and the disparity of resources between the parties.

The rationale underlying the expression "not prohibitively expensive" used in Article 29(3)(b)⁹ of the CS3D to refer to costs, is that the total cost of seeking reparation must not be so high as to prevent or discourage victims from initiating or pursuing legal proceedings. In this regard, the Court of Justice of the European Union (CJEU) has already established, when interpreting the same wording in the context of the Aarhus Convention, that all costs arising from participation in the proceedings must be considered collectively. This assessment cannot be limited to the claimant's financial circumstances, and costs must neither exceed their financial capacity nor be objectively unreasonable. Factors that may be taken into account include the circumstances of the parties, the significance of the interests at stake, and the legal and procedural complexity of the case (COURT OF JUSTICE OF THE EUROPEAN UNION, 2024, paras. 73-75). Nevertheless, the provision establishes the

⁹ "the cost of proceedings is not prohibitively expensive for claimants to seek justice".

required outcome - that costs must not be prohibitive - without creating a detailed framework for achieving it, and its practical implementation remains dependent on the procedural mechanisms of the Member States.

The difficulty of obtaining legal assistance forms part of the same problem. Litigation involving corporate groups, transnational chains, environmental damage or collective violations may require specialised knowledge and the mobilisation of resources over prolonged periods. Where affected persons lack the resources to secure adequate legal representation, or where legal aid systems do not cover the costs and complexity of such proceedings, the inequality between the parties is not remedied merely by formally recognising the possibility of seeking judicial redress. Access to justice also depends on the existence of conditions that enable claimants to formulate their claims in legal terms, produce evidence, respond to the opposing party's litigation strategies and sustain proceedings until a judgment is obtained and, where necessary, enforced.

The Directive also provides for injunctive measures, ensuring that claimants may seek definitive or provisional measures aimed at bringing violations of national provisions transposing the CS3D to an end, including through summary proceedings and the imposition of obligations to act or refrain from acting. Given that, in the context of such violations, the continuation of the conduct may exacerbate harm that is difficult or impossible to reverse, these measures enable judicial intervention to address the violating conduct itself, making cessation a dimension of access to justice, rather than merely of reparation (EUROPEAN UNION, 2024, Article 29(3)(c)).

In such litigation, the evidence necessary to establish the violation and liability may not be available to affected persons and communities. Contracts, records relating to the value chain, risk assessments, audits, internal communications, information concerning suppliers and business partners, and documents relating to prevention and mitigation measures are largely produced or retained within corporate organisations. Companies therefore control the information necessary to reconstruct the facts and demonstrate the relationship between the activity, the breach of obligations and the resulting harm. For this reason, establishing a reversal of the burden of proof in the instrument would be essential. The CS3D itself expressly recognised, in the text adopted in 2024, that difficulties in accessing evidence constituted one of the practical and procedural

obstacles to access to justice that it sought to address (EUROPEAN UNION, 2024, recital 82).

Article 29(3)(e) addressed this asymmetry through a mechanism for court-ordered disclosure of evidence. Where a claimant provides a reasoned justification, based on facts and evidence reasonably available to them, sufficient to support the plausibility of their claim for damages, and indicates that additional evidence is under the company's control, the court may order the company to disclose it. The disclosure order is therefore subject to an assessment of necessity and proportionality, taking into account the extent to which the claim is already supported by available evidence, the scope and cost of disclosure, and the legitimate interests of the parties and third parties.

Thus, the party occupying a position of informational disadvantage is required to provide an initial degree of substantiation before gaining access to information whose concentration within the corporate sphere is itself one of the causes of that disadvantage. The plausibility requirement may therefore create a form of circularity whereby, in order to access the documents necessary to substantiate their claim more fully, claimants must first establish a sufficiently well-founded claim without possessing those documents. The greater the fragmentation of the chain and the complexity of the corporate structure, the more difficult it may become to overcome this initial threshold.

It is necessary to emphasise the weakening of the representation provisions established in the 2024 CS3D through Omnibus I. The previous version required Member States to establish reasonable conditions under which affected persons and communities could be represented by trade unions, non-governmental organisations and, in accordance with national law, national Human Rights institutions (EUROPEAN UNION, 2024, Article 29(3)(d)).

In cases involving collective, geographically dispersed and complex corporate violations, these organisations can bring together specialised knowledge, finance expert assessments, consolidate dispersed violations, preserve evidence, reduce victims' individual exposure, partially redress the disparity of resources between litigants and provide institutional continuity to proceedings that affected persons would find difficult to sustain individually. The ECCJ emphasises that removing this guarantee is likely to have particularly severe consequences for those with the least financial capacity to sustain litigation individually, since it eliminates the European standard that ensured their ability to rely on organisations possessing the

resources and expertise necessary to represent them in court (ECCJ, 2026, p. 8). In this sense, representation functioned as a mechanism for reducing the dependence of access to justice on individuals' own organisational and litigation capacities. By removing this guarantee, Omnibus I relieved Member States of the obligation to ensure that such representation was possible.

The LBI adopts a different approach, with Article 7 of the Updated Draft structuring access to reparation around the barriers faced by victims. States must ensure that competent authorities are able to provide adequate, timely and effective remedies and overcome specific obstacles faced by women and persons or groups in situations of vulnerability or marginalisation. The provision requires policies aimed at progressively reducing legal, practical and other relevant barriers, and includes adequate and effective legal assistance, accessible information, and measures concerning costs and the practical conditions under which State mechanisms can be used.

While the CS3D establishes its access-to-justice safeguards within a directive whose central focus is the corporate due diligence process, the LBI seeks to frame the problem in terms of victims' capacity to mobilise the legal system. The starting point is no longer limited to identifying which procedures companies must adopt, but also encompasses the conditions that States must establish to enable violations to be challenged. This shift in perspective does not, in itself, guarantee greater effectiveness, but it makes it possible to address obstacles that cannot adequately be accommodated within a framework centred on corporate management of violations.

Article 7 proceeds from the recognition that legal and practical barriers may prevent a violation from being translated into an effectively enforceable claim, and assigns States responsibility for creating the conditions necessary to overcome them. In this respect, moving beyond a strictly formal conception of access to justice, merely making judicial or non-judicial mechanisms available is insufficient; their design must take into account the actual conditions under which affected persons and communities are able to use them, including in the face of structural inequalities and specific situations of vulnerability or marginalisation. We regard this as an advance in the Updated Draft, precisely because it recognises that difficulties in obtaining reparation may arise both from the corporate violation itself and from the inadequacy or ineffectiveness of the State structures intended to respond to it (HOMA, 2024, pp. 21-22).

This concern also extends to the evidentiary framework provided for in Article 7, which has been the subject of intense dispute during the Treaty negotiations. The document prepared for the eleventh session records that the intersessional consultations held in April 2025, devoted to victims' rights and protection and access to reparation, were marked by proposals from Global South countries aimed at strengthening procedural safeguards and full reparation, while other positions insisted on general formulations and greater reliance on domestic law. The official text recording proposals submitted throughout the negotiations also demonstrates that the reversal of the burden of proof remains contested.

Companies normally control not only individual documents, but the very informational architecture of the facts underlying the litigation: they know who made the decisions, which risks were identified, which reports circulated internally, which instructions were transmitted to subsidiaries, which audits were conducted, which warnings were received and how contractual relationships were structured. Affected persons know the harm they have suffered; frequently, however, they lack access to the corporate processes that explain how that harm was produced or tolerated. For this reason, access to evidence and redistribution of the burden of proof are not interchangeable mechanisms. The former seeks to open corporate records to judicial scrutiny; the latter determines who bears the consequences when, despite such access, certain relevant facts remain uncertain. An effective regime must take both into account.

Accordingly, Article 7 of the document incorporates the possibility of redistributing the burden of proof, allowing courts to order its reversal where necessary to ensure victims' effective access to reparation. This provision acknowledges that evidentiary rules are not neutral in determining the effectiveness of legal protection, and that invariably requiring affected persons to establish every element necessary to substantiate their claims may render reparation formally recognised but practically unattainable. At the same time, the provision remains dependent on the actions of national authorities and does not establish an automatic reversal or a uniform evidentiary regime. We consider the incorporation of this mechanism a positive development, although its effectiveness will depend on how this power is concretely incorporated into domestic legal systems and exercised by States (HOMA, 2024, pp. 21-22).

