



Convention on Access to Information,  
Public Participation in Decision-making and  
Access to Justice in Environmental Matters  
(Aarhus Convention)

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**UN Special Rapporteur on environmental defenders under the Aarhus Convention**

6 September 2023

Excellencies,

I have the honour to address you in my capacity as UN Special Rapporteur on environmental defenders under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention).

With the first Working Group meeting on the draft European Union Directive on Corporate Sustainability Due Diligence (CSDDD or the Directive) to take place tomorrow, 7 September 2023, I take this opportunity to address you on the draft text of the Directive, within the scope of my mandate.

As you may be aware, article 3 (8) of the Aarhus Convention requires that “each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted or harassed in any way for their involvement.” As a Party to the Aarhus Convention, the European Union is bound by its provisions, including article 3 (8).

At its seventh session (Geneva, 18 – 20 October 2021), the Meeting of the Parties to the Aarhus Convention adopted decision VII/9 on a rapid response mechanism to deal with cases related to article 3 (8) of the Convention.<sup>1</sup> Decision VII/9 establishes the rapid response mechanism in the form of an independent Special Rapporteur on environmental defenders under the authority of the Meeting of the Parties. At its third extraordinary session (Geneva, 23 – 24 June 2022), I was elected, by consensus, by the Meeting of the Parties as the Special Rapporteur on environmental defenders under the Aarhus Convention.

In accordance with my mandate as set out in decision VII/9 of the Meeting of the Parties to the Aarhus Convention, I wish to provide the following comments on the current text of the draft Directive, including the amendments proposed in the Report of the European Parliament published on 1 June 2023 (the Parliament’s Report)<sup>2</sup> and the General Approach of the Council of the European Union agreed on 30 November 2022 (the Council’s General Approach)<sup>3</sup>:

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<sup>1</sup> Available at: [https://unece.org/sites/default/files/2022-01/Aarhus\\_MoP7\\_Decision\\_on\\_RRM\\_E.pdf](https://unece.org/sites/default/files/2022-01/Aarhus_MoP7_Decision_on_RRM_E.pdf).

<sup>2</sup> Amendments adopted by the European Parliament on 1 June 2023 on the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, available at: [https://www.europarl.europa.eu/doceo/document/TA-9-2023-0209\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/TA-9-2023-0209_EN.pdf).

<sup>3</sup> Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 – Council General Approach, 30 November 2022, available at: <https://data.consilium.europa.eu/doc/document/ST-15024-2022-REV-1/en/pdf>.

## **1. I welcome the European Union’s initiative to increase corporate due diligence obligations in relation to adverse human rights and environmental impacts**

As I set out in my “Vision for the Mandate” which I delivered to Parties and interested stakeholders on 23 November 2022,<sup>4</sup> I consider the CSDDD to be an asset for the mandate as it will impose clear corporate due diligence requirements on companies acting within the European Union as well as establish complaints and supervisory procedures with the power to sanction companies in case of non-compliance. This can prove to be a powerful tool in holding corporate actors to account for the adverse human rights and environmental impacts of their operations, including through acts and omissions of direct and indirect business partners in the value chain.

The CSDDD is also important to avoid fragmentation within the Union and create a clear and transparent legal framework of the obligations of both companies and European Union Member States. Transparency is key not just for the companies themselves to know their obligations but also for affected stakeholders to understand available means of recourse against corporate actions. It will also help to ensure a level-playing field within the internal market and bring to the forefront the importance of the prevention of adverse human rights and environmental impacts and redress for such adverse impacts where preventive steps were insufficient.

I therefore warmly welcome and congratulate the European Union on this important legislative initiative. However, at the present time, Member States are at a critical juncture in the negotiations of the CSDDD where fundamental elements of the draft text must be solidified, clarified or reshaped. If Member States fail to take a strong stance on certain obligations under the Directive, including as it pertains to the protection of environmental defenders, the CSDDD risks losing much of its practical significance.

## **2. I welcome the express inclusion of environmental defenders in the Parliament’s Report and the Council’s General Approach**

I strongly support the amendments introduced in the Parliament’s Report and the Council’s General Approach that specifically acknowledge both the critical role of environmental defenders in raising awareness of adverse human rights and environmental impacts as well as the specific risks they face for trying to hold companies accountable for such adverse impacts.<sup>5</sup>

In this context, I would like to highlight three key changes that were introduced and should be retained in the final text of the Directive in order to ensure comprehensive protection and inclusion of environmental defenders in the context of corporate due diligence.