Another relevant element is the concern with the implementation of reparation itself. Article 7 of the LBI does not bring State involvement to an end once a reparatory measure has been recognised, but also incorporates monitoring

of its implementation. This aspect is important because it shifts the focus of reparation from the existence of a decision to its effective implementation: a judicial, administrative or extrajudicial determination that remains unenforced does not restore the rights of affected persons and communities. In this sense, monitoring allows reparation to be understood as a process that must produce concrete outcomes for affected persons and communities.

The document also currently provides for recourse to non-judicial mechanisms, which we identify as one of the aspects requiring particular caution. Article 7.2 incorporates these mechanisms as possible avenues for accessing reparation, potentially broadening the alternatives available and enabling faster and less costly responses. The problem arises when such mechanisms begin to operate as substitutes for judicial protection, particularly given the imbalance of power between affected persons and communities and TNCs. Without sufficient guarantees of independence, oversight, the binding nature of decisions and their effectiveness, extrajudicial mechanisms may shift Human Rights disputes into negotiation forums where the conditions of participation remain profoundly unequal. For this reason, HOMA's analysis maintains that these avenues should operate on a complementary basis, preserving victims' freedom of choice and their access to judicial mechanisms (HOMA, 2024, pp. 21-22).

Unlike the current version of the CS3D, as amended by Omnibus I, the LBI provides for the possibility of claims being brought by third parties, with victims' consent or in the justified circumstances provided for by the instrument, thereby strengthening this dimension of accessibility. This provision ensures that the capacity to seek reparation is not exclusively dependent on individual action and recognises the importance of representative forms of engagement with justice mechanisms.

A more profound limitation concerns the position occupied by affected persons and communities in determining reparation. The LBI recognises specific vulnerabilities and seeks to remove barriers to access to justice, but does not establish with sufficient clarity the centrality of victims' suffering, needs and priorities as a guiding principle for the determination, implementation and evaluation of reparatory measures. This limitation can be understood in light of the principle of the centrality of victims' suffering, developed by Antônio Augusto Cançado Trindade within the Inter-American Human Rights System. The principle is grounded in a reversal of perspective: a violation should not be understood

primarily through the conduct of the responsible actor or the abstract categories used to characterise it, but through the concrete experience of those who have suffered its consequences (CANÇADO TRINDADE, 2007, p. 238).

In the field of reparation, Cançado Trindade proposes that its determination should be guided by the triad of victimisation, human suffering and the integral rehabilitation of the victim, considered in the entirety of their personality (CANÇADO TRINDADE, 2007, p. 238). This requires more than recognising victims as holders of violated rights or allowing them to be heard during proceedings. Rather, it requires moving them from the position of passive recipients of solutions determined by third parties to that of subjects of the reparatory process itself. This has implications both for identifying violations and for determining appropriate forms of reparation, which must take into account the concrete consequences of the violations, the needs of affected persons and communities, their participation in developing responses, and the prevention of further violations.

From this perspective, both the LBI and the CS3D exhibit limitations and gaps. Both recognise the asymmetries characterising relationships between TNCs and affected persons and communities and incorporate mechanisms for participation and reparation, but neither establishes the centrality of victims as a guiding principle throughout the entire reparatory process. Under the CS3D, stakeholder consultation forms part of the determination of reparatory measures, but decision-making remains embedded within the corporate due diligence process. Under the LBI, although Article 7 represents progress by recognising vulnerabilities and concrete barriers to accessing reparation, it likewise does not expressly establish that the experience of harm and the needs of affected persons and communities should guide the determination, implementation and evaluation of reparatory measures. This distinction is significant because consulting victims is not equivalent to placing them at the centre of the process: the latter presupposes that the adequacy of reparation must also be assessed according to its capacity to respond concretely to the suffering caused by the violation and to restore, to the greatest extent possible, the rights and living conditions that have been violated.

Access to reparation is also addressed through the LBI's provision for an International Fund for Victims, intended to provide legal and financial assistance to affected persons and communities. The problem lies in its financing arrangements, since the text assigns responsibility for funding to States without establishing a corresponding obligation for corporate contributions. This transfers the costs of violations associated with business activities to public resources, while shielding

companies from the obligation to finance the very mechanism established to address harm associated with those activities. Where harm arises in the context of private economic activity, but the institutional financing of its reparation falls exclusively upon States, the benefits of the activity are privatised while part of the costs of its violations are socialised.

The CS3D, in turn, does not establish a comparable fund. Its framework remains essentially linked to the individual obligations of companies and national administrative and judicial mechanisms, without creating a collective financial structure for victims. This absence may be contrasted with Brazilian Bill No. 572/2022, currently undergoing legislative consideration in Brazil as a proposed national framework on Human Rights and Business. Although it is not the subject of analysis in this report, the Bill offers a particularly interesting solution to this issue that could be useful to the European system, by directly linking the financing of reparation to the responsible corporate actor. Article 13 establishes that, where an obligation to provide reparation exists, the company responsible for the violation must itself establish a Fund to cover the basic needs of affected persons, groups and communities until the process of full reparation has been completed, also serving as a guarantee for emergency and reparatory measures. Furthermore, the Bill seeks to remove corporate control over the use of these resources: it provides for a management structure in which representatives of affected communities hold 50% of the seats, alongside representatives of the State and the Public Defender's Office, while the Public Prosecutor's Office is responsible for overseeing the implementation and management of the Fund. Article 14 specifies, among its purposes, the provision of emergency financial assistance to ensure the subsistence of affected populations and the fulfilment of priority healthcare needs arising from the violation. This comparison offers both a model for establishing a fund to guarantee affected persons' access to justice under the CS3D and a basis for developing mechanisms to adequately regulate the availability and management of the resources necessary for implementation under the LBI.

Full reparation must also be understood as extending beyond compensation. In cases of corporate violations, restoring victims to their previous situation may be impossible, since territories may have been destroyed, ways of life disrupted, people displaced, community ties severed and environmental damage inflicted over decades. A framework centred on affected persons and communities must accommodate, according to the nature of the harm, restitution, compensation,

rehabilitation, cessation of the violation, satisfaction and guarantees of non-repetition. More importantly, these measures are not interchangeable. Financial compensation must not function as a means of purchasing the continuation of a violation, just as a future corporate policy cannot substitute for reparation for harm already caused.

Strengthening Article 7 of the LBI cannot, in itself, ensure reparation for affected persons and communities. Its effectiveness also depends on coordination with provisions concerning liability, jurisdiction, limitation periods, applicable law and, above all, cooperation and mutual legal assistance between States. Such coordination is necessary because, in violations involving TNCs, the different elements required to establish liability are rarely located within a single jurisdiction. Victims may be located in one State, while the controlling company, relevant documents and assets against which judgments may be enforced are located in others. In such cases, recognising the right to reparation has limited practical significance unless mechanisms exist to enable the cross-border gathering of evidence, the conduct of joint investigations, the identification and freezing of assets, and the enforcement of judgments beyond national borders.

In this respect, the current framework of the LBI still exhibits weaknesses, and the dilution of provisions on mutual legal assistance has removed more concrete mechanisms contained in previous versions, including those relating to evidence gathering, joint investigations and measures concerning assets located in other jurisdictions. Access to justice, accountability and enforcement must operate in a coordinated manner, since a favourable judgment that cannot reach evidence, responsible actors or assets located abroad is unlikely to produce effective reparation. This is also one of the principal potential strengths of a multilateral instrument: unlike a regional directive focused primarily on regulating corporate obligations, the Treaty has the potential to establish mechanisms connecting different jurisdictions, thereby reducing the distance between the recognition of a right and its effective realisation in transnational contexts.

10. LIABILITY AND JURISDICTION

The Directive provides for civil liability under Article 29, establishing that a company shall be held liable where, intentionally or negligently, it fails to comply with its HRDD obligations and, as a consequence, causes damage to a natural or legal person. Liability is therefore fault-based: the occurrence of a violation is not sufficient to establish corporate liability, as it is necessary to demonstrate a breach

of the obligation, damage and a causal link between them. The Directive further provides that a company shall not be held liable where the damage was caused exclusively by its business partners in the chain of activities. Once liability has been established, the affected person is entitled to full compensation for the damage suffered, without such compensation resulting in overcompensation through punitive or multiple damages.

The version adopted in 2024 provided for a harmonised civil liability regime, meaning that EU law itself established common minimum conditions for determining when a company could be held civilly liable for failing to comply with its due diligence obligations. Harmonisation did not entail the creation of a complete and autonomous European civil liability system, since several issues remained subject to national laws, but it standardised the core requirements for liability arising under the CS3D. Thus, regardless of the Member State in which proceedings were brought, there was a common European standard linking breaches of due diligence obligations to the possibility of civil liability, helping to reduce differences between national regimes and prevent the effectiveness of the same European obligations from varying substantially depending on the applicable legal system.

Omnibus I, however, removed Article 29(1) itself, eliminating the harmonised conditions for civil liability and leaving national legal systems to define its requirements. In other words, it ceased to establish a uniform basis for liability, replacing a common European standard with a patchwork of national regimes. The result is that different consequences may arise depending on the applicable national law.

The removal of this regime must be understood alongside the expansion of maximum harmonisation of due diligence obligations and the restrictions on *gold-plating*, which refers to the adoption by Member States, when transposing a European directive, of requirements exceeding the standard established by the EU legislature. Although this practice may result in higher levels of protection at the national level, it is criticised, particularly from the perspective of the internal market, for potentially creating regulatory differences between Member States and increasing compliance costs for companies operating across different jurisdictions. In the case of the CS3D, *Omnibus I* expanded maximum harmonisation across central aspects of due diligence obligations precisely with the stated objective of

restricting these national divergences and preventing regulatory fragmentation (STRAMPELLI, 2026, pp. 23-24).

While fragmentation between national legal systems is opposed when it may expand or differentiate the obligations imposed on companies, it is accepted precisely when determining the conditions under which companies may be held liable. *Omnibus I* introduces a selective application of the logic of harmonisation, restricting Member States' autonomy to establish different due diligence standards while simultaneously returning to those same legal systems the responsibility for defining the requirements for civil liability. Regulatory diversity is therefore constrained at the level of corporate obligations but preserved when determining whether, and under what conditions, a breach of those obligations will give rise to a duty to provide reparation. In this way, the duties imposed on companies are harmonised, while the conditions governing their liability towards affected persons and communities become fragmented (STRAMPELLI, 2026, pp. 37-38).

This change is even more significant in transnational cases, because the existence of a European obligation and the jurisdiction of a European court do not necessarily mean that the law of a Member State will govern liability. The CS3D did not establish a special regime of international jurisdiction for civil liability claims arising from corporate violations. The determination of the competent court remains governed by the general European system of Private International Law, particularly the Brussels I *bis* Regulation, while the determination of the law applicable to non-contractual obligations remains, as a general rule, subject to the Rome II Regulation. Jurisdiction and applicable law are distinct questions, meaning that a court in a Member State may have jurisdiction to hear a claim while nevertheless being required to determine corporate liability under the law of another country.

This problem already existed under the 2024 Directive, but it had been partially addressed by Article 29(7), which required national provisions transposing certain elements of the civil liability regime to be considered overriding mandatory provisions where the law applicable to the claim was not that of a Member State. This provision was particularly important for harm occurring outside the Union, as it sought to prevent the application of less protective foreign legislation from neutralising the liability regime established by the CS3D. *Omnibus I* also removed this safeguard, meaning that the determination of applicable law once again depends entirely on general conflict-of-law rules, without the Directive ensuring the

overriding application of its former harmonised liability regime (STRAMPELLI, 2026, pp. 21-24).

Fragmentation therefore emerges at different levels. A company may be subject to European due diligence obligations, face proceedings before a European court and nevertheless have its civil liability determined under a national regime different from that applicable to another company subject to the same obligations or, in litigation involving extraterritorial harm, under the legislation of a third State. The uniformity of corporate obligations thus ceases to correspond to uniformity in the conditions governing their enforceability.

From this perspective, removing harmonisation does not necessarily eliminate the legal uncertainty invoked to justify the “simplification” agenda. For companies operating transnationally, replacing common European conditions with different national regimes may merely shift the complexity. Rather than managing their liability according to a common framework established by the Union, corporate groups must consider their exposure under different national systems. For affected persons and communities, the problem is more serious, because this diversity compounds the existing difficulties of identifying the competent forum, determining the applicable law, establishing causation and legally reaching the different entities comprising transnational corporate structures (STRAMPELLI, 2026, pp. 37-38).

The existence of a European obligation does not, in itself, mean that its breach will produce equivalent civil consequences throughout the Union. Companies subject to the same obligations may face different regimes of attribution, causation and liability depending on the applicable legal system, while victims of similar violations may encounter substantially different possibilities for obtaining reparation. Therefore, uniformity of obligations does not correspond to uniformity of enforceability. The literature has already identified a bifurcated structure in this framework, whereby preventive regulation remains strongly Europeanised, while civil liability is once again subjected to the diversity of national systems, potentially producing differences even in the degree of deterrence generated by the regime (STRAMPELLI, 2026, pp. 37-38).

The notion of “simplification” used to justify *Omnibus I* must also be examined, since simplifying a legal instrument does not necessarily mean reducing its level of protection. Greater clarity in obligations or a reduction in bureaucracy may make

due diligence more efficient without compromising its purpose. The problem is different when so-called simplification is achieved by reducing the number of companies covered, eliminating obligations or weakening accountability mechanisms. In such cases, regulation is not merely being made simpler; its scope and capacity to prevent violations and produce legal consequences when they occur are being reduced (STRAMPELLI, 2026, pp. 37-38).

It is therefore necessary to identify what was actually simplified during this process and whose interests and costs were taken into consideration. The European *better regulation* agenda places considerable emphasis on reducing the administrative burdens and compliance costs borne by companies. The risk lies in treating regulation itself predominantly as an economic cost, relegating its function of correcting power asymmetries and protecting rights to a secondary position (BARONCELLI, 2025, pp. 9-10). In the case of the CS3D, reducing the costs borne by companies, as invoked to justify *Omnibus I*, involves shifting costs onto affected persons and communities, thereby transferring them precisely to those who suffer the harm that the regulation was intended to prevent.

The LBI presents a different framework. Article 8 establishes a broader system of liability, requiring States to establish liability regimes for natural and legal persons and encompassing different forms of liability, including civil, administrative and, in accordance with national legal systems, criminal liability. It also provides that States must establish legal grounds capable of addressing situations in which liability arises not only from directly causing harm but also, in the circumstances provided for by the instrument, from failures to prevent violations related to activities under their control, management or supervision.

While the CS3D retains HRDD obligations but removes the harmonised core of civil liability, the LBI moves in the opposite direction, seeking to establish minimum international standards of liability that States must incorporate into their legal systems. It brings together different forms of liability and seeks to reduce the gaps that allow the transnational organisation of economic activity to hinder the legal attribution of responsibility. The difference lies in the very function assigned to liability: while the CS3D preserves a strong regulatory and preventive dimension but streamlines a decisive part of the civil consequences of its breach, the LBI seeks to make liability one of the structural elements of an international framework on Human Rights and Business.

For this reason, liability cannot be analysed separately from provisions concerning jurisdiction, applicable law and legal cooperation. Establishing corporate liability is insufficient unless the legal conditions necessary to make it effective also exist. Affected persons and communities must have access to a competent court, sufficient time to bring proceedings, applicable-law rules that do not render liability unattainable, and the ability to obtain evidence, locate assets and enforce judgments when these elements are distributed across different countries.