### **A. Inclusion of environmental defenders in the group of stakeholders**

Of the three draft texts, the Council’s General Approach is the only draft that specifically includes environmental defenders in the definition of “stakeholders” in article 3(n) of the Directive. This is absolutely critical as a large number of provisions across the Directive only grant rights to “stakeholders” as defined in article 3(n). Environmental defenders are at the forefront of environmental protection, including in relation to corporate action. As a result of their efforts, environmental defenders face serious risks of reprisals and other forms of harassment, often through the hands of corporate actors. This must be reflected in the provisions

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<sup>4</sup> Available at: [https://unece.org/sites/default/files/2022-11/Vision\\_for\\_mandate.pdf](https://unece.org/sites/default/files/2022-11/Vision_for_mandate.pdf).

<sup>5</sup> In addition to the operative parts of the CSDDD, both the Parliament’s Report and the Council’s General Approach specifically reference environmental defenders in the recitals, see e.g. Parliament’s Report, paras. 44c (new), 65a (new); Council’s General Approach, para. 26a.

of the Directive. Omitting environmental defenders from the definition of “stakeholders” in the Directive would not only be short-sighted but may also in practice exclude them from the protection of the Directive. I therefore strongly support the express inclusion of environmental defenders in the definition of “stakeholders”, as set out in the Council’s General Approach.<sup>6</sup>

Accordingly, the failure of both the Commission’s proposal and the Parliament’s Report to expressly include environmental defenders in the definition of “stakeholders” is a significant omission. I have serious concerns more generally about the approach taken in the Parliament’s Report in relation to the category of “affected stakeholders” under article 3(n). Not only does the Parliament fail to include environmental defenders in its definition of “affected stakeholders”, it also introduces a set of requirements before *any* individual can qualify as an “affected stakeholder” (including the need to show rights or “legitimate” interests that are “affected” or “could be affected”). Besides creating unacceptable hurdles for victims of corporate misconduct, such language also creates uncertainty and a risk of abuse, as “legitimacy” is an inherently vague concept.

Moreover, in contrast to the Council’s General Approach, the Parliament does not automatically include civil society actors within its definition of “affected stakeholders”. Rather, the Parliament proposes to include civil society as a stakeholder only where (i) there is no affected individual/group/community, and (ii) the organization is “credible and experienced”.<sup>7</sup> This ignores the central role of civil society in holding companies accountable for their adverse human rights and environmental impacts and imposes unreasonable additional hurdles for such organizations to do their valuable work going forward.

I therefore urge the negotiators to follow the approach taken by the Council to expressly include environmental defenders and civil society organizations in the definition of “stakeholders”, and to reject the Parliament’s proposed amendments that create significant hurdles for such vital actors to raise awareness about corporate misconduct and that may thereby exclude them from key processes to ensure accountability for adverse human rights and environmental impacts.

#### B. Standing for environmental defenders in internal complaints mechanism

As I will further address below, I strongly welcome the detailed provisions in all three draft texts on complaints procedures in relation to adverse human rights and environmental impacts. While, as discussed below, I see certain shortcoming in the provisions on standing to bring complaints, I welcome the specific inclusion of “legal or natural persons defending human rights or the environment” as having the right to submit notifications under the complaints mechanism envisaged in article 9(2)a (new) of the Parliament’s Report.<sup>8</sup> I recommend that, for consistency, the Parliament amend the text of article 9(2)a (new) to refer to “grievances” or “complaints” as opposed to “notifications” in this context in order to clarify that the standing of such environmental defenders is equal to that of the other groups listed in article 9(2) of the Directive.

#### C. Inclusion of the Aarhus Convention, including article 3(8), in the Annex

I strongly welcome the Parliament’s amendment to expressly add to the Annex, Part II, of the Directive both the Aarhus Convention as a whole, and in particular articles 4, 6 and 9, as well as, separately, article 3(8) of the Convention, which is the basis of my mandate as Special Rapporteur on environmental defenders.<sup>9</sup> Environmental defenders play a central role in raising

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<sup>6</sup> See also Council’s General Approach, recital 26a.