Nevertheless, Article 8 is not without criticism. HOMA (2024, pp. 25-26) draws attention to the excessively general treatment of natural and legal persons. TNCs operate through hierarchical structures, internal policies, divisions of responsibilities and collective decision-making processes. Treating the liability of natural and legal persons without sufficient distinction may obscure precisely the need to develop specific criteria for attributing liability to corporate organisations, without making corporate liability depend exclusively on identifying and punishing particular individuals.

The problem becomes even more important when violations arise through complex corporate structures. The provision seeks to address situations in which a company exercises control, management or supervision over other entities or fails to adopt appropriate measures to prevent violations connected to its business relationships. This approach is important because it shifts the focus from isolated legal personality to the power relationships existing within the economic organisation. However, the text still does not establish a sufficiently clear and comprehensive rule governing the liability of controlling companies for violations committed through subsidiaries and third parties. We consider that the absence of a clearer mandatory link between controlling companies and their global chains allows liability to remain dispersed across legally fragmented structures.

An economic organisation may function as a coordinated unit for investment, production, risk management and the appropriation of profits, while appearing legally fragmented when the need to answer for harm arises. If liability follows only the formal boundaries between legal entities, corporate structures may operate simultaneously as mechanisms of economic integration and the dispersion of risk. The challenge for the LBI is precisely to prevent economic control from being relevant to organising and extracting value from the chain while becoming

irrelevant when legal consequences must be attributed for violations occurring within it.

From a comparative perspective, the Directive is primarily based on breaches of HRDD duties imposed on the company itself, whereas the LBI seeks to establish a broader regime of legal liability relating to business activities and relationships of control. The first model may reach a controlling company where its own omission constitutes a breach of a legally imposed duty, but it does not automatically transform corporate control into a basis for liability. The second has greater potential to address transnational corporate structures, but this potential depends on the precision with which the final text defines control, management, supervision, contribution and omission. An excessively open-ended provision risks leaving these matters to different domestic legal systems, reproducing internationally the very fragmentation that the Treaty seeks to overcome.

The difference between the two instruments becomes even clearer in relation to jurisdiction. Article 9 of the LBI establishes jurisdictional grounds expressly designed for transnational corporate litigation. Among other criteria, the document allows jurisdiction to be based on the place where the harm occurred and the domicile of the persons responsible, and introduces an innovation by allowing civil proceedings to be brought in the State of the victim's nationality or habitual residence. This provision reduces obstacles arising from the need to travel and the distance between affected persons and communities and the forums where companies are established. This distinction is particularly significant when compared with the CS3D, since Brussels I *bis* structures jurisdiction predominantly around the relationship between the defendant and the forum, whereas the LBI deliberately introduces the victim's circumstances as a connecting factor.

Another point requiring attention, already identified by HOMA in an earlier analysis (2024, p. 29), is the regression resulting from the removal of the express prohibition of *forum non conveniens*, which appeared in a previous version of the Treaty. This doctrine allows a court that has jurisdiction to decline to hear a case on the grounds that another forum is more appropriate. In transnational litigation, this may create a significant barrier for victims. Proceedings brought, for example, in the country where the controlling company is headquartered could be redirected to the country where the harm occurred, even where victims face greater difficulties accessing justice there. The current text seeks to reduce this risk by requiring decisions concerning the exercise of jurisdiction to take victims' rights into account, including where proceedings may be discontinued in favour of another forum.

Nevertheless, this protection is weaker than the previously proposed solution: rather than expressly preventing a competent court from declining jurisdiction on the basis of *forum non conveniens*, the Treaty now allows that possibility, subject to consideration of victims' rights.

This gap is aggravated by the absence of a genuine *forum necessitatis*. Such a mechanism would allow a court to assume jurisdiction exceptionally where no other jurisdiction was effectively available to provide justice. Its importance lies not in permitting indiscriminate universal jurisdiction, but in preventing a denial of justice, since where the forums ordinarily connected to a case are inaccessible or incapable of providing effective protection, some court must be able to hear the claim (HOMA, 2024, p. 29).

There is also a significant gap concerning corporate assets. Article 9.2 employs different criteria to determine the domicile of a legal person, including incorporation or registration, central administration, principal place of business and, in the current version, reference to principal assets or operations. We maintain that the location of assets should play a stronger role as a jurisdictional connecting factor, particularly given the relationship between adjudication and enforcement. After all, obtaining a judgment against a company is insufficient if the assets necessary to satisfy it are located in another jurisdiction and require separate recognition and enforcement proceedings. Bringing jurisdiction and the location of assets into closer alignment could reduce this disconnect.

Regarding limitation periods, Article 10 establishes that violations constituting the "most serious crimes" of concern to the international community, including war crimes, crimes against humanity and genocide, shall not be subject to statutory limitations. For other violations, it requires limitation periods to be appropriate to the gravity of the case and not unduly restrictive, taking into account the circumstances, the location of the harm and the time necessary to identify it. This concern is particularly important in cases involving environmental damage or exposure to toxic substances, whose consequences may emerge years later, as well as situations of displacement or community disruption in which immediate access to the justice system is materially impossible.

The wording, however, requires critical examination. We criticise the expression "*most serious crimes*" for its indeterminacy and the risk of generating disputes over which violations reach the threshold required for the exclusion of statutory

limitations. Corporate violations may cause massive, long-lasting and intergenerational harm without necessarily falling within the traditional categories of international crimes mentioned in the Article. Large-scale labour exploitation and prolonged environmental degradation are examples demonstrating that social and human gravity does not necessarily correspond to international criminal classification (HOMA, 2024, p. 31).

As discussed in Section 10 of this report, the CS3D does not contain a comparable autonomous regime excluding statutory limitations. The original version harmonised certain safeguards concerning limitation periods for civil claims, but the determination of the law governing limitation periods in transnational litigation remains closely connected to Rome II, Article 15 of which includes rules on limitation and prescription within the scope of the law applicable to non-contractual obligations. The former mechanism under Article 29 reduced part of this risk, but its removal by *Omnibus I* once again makes the law designated by general conflict-of-law rules particularly significant.

Finally, Article 11 of the LBI directly addresses applicable law. One advance in the document was the expansion of connecting factors to consider not only the place where acts or omissions occurred, but also the place where they produced effects. This expansion prevents the determination of applicable law from remaining rigidly tied to the territory where a corporate decision was made or the conduct formally occurred, when its effects on Human Rights materialise in another jurisdiction (HOMA, 2024, p. 32).

Nevertheless, the discussion of applicable law reveals one of the Treaty's most profound political disputes. During the 2025 intersessional consultations, a tendency to subordinate the application of Article 11 to domestic law gained strength, potentially producing divergent and politically convenient interpretations among States. This approach is problematic because a treaty intended precisely to overcome national gaps in accountability loses part of its purpose if decisive questions concerning the effectiveness of liability are once again left, without sufficiently strong international standards, to the same national systems whose differences enable the fragmentation of *accountability*. Where conflicts between laws arise, the provision offering greater protection to Human Rights and victims' interests should prevail, bringing the solution closer to a *pro persona* principle.

We may therefore conclude that the CS3D produces a substantive internationalisation of corporate obligations, whereby companies within its scope

must consider impacts that may occur far beyond European borders. However, the Directive has not established an equivalent internationalisation of accountability mechanisms. Jurisdiction remains essentially governed by Brussels I *bis*, applicable law by Rome II and, following *Omnibus I*, the conditions governing civil liability have largely returned to national legal systems, while the European safeguard ensuring the overriding mandatory application of the Directive's liability regime has disappeared. The LBI adopts a broader approach, recognising that establishing obligations for companies is insufficient to ensure their accountability and seeking to address more directly the legal obstacles created by TNCs that may hinder or prevent liability from being established.

11. COOPERATION AND LEGAL ASSISTANCE

In the field of cooperation and legal assistance, the EU Directive establishes a predominantly administrative and intra-European institutional framework, structured around cooperation between national supervisory authorities and the creation of a European Network of Supervisory Authorities. This model seeks to address the transnational nature of chains of activities and the risks of adverse impacts, which frequently extend beyond the jurisdiction of the authority responsible for supervising the company.

Article 28 constitutes the core of this system. The Directive requires the European Commission to establish a European Network of Supervisory Authorities intended to “facilitate cooperation between supervisory authorities, as well as the coordination and alignment of regulatory, investigative, sanctioning and supervisory practices of supervisory authorities and, where appropriate, the sharing of information among them”.

This framework is reinforced by the express provision for mutual assistance between national authorities. Under Article 28(3), supervisory authorities must “provide each other with relevant information and mutual assistance in the performance of their duties and put in place measures for effective cooperation with each other”. Such assistance expressly includes the cooperation necessary for the exercise of supervisory powers, “in particular with regard to inspections and requests for information”. Article 28(4) of the Directive also establishes deadlines for responding to requests for assistance, requiring authorities to respond without

undue delay and, as a general rule, within a maximum period of one month, which may be extended under certain circumstances.

This structure represents an important dimension of the institutionalisation of cooperation. Rather than making cooperation between authorities entirely dependent on the conclusion of specific agreements between States, the Directive establishes legal obligations of cooperation, permanent supervisory authorities and minimum procedures for exchanging information and conducting investigative measures. The system also addresses potential uncertainties concerning the allocation of competences under Article 28(9). In such cases, relevant information must be shared with the European Network, which may coordinate efforts to find a solution.

In practice, according to Muñoz (2025, p. 18), the CS3D relies on a European network of supervisory authorities, sector-specific Commission guidance on risk factors, due diligence processes, model contractual clauses, suitability criteria, data and information sources, and transition plans, as well as initiatives by Member States to provide information and support to companies. For Muñoz, from a business perspective, this may result in an extensive system of rules and resources requiring management. However, “in any event, national authorities and courts, entrusted with processing such rules, are likely to be weakest link” (MUÑOZ, 2025, p. 18), since the national authorities and courts responsible for implementing this regulatory framework are subject to economic pressures associated with companies’ pursuit of competitive advantages.

The author (MUÑOZ, 2025, p. 18) further notes that “this is compounded by another risk: that CSDDD obligations will be shaped not in cooperative, but in ‘adversarial’ scenarios”¹⁰. This observation is particularly relevant because institutional cooperation does not eliminate the disparities in administrative capacity among Member States. On the contrary, the effectiveness of the European Network will depend, to a large extent, on the capacity of national authorities to produce, share and interpret information, conduct investigations and impose sanctions.

¹⁰ In any event, national authorities and courts, entrusted with applying such rules, are likely to constitute the weakest link. This situation is compounded by another risk: that CSDDD obligations will be shaped not in cooperative contexts, but rather in “adversarial” scenarios. (Our translation)

With regard specifically to the supervisory authorities provided for under Article 24 of the Directive, which comprise the European Network of Supervisory Authorities, each Member State designates one or more supervisory authorities to oversee compliance with the obligations imposed on companies that have their registered office (in the case of EU companies) or a branch (in the case of third-country companies) within its territory. According to Brabant et al. (2022), the possibility of designating more than one authority allows Member States to draw on greater specialisation and technical expertise, for example, by assigning the supervision of environmental matters to specialised environmental bodies, while ensuring that the respective authorities are coordinated and cooperate closely and effectively with one another.

However, according to Muñoz (2025, p. 18), the effectiveness of this model will depend significantly on the technical capacity of national administrative and judicial authorities to assess the adequacy of the due diligence measures adopted by companies. In a relatively new field, such capacity “is by no means guaranteed”.¹¹ Muñoz (2025, p. 18). According to Muñoz, in theory, the Directive requires Member States to ensure that the competent authorities have adequate resources to perform their functions. However, this is easier said than done - or implemented - particularly as pressure on Member States to ensure that companies remain competitive continues to increase.

Finally, it should be emphasised that the Directive establishes a sophisticated framework for supervision and cooperation to ensure compliance within the European regulatory space, but does not create an equivalent regime of mutual legal assistance between European States and other States in which “adverse impacts on Human Rights or the environment” may occur as a result of extensive “chains of activities”. This limitation becomes particularly significant when investigations or efforts to obtain reparation require access to evidence, witnesses, documents, assets or authorities located outside the European Union.

In such cases, the effectiveness of European administrative cooperation may depend on mechanisms external to the Directive itself, such as international judicial cooperation instruments or bilateral and multilateral agreements. However, jurisdictional fragmentation has historically constituted one of the obstacles to

¹¹ “is by no means guaranteed”. (Our translation)

holding transnational corporations accountable: a company may be domiciled in one State, its parent company in another, its economic activities conducted in a third, and the affected persons and communities located in a fourth State. Without effective mechanisms for obtaining evidence, locating assets, carrying out procedural acts and enforcing judgments, the formal existence of rights and accountability mechanisms may fail to translate into effective reparation.

There is, therefore, a distinction between the cross-border administrative coordination within the European Union proposed by the Directive and the establishment of mutual assistance and international legal cooperation mechanisms aimed at investigating and providing reparation for Human Rights violations in transnational contexts, as envisaged in the Draft of the UN Binding Treaty on Transnational Corporations (TNCs) currently under negotiation.

Article 12 of the draft Treaty adopts an approach more directly concerned with mutual legal assistance between States, with the aim of facilitating the exchange of information and ensuring the effectiveness of judicial decisions beyond national borders. The text emphasises general obligations of cooperation in civil, criminal and administrative proceedings (HOMA, 2024). Nevertheless, the most recent version of Article 12 has significantly reduced the operational scope of such assistance, no longer expressly providing for mechanisms previously included, such as the protection of victims and witnesses and asset recovery. It also makes the implementation of certain measures dependent on the existence of bilateral or multilateral agreements, without establishing with sufficient clarity which measures should be adopted in the absence of such instruments.

The Draft Treaty also addresses international legal cooperation. This is an extremely relevant aspect, since international cooperation should not be understood merely as a mechanism of convenience between States, but rather as a condition for ensuring effective access to justice in cases of transnational violations. Article 13 of the Treaty indicates that international cooperation remains strongly State-centred, without imposing corresponding obligations on companies themselves concerning cooperation in the prevention of violations and the provision of reparation (HOMA, 2024). Furthermore, according to HOMA (2024), this provision lacks concrete details on how such cooperation will actually be implemented, thereby limiting its practical impact.

The provision for an International Fund for Victims, in turn, is identified as a potentially significant measure for expanding access to reparation. However,

By placing the financial responsibility for the Fund solely on States, the treaty diverges from its central objective of holding transnational corporations accountable. This approach disregards the direct role of businesses in causing harm and allows them to evade financial and reparative obligations, shifting the burden onto States¹² (HOMA, 2024).

Therefore, the draft Treaty adopts a broader conception of international cooperation and mutual legal assistance, more directly linked to the need to overcome the jurisdictional fragmentation characteristic of violations committed in the context of transnational activities. The CS3D, in turn, makes progress in establishing a permanent institutional framework for cooperation between supervisory authorities, with mechanisms for information sharing, mutual assistance, coordination of investigations and alignment of regulatory and sanctioning practices. However, this system remains predominantly confined to administrative cooperation within the European Union and does not, in itself, resolve the obstacles to judicial cooperation with third States where adverse impacts may occur.

In this respect, an important tension emerges between the two models. The CS3D is more concrete in institutionalising administrative cooperation, but remains territorially limited to the European regulatory space; the draft Treaty has a genuinely international orientation, focused on cross-border legal assistance, but its mechanisms are less detailed and more dependent on State-centred cooperation. Ultimately, the effectiveness of an international regime on Business and Human Rights will depend on its capacity to transform cooperation from a possibility contingent upon State willingness into a legal obligation supported by concrete mechanisms for implementation and access to justice.

12. SUPERVISION, MONITORING AND SANCTIONS

The previous section addressed the Directive's establishment of supervisory authorities, which are designated by each Member State. The text provides for the possibility of designating one or more supervisory authorities to oversee

¹² "Assigning financial responsibility exclusively to States creates a tension with the objective of holding transnational corporations accountable. As noted in the material, this arrangement may shift the financial burden arising from harm caused by corporate activities onto States, allowing companies to remain exempt from financial obligations directly related to reparation." (Our translation)

companies' compliance with the obligations established by the Directive, whose provisions are incorporated into the national laws of European States.