<sup>7</sup> Parliament’s Report, art. 3(n).

<sup>8</sup> See also Parliament’s Report, recital 42.

<sup>9</sup> Parliament’s Report, Annex, Part II, points 12c (new) and 12d (new).

awareness of the adverse human rights and environmental impacts caused by corporate wrongdoing, and as a result often face serious reprisals and other forms of intimidation. It is absolutely critical that the obligation under article 3(8) of the Aarhus Convention to prevent the harassment, penalization and persecution of environmental defenders is expressly included in the Annex as an adverse environmental impact covered by the CSDDD. I therefore applaud the Parliament's amendments in this regard.<sup>10</sup>

Consistent with the Parliament's strong stance against the persecution of environmental defenders, I also strongly welcome the Parliament's express reference in recital 44d (new) to strategic lawsuits against public participation (SLAPPs) as a "particular form of harassment brought against natural or legal persons to prevent or penalize speaking up on issues of public interest". As I have set out both in my "Vision for the mandate"<sup>11</sup> and my letter on the proposed European Union Directive on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings,<sup>12</sup> the use of SLAPPs has become an increasing and pressing issue not just within European Union Member States but globally. In my "Vision for the mandate", I therefore identified SLAPPs as a key component of my mandate as Special Rapporteur on environmental defenders under the Aarhus Convention. I accordingly welcome the Parliament's specific acknowledgement of the use of SLAPPs as a form of harassment to silence environmental defenders in the context of corporate wrongdoing.

It is highly concerning that neither the Commission's proposal nor the Council's General Approach contain a single reference to the Aarhus Convention and its article 3(8) throughout the draft Directive. A failure to include the Aarhus Convention among the instruments listed in Part II of the Annex is a serious limitation on the scope of the Directive and creates a significant gap in any future sustainability due diligence system. I therefore very much commend the leadership shown by the Parliament in this regard.

### **3. I welcome the express provisions on meaningful stakeholder engagement in the Parliament's Report**

I welcome the acknowledgement of the importance of effective public participation and stakeholder engagement in the Parliament's Report. In particular, article 8d as newly introduced in the Parliament's Report adds a detailed provision on the obligation to carry out meaningful engagement with affected stakeholders. This is consistent with other amendments made by the Parliament which emphasize the importance of stakeholder engagement, consultations and dissemination of information,<sup>13</sup> and which is reflective of the principles underlying the Aarhus Convention.

However, since the Parliament has failed to include environmental defenders in its definition of "affected stakeholders", environmental defenders are not considered primary stakeholders to be involved in meaningful engagement during the due diligence process. Instead, environmental defenders fall within sub-paragraph (2) of article 8d and thus within a secondary group for consultations only where no meaningful engagement with affected stakeholders can be conducted, or where additional expert perspectives are considered "useful". Presumably environmental defenders would then also only be included within the process for dissemination

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<sup>10</sup> The Parliament's Report also specifically references art. 9 of the Aarhus Convention in recital 59a (new) acknowledging the importance of access to justice and the right to an effective remedy.

<sup>11</sup> Available at: [https://unece.org/sites/default/files/2022-11/Vision\\_for\\_mandate.pdf](https://unece.org/sites/default/files/2022-11/Vision_for_mandate.pdf).

<sup>12</sup> Available at: [SR letter EU anti-SLAPP directive 2023-07-12.pdf \(unece.org\)](#).

<sup>13</sup> See e.g. Parliament's Report, recitals 26c, 30, 38, 44c, and art. 4(1)(fa); see also Council's General Approach, art. 7(2)(a).

of and access to relevant information under sub-paragraphs (3)-(4) where there are no directly affected stakeholders. This is a significant limitation.<sup>14</sup>

As I explained above, it is critical that environmental defenders are specifically included in the definition of stakeholders in article 3(n), and thus are required to be consulted under article 8d as a matter of course.

#### **4. I welcome the proposed broadening of the substantive scope of the Directive in the Parliament's Report and Council's General Approach**

I welcome several changes introduced by the Parliament and the Council that clarify and broaden the scope of the CSDDD.