Regarding supervision, according to the Directive, the authority “may” act on its own initiative under Article 25(2). Furthermore, pursuant to Article 26(1), “Member States shall ensure that natural and legal persons have the right to submit substantiated concerns, through easily accessible channels, to any supervisory authority when they have reasons to believe, on the basis of objective circumstances, that a company is failing to comply with the provisions of national law adopted pursuant to this Directive” (emphasis added).

With regard to the receipt of complaints, the CS3D grants supervisory authorities a margin of discretion in deciding whether or not to initiate an investigation. Furthermore, under Article 25(2), an authority “may” initiate an investigation, either on its own initiative or following a substantiated concern, where it considers that it has sufficient information indicating a possible breach of the obligations established by the national legislation implementing the Directive.

It should be emphasised that the authority cannot simply disregard a complaint that has been submitted. This is because Article 26(4) establishes a duty to assess substantiated concerns within an appropriate period and, where appropriate, exercise the powers provided for under Article 26(5). The authority must also communicate the outcome of its assessment and provide the reasons for its decision. The more problematic issue, however, lies in the absence of more precise criteria for determining when the information submitted is sufficient to justify opening an investigation.

The expression used in Article 25(2), “sufficient information indicating a possible infringement”, establishes a relatively open-ended threshold, the application of which will depend to a significant extent on the assessment of the competent authority. This raises the question: what degree of severity of a violation would justify administrative intervention? The breadth of this discretion may produce differences in the practices of national authorities and, consequently, affect the uniformity and effectiveness of CS3D enforcement. Moreover, pressure on Member States to ensure that companies remain competitive, combined with the absence of sufficiently objective mechanisms to constrain the authorities' discretion (“substantiated concerns” (Article 26) and “sufficient information” (Article 25(2))), may create an obstacle to effective corporate supervision.

This difficulty is aggravated by the distribution of the burden of proof, insofar as responsibility for presenting evidence capable of demonstrating the existence of violations may fall largely on affected persons and on the organisations or trade unions supporting them (HOMA, 2024). This requirement is particularly problematic given the evident information asymmetry between these actors and companies, which generally have greater access to the documents, data, contracts and other information necessary to identify and substantiate violations occurring within their operations or business relationships. This is especially true where “impacts” occur at more distant levels of the chain of activities and involve workers or communities with limited access to relevant information.

This concern could be partially mitigated by the possibility of judicial review of the authority’s decisions, acts or omissions by a court or another independent and impartial body (Article 25(7)). However, although Article 26(6) significantly broadens the range of actors entitled to bring matters before the authority (natural and legal persons), review of a decision by a court or another independent and impartial public body is conditional upon the existence of a “legitimate interest in the matter”. This asymmetry reveals a discrepancy between opening the supervisory mechanism to third parties and restricting access to judicial review.

It should also be noted that the supervision provided for under the Directive is administrative in nature, meaning that supervisory authorities may impose administrative sanctions on companies. Pursuant to Article 25(5), in the exercise of their duties, supervisory authorities shall have at least the power to:

- a) Order the company to:
 - i) cease the infringement of the provisions of national law adopted pursuant to this Directive, by taking measures or bringing the conduct to an end;
 - ii) refrain from any repetition of the conduct in question; and
 - iii) where appropriate, provide remediation that is proportionate to the infringement and necessary to bring it to an end;
- b) Impose sanctions in accordance with Article 27; and
- c) Adopt interim measures in the event of an imminent risk of severe and irreparable harm. (Emphasis added)

With regard to point (a), it should be recalled that “if a negative impact is likely to occur or already has occurred, the company is obliged to take appropriate measures to prevent or terminate it. This duty is procedural in nature (ie, an obligation of means) rather than an obligation of result”¹³ (SINNIG, Julia; ZETZSCHE, Dirk A, 2025, p. 643). Consequently, where a Human Rights violation occurs within a company's supply chain, rights holders may be unable to hold the company liable for the violation itself, but only for its failure to conduct HRDD (OTTEBURN, Kari; MARX, Axel, 2023). In other words, the identification of an “adverse impact” does not, in itself, give rise to an obligation to provide reparation if the company demonstrates that it has diligently carried out the required processes.

Deva (2023, p. 413) draws attention to a fundamental distinction between the outcome sought - the corporate responsibility to respect Human Rights - and the process used to achieve it, namely Human Rights due diligence. According to the author, current European HRDD legislation, such as the Directive, focuses predominantly on making the due diligence process mandatory, without necessarily establishing obligations directly aimed at achieving concrete Human Rights outcomes. Although mandatory HRDD represents progress, it may not be sufficient to ensure the effective protection of rights holders.

Similarly, Krajewski (2023) argues that the decision to regulate due diligence processes as a priority tends to preserve the traditional legal division between the public and private spheres, insofar as it imposes procedural obligations on companies to identify, prevent and mitigate risks, rather than establishing substantive obligations directly related to respecting Human Rights and capable of producing concrete outcomes in terms of protecting those rights.

Regarding the imposition of sanctions, Article 27(1) provides that Member States are responsible for establishing their own rules. As regards the two mandatory forms of sanction prescribed by the Directive, Member States must provide, at a minimum, for the following: financial penalties, with a starting point of up to 5% of the group's global turnover, taking into account aggravating and mitigating circumstances when calculating the actual penalty; combined with the public disclosure of the specific legal infringement and the sanction imposed (a practice known as “name and shame”). Furthermore, non-compliance with the CS3D

¹³ “If an adverse impact is likely to occur or has already occurred, the company is obliged to take appropriate measures to prevent or bring it to an end. This duty is procedural in nature (i.e., an obligation of means) rather than an obligation of result.” (Our translation)

may result in a company being excluded from public procurement procedures and having financial support suspended where the provisions of the Directive have been breached (SINNIG, Julia; ZETZSCHE, Dirk A, 2025, pp. 648–649).

The practice known as “name and shame” is characteristic of HRDD, which uses the public exposure of companies that violate their obligations as an enforcement strategy. Although publicly identifying companies that fail to comply with their due diligence obligations may have reputational consequences and encourage consumers and investors to exert pressure on companies engaging in inappropriate conduct, its effectiveness depends on assumptions that cannot be taken for granted. As Deva (2023, p. 413) observes, it should not be assumed that market forces and societal expectations are sufficient to induce companies to take their responsibility to respect Human Rights seriously.

The logic of name and shame assumes, to some extent, that consumers are aware of violations, are willing and able to change their purchasing decisions, and that the resulting loss of reputation and market share creates sufficient economic incentives for companies to change their conduct. These assumptions are particularly fragile given that consumers frequently lack adequate information about the social and labour conditions within companies’ chains of activities or, even when informed, may not change their consumption patterns. More fundamentally, reliance on reputational mechanisms may transform respect for Human Rights into a variable of competition between companies, as though compliance with these standards depended on a company’s ability to gain an economic or reputational advantage over its competitors (DEVA, 2003).

Finally, HOMA (2024) emphasises that, if it cannot be demonstrated that violations were caused by deficiencies in the content and/or implementation of due diligence plans, the company cannot be held liable for the resulting harm. As regards the possibility of natural persons (managers) or legal persons (companies) being held criminally liable for Human Rights violations, the Directive simply makes no mention of this.

In comparison with the Directive, Article 8 of the current Draft Treaty requires States Parties to establish a comprehensive and adequate system of legal liability for business enterprises, which may take the form of civil, administrative or criminal liability, depending on the circumstances, as discussed earlier in this report. The text also requires liability to be proportionate to the severity of Human Rights

violations and appropriate to the reparation needs of affected persons and communities, although this remains a general approach.

13. NORMATIVE PRIMACY AND COHERENCE WITH OTHER REGIMES

The effectiveness of a regulatory regime depends, among other factors, on the position occupied by the obligations it imposes in relation to other rules governing economic activity. The activities of TNCs are simultaneously regulated by different legal orders and regimes, ranging from corporate, commercial, labour and environmental law to international trade and investment rules. These regimes may complement one another, but they may also establish different priorities or produce conflicting obligations.

Normative coherence concerns determining whether obligations to protect Human Rights will operate merely as another set of rules to be reconciled with other regulated interests, or whether they will be given precedence when reconciliation is not possible. The CS3D and the LBI address this problem through different legal structures. Under the Directive, the issue arises primarily in the relationship between the standard established by the European Union and the regulatory autonomy of Member States; under the LBI, it assumes a broader dimension, involving the relationship between Human Rights obligations and other rules of domestic and international law, particularly international trade and investment regimes.

Article 4 of the CS3D, as amended by Omnibus I, significantly expands the scope of maximum harmonisation and prevents Member States from introducing national Human Rights and environmental due diligence obligations that diverge from those established by the Directive in the areas expressly covered. This restriction extends to central elements of the due diligence process, including obligations under Articles 6, 8 and 9, Article 10(1)–(5), Article 11(1)–(6) and Articles 14 to 16. Article 4(2) preserves some degree of national discretion: stricter provisions remain possible in areas not subject to maximum harmonisation, as do more specific rules concerning their objectives or scope of application, including those relating to particular products, services or situations.

This change is significant because it alters the traditional relationship between the Directive and national law. Under a minimum harmonisation model, European law essentially operates as a common floor, establishing the level below which States cannot fall while allowing them to adopt higher levels of protection.

Maximum harmonisation operates differently. In the areas it covers, the European standard also functions as a limit on national divergence. A State cannot simply consider the European solution insufficient and replace it with a more demanding general HRDD obligation within the same harmonised field. It is in this sense that the expansion of Article 4 transforms parts of the CS3D from a regulatory floor into a ceiling, although this ceiling is partial and coexists with room for more specific or stricter national rules outside the harmonised core (STRAMPELLI, 2026, pp. 23-24).

The justification presented for this approach is familiar: preventing gold-plating, reducing differences between national regimes, providing greater legal certainty and avoiding situations in which companies operating across several Member States must comply with different HRDD frameworks. The Commission itself linked the expansion of maximum harmonisation to the creation of a “level playing field” and the reduction of internal market fragmentation. At the same time, it acknowledged that extending maximum harmonisation even further could prevent States from responding to emerging social and environmental risks or establishing higher levels of protection in specific areas. Defining what constitutes a floor and what constitutes a ceiling means distributing regulatory power between the Union and Member States and, consequently, determining the political level at which Human Rights protection may be expanded.

The problem becomes more evident when the expansion of maximum harmonisation is considered in the context of *Omnibus I*. The standard that now limits national divergence does not correspond to the more protective framework originally envisaged for the CS3D, but rather to a Directive whose scope and various obligations have simultaneously been reduced. There is, therefore, an important difference between harmonising rules to prevent States from providing lower levels of protection and harmonising them in a way that also prevents States from adopting divergent and potentially more protective general obligations in certain areas.

The transformation introduced by *Omnibus I* simultaneously redefines the content of protection and the capacity of States to restore it through national legislation. It represents a selective form of harmonisation that combines greater uniformity in certain aspects of due diligence obligations with a return to national regulation in other areas, particularly civil liability, without an entirely coherent normative criterion governing these developments (STRAMPELLI, 2026, pp. 37-38).

The result is that national discretion to diverge in significant areas of corporate obligations is restricted, while reliance on national law to determine the civil consequences of non-compliance increases. The concern with normative fragmentation is therefore not applied consistently. Diversity between States is opposed when it could produce different corporate duties, but accepted when it determines the conditions for liability and reparation (see Sections 10 and 11). This asymmetry weakens the argument that harmonisation responds exclusively to the need for internal market coherence and reveals an essentially political choice concerning which national differences the Union considers problematic and which it is willing to preserve.

The LBI addresses the question of coherence at a different level. Article 14 does not concern the distribution of competences between a supranational legal order and its Member States, but rather the relationship between the future Treaty and domestic law, States' other international obligations and, particularly, international trade and investment regimes. This concern is fundamental because international Human Rights protection and international investment protection have historically developed through different normative frameworks. A State may simultaneously be required to adopt measures to prevent Human Rights violations and be bound by trade or investment agreements protecting the economic interests of foreign investors. The adoption of environmental, labour or Human Rights regulations may therefore interact with guarantees established under investment treaties.

Article 14 seeks to preserve fundamental principles governing relations between States by reaffirming sovereignty, sovereign equality, territorial integrity and non-intervention. Article 14.2 accordingly establishes that the LBI does not authorise a State to exercise jurisdiction within the territory of another State. This provision is understandable, but requires careful delimitation in a treaty specifically intended to address violations connected to transnational business activities. Respecting another State's territorial sovereignty does not mean preventing a State from exercising jurisdiction over events occurring abroad where a legitimate connecting factor recognised under International Law exists. This distinction is particularly important because Article 9 of the LBI itself establishes jurisdictional grounds intended to allow certain transnational violations to be adjudicated outside the State where the harm occurred. An excessively restrictive interpretation of Article 14.2 could therefore conflict with the jurisdictional framework established by the Treaty itself. Sovereignty should operate as a limit on the improper exercise of

jurisdiction, rather than as a justification for preserving accountability gaps created by the transnational dispersion of business activities.

Article 14.3 provides that the instrument should be interpreted consistently with national and international rules that are more favourable to Human Rights protection. This provision reflects an approach close to the *pro persona* principle: where different rules may apply, interpretation should preserve the one offering greater protection to the individual. This approach prevents the Treaty from being used to justify reducing levels of protection already established under national laws or other international instruments. However, the text does not establish the *pro persona/pro homine* principle with sufficient clarity as an express rule for resolving normative conflicts. The reference to the “more favourable” rule provides interpretative guidance, but does not, in itself, resolve how that rule should be identified when different legal regimes actually conflict.

At this point, it is necessary to emphasise the distinction between compatibility and primacy. Requiring two rules to be interpreted compatibly means seeking an interpretation that allows both to be preserved. Establishing primacy, on the other hand, means determining in advance which obligation will prevail when reconciliation is impossible. The first mechanism operates as long as the conflict can be resolved through interpretation; the second becomes necessary when two obligations are genuinely incompatible. For this reason, a coherence clause does not produce the same legal effects as an unequivocal clause establishing the supremacy of Human Rights. An obligation to interpret economic agreements consistently with Human Rights may reduce tensions, but offers a limited response where a genuine normative incompatibility exists.

The development of the LBI demonstrates a progressive departure from stronger formulations of primacy. The initial documents expressly proposed the precedence of Human Rights obligations over trade and investment regimes. In subsequent versions, this approach was gradually reformulated in terms of coherence and compatibility. In the Updated Draft, the concern remains that relevant agreements, including trade and investment agreements, should be interpreted and implemented in a manner that does not undermine States’ capacity to fulfil their Human Rights obligations. Nevertheless, proposals submitted during the negotiation process by States, particularly those from the Global South, and supported by organised civil society advocating for the instrument, seek to restore

stronger language, including express references to the *pro persona* principle and the primacy of Human Rights.

14. FINAL CONSIDERATIONS

The effectiveness of a regulatory framework depends, among other factors, on its ability to establish legal limits on the transnational organisation of economic power. The comparison between the CS3D, particularly following *Omnibus I*, and the process of developing the LBI reveals a dispute that extends beyond the choice between different regulatory techniques. What is at stake is how far the law is prepared to impose legal limits on the transnational organisation of economic power when those limits no longer merely require companies to adopt internal procedures, but begin to affect their organisational freedom, costs, exposure to liability and the concrete possibilities of reparation available to affected persons and communities.

The European experience demonstrates the limitations of a regulatory strategy built fundamentally around due diligence. Transforming HRDD into a legal obligation represented an important departure from decades in which voluntary instruments predominated. Nevertheless, requiring companies to identify, assess and manage risks is not equivalent to establishing a regime capable of holding them fully accountable for the legal consequences of the impacts produced by their activities. The more regulation focuses on the existence and quality of corporate procedures, the greater the risk of shifting the centre of Human Rights protection towards corporate risk management, leaving companies with significant control over the production of information, the identification of impacts and the assessment of responses considered appropriate. This report demonstrates that HRDD is necessary, but cannot replace State regulation, liability and reparation.

Omnibus I makes this limitation more evident because it does not merely introduce technical adjustments to the CS3D. The reform politically redefines the balance established in 2024 between the protection of rights and economic interests. The increase in application thresholds, restrictions on participation, removal of the climate obligation, weakening of the sanctions regime, elimination of harmonised European conditions for civil liability and expansion of maximum harmonisation affect different dimensions of the Directive, but converge in reducing its capacity to produce legal consequences for companies. More importantly, this revision took place before the previously adopted regime had been fully implemented and could be evaluated. It is therefore clear that the changes

introduced form part of a redefinition of the priorities of European regulatory policy itself.

The most striking contradiction in this process emerges in the treatment of normative fragmentation. Omnibus I expands maximum harmonisation across central elements of due diligence, limiting Member States' ability to establish different or more demanding general obligations in the areas covered. In these areas, the European standard also begins to operate as a regulatory ceiling. At the same time, the reform eliminates the harmonised conditions for civil liability and returns to national legal systems the task of determining when breaches of corporate obligations will give rise to liability. There is, therefore, a selectivity that is difficult to ignore: regulatory diversity is restricted when it may increase or differentiate corporate duties, but preserved when it may make companies more difficult to hold accountable.

This observation shifts the debate on "simplification". The issue is not to deny that companies simultaneously subject to different regimes may face compliance costs or legal uncertainty, but to determine which forms of complexity are considered intolerable and which remain acceptable. The existence of different national HRDD obligations is presented as fragmentation that must be addressed; however, the possibility that victims of similar violations may encounter different regimes of liability, causation and reparation remains subject to the diversity of national legal systems. For TNCs, removing a European liability standard may even shift regulatory complexity rather than eliminate it. For affected persons and communities, this complexity compounds obstacles relating to the competent forum, applicable law, obtaining evidence and identifying the legal entities responsible.

The distributive dimension becomes unavoidable. Regulatory costs do not disappear when a corporate obligation is eliminated; they are redistributed. Thus, reducing the cost of prevention may increase the social cost of violations; restricting information-production obligations may increase the evidentiary burden borne by affected persons and communities; removing representation safeguards may transfer the cost of organising collective litigation to victims; and weakening civil liability may shift the costs of harm that companies no longer internalise onto individuals, workers, communities and States. An assessment of a "simplification" policy cannot account only for the costs companies are no longer required to bear. It must also identify who ultimately bears the costs transferred away from them.

In this respect, the LBI offers greater potential, as it may address issues that these regimes can scarcely resolve in isolation, namely the gaps arising from the difference between an economy organised transnationally and accountability systems that remain predominantly national. This report demonstrates that the CS3D substantively internationalises certain corporate obligations, but does not establish an equivalent internationalisation of the conditions governing liability. Jurisdiction and applicable law therefore remain subject to the general rules of Private International Law and, following Omnibus I, civil liability has largely returned to national legal systems.

This is the function that should strategically guide the LBI negotiations. The Treaty will justify its existence only if it produces normative value precisely where national or regional regulation encounters its limits: liability within fragmented corporate structures, jurisdiction over transnational violations, appropriate rules on limitation periods and applicable law, access to evidence, legal cooperation between States, protection of affected persons and communities, and effective conditions for obtaining reparation. A treaty that merely requires States to adopt preventive measures or establish due diligence regimes, while once again leaving decisive questions of liability to different domestic legal systems without sufficiently strong standards, would internationalise the obligation to regulate without internationalising the minimum conditions necessary for its effectiveness.

The negotiation process itself reveals tendencies towards weakening provisions, adopting open-ended formulations and granting increasing deference to national legal systems in areas where legal fragmentation is precisely part of the problem. The discussion of applicable law is illustrative: returning broad discretion to domestic legal systems to determine the effects of an international rule intended to overcome transnational gaps may allow the same national differences that hinder accountability to continue determining its effectiveness. The risk of the multilateral process is not merely that it may fail to achieve the ideal model, but that it may produce an instrument whose degree of flexibility allows States to preserve, under a common framework, differences that continue to prevent accountability in concrete cases.

The comparison also demonstrates that the debate should not be reduced to an opposition between the CS3D and the LBI. The instruments should fulfil different functions within a multilevel regulatory framework. National and regional rules may develop more comprehensive corporate obligations, supervisory mechanisms and specific liability regimes. The Treaty should establish an international minimum

standard of protection, particularly for problems arising from the transnational nature of business activities, without preventing other legal systems from going beyond it. The strategic function of a multilateral instrument should not be to standardise protection according to the lowest politically acceptable common denominator, but to prevent territorial, corporate and normative differences from being used to weaken the enforceability of Human Rights.

This conclusion becomes even more important in light of the recent experience of the CS3D itself. *Omnibus I* demonstrates that the contemporary challenge for the Business and Human Rights agenda is not merely to secure new legal standards, but also to prevent their regression. The 2024 Directive had not even been fully tested when significant elements of its framework were removed. In this sense, a multilateral minimum standard would serve a purpose extending beyond expanding regulation to States that do not yet have national legislation, potentially also establishing minimum safeguards against subsequent deregulatory measures. To achieve this, however, the LBI itself must preserve clauses that allow more protective standards and prevent the Treaty from becoming a ceiling.

The future of the Business and Human Rights agenda therefore depends on avoiding two forms of reduction. The first is reducing regulation to due diligence, as though requiring companies to identify and manage their risks were sufficient to address the economic structures that produce violations. The second is reducing accountability to the abstract existence of a right to bring legal proceedings, ignoring that the ability to exercise that right depends on a range of factors directed towards Human Rights protection and access to justice and reparation for affected persons and communities. These include jurisdiction, applicable law, evidence, representation, costs, limitation periods, cooperation and the possibility of legally reaching corporate entities and assets distributed across different States.

In this sense, the central conclusion of this report also provides guidance for future negotiations. It is not enough to globalise corporate duties while the mechanisms necessary to enforce them remain territorially confined. Contemporary business activity uses corporate, contractual and territorial fragmentation to organise production, financing, risks and the appropriation of value on a transnational scale. The law cannot accept this integration for economic purposes while simultaneously treating each company, contract and territory in isolation when questions of liability arise. As long as capital can operate in an integrated

manner while justice remains constrained by borders that corporate organisations routinely cross, a structural asymmetry will persist between the capacity to cause harm and the capacity to demand reparation.

The criterion for assessing these instruments should be whether their legal frameworks concretely alter the distribution of power between companies and rights holders; whether they enable violations to be prevented before they occur; and, where prevention fails, whether they make it possible to identify those responsible, bring them before a competent court, obtain the necessary evidence, apply an appropriate legal regime and secure full reparation. If these conditions are not addressed, regulation will exist, but so too will the legal architecture that allows the transnational nature of corporate activity to result in fragmented liability.

This is where both the opportunity and the risk of the LBI lie. After more than a decade of negotiations, its relevance will not be measured simply by the conclusion of a treaty. A weak instrument does not necessarily represent progress merely because it is legally binding. If the price of consensus is the removal of precisely those mechanisms capable of addressing transnational accountability gaps, the result may be the international consolidation of an insufficient standard. The priority, therefore, should not be to conclude the process at any cost, but to ensure that the final instrument responds to the problem that justified its creation and prevents the organisation of economic activity from continuing to produce spaces in which corporate power is global while liability remains fragmented.

In this context, the negotiations surrounding the Legally Binding Instrument remain one of the few international forums in which it is still possible to defend the primacy of Human Rights over corporate economic interests, understood in their broadest sense, encompassing not only the protection of fundamental rights but also the guarantees relating to sustainability and environmental protection. This becomes particularly significant in the context of an increasingly evident climate crisis, which underscores the urgency of establishing binding international obligations capable of ensuring that corporate activities do not undermine environmental integrity, human dignity, and the effective enjoyment of Human Rights.

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