First, I strongly welcome that both the Parliament's Report and the Council's General Approach remove the requirement in article 1(1) of the Directive for there to be an "established" business relationship in order for a business partner's operation to fall within the scope of a company's due diligence obligations.<sup>15</sup> The requirement in the Commission's proposal for an "established" business relationship will create uncertainty and an unnecessarily high threshold for inclusion within the scope of the Directive. Indeed, I can see various scenarios where a business relationship may not be "established" in terms of length of cooperation, but where the conduct of a business partner may clearly fall within a company's sphere of responsibility, such as in the context of temporary security services or direct operational support at a manufacturing facility. To ensure comprehensive protection, companies should be required to prevent adverse human rights and environmental impacts within the value chain irrespective of the length of the business relationship.

Second, I welcome the Parliament's amendment to lower the overall threshold for a company to fall within the scope of the Directive under article 2(1). In contrast, the Commission and the Council only lower the threshold in terms of total number of employees and net turnover in relation to specific high-impact industries. While there is merit in identifying particular high-impact industries as done in article 2(1)(b) of the Commission proposal and the Council's General Approach and subjecting such industries to a lower threshold, I consider that such a "list" approach risks being arbitrary and under-inclusive. For example, the list as it currently stands does not include the energy sector, which has a significant impact on both human rights and the environment. As such, I support the Parliament's amendment to step away from a focus on specific industries and instead lower the general threshold. This ensures the Directive comprehensively covers adverse human rights and environmental impacts, irrespective of the specific industry of the relevant company provided the threshold number of employees and net turnover is met.

#### **5. I recommend to clarify the standing of environmental defenders and civil society organizations in complaints procedures**

As I mentioned above, while I strongly welcome the inclusion of environmental defenders among the persons given standing to bring a complaint in the context of the internal grievance procedure under the Parliament's Report,<sup>16</sup> I have serious concerns about existing hurdles for

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<sup>14</sup> See also Parliament's Report, recital 44c (new) and art. 14(1)b (new).

<sup>15</sup> Consistent with this change, recital para. 20, art. 1(1)(2) and art. 3(1)(f) have also been deleted in the Parliament's Report and the Council's General Approach.

<sup>16</sup> Parliament's Report, art. 9(2)a (new).

civil society in bringing complaints within such procedures across the three draft texts of the Directive.

Under article 9(2) of the Commission's proposal, the Parliament's Report and the Council's General Approach, civil society only have standing to bring complaints if (i) according to the Commission, the organization is "active in the areas related to the value chain concerned", (ii) according to the Council, the organization is "active in the areas related to the human rights or environmental adverse impact that is the subject matter of the complaint", or (iii) according to the Parliament, where there are no affected individuals/groups/communities, the organization is "credible and experienced" and its purpose includes the protection of the environment. These approaches to standing of civil society impose vague exclusionary criteria that show a lack of understanding of the central role played by civil society in addressing adverse human rights and environmental impacts and in holding corporations to account for such adverse impacts. Any of the three approaches would presumably exclude civil society that acts in the general public interest or the interests of a specific group (e.g. journalists) and therefore are not "active" in a specific area of the value chain or in relation to a specific human right or the environment.

I am particularly concerned about the exceedingly high standard and contradictory provisions introduced by the Parliament. In addition to the long list of criteria under article 9(2), the Parliament also adds new article 9(2)a which not only provides for standing for environmental defenders as discussed above, but also provides standing for civil society organizations in line with the Commission proposal (i.e. those "active in the areas related to the value chain concerned"). However, by, first, imposing various criteria for standing under article 9(2), and then, second, adding a new 9(2)a which seemingly removes some of those criteria, the Parliament's Report creates significant uncertainty that undermines the need for a clear and transparent legal framework. As the text currently stands, the Parliament's Report creates the serious risk that standing for civil society will be limited in practice in the implementation of these provisions.

Instead, it should be clear that both environmental defenders and civil society organizations acting either on behalf of affected individuals, groups or communities or acting in the public interest have the same standing as affected individuals to bring complaints. The Parliament adopted such an approach in relation to claims for civil liability before national courts, clarifying under article 22(2)a (new) that Member States must ensure that "measures are in place to ensure that mandated trade unions, civil society organizations, or other relevant actors acting in the public interest can bring actions before a court on behalf of a victim or a group of victims of adverse impacts, and that these entities have the rights and obligations of a claimant party in the proceedings".<sup>17</sup> Equally, across the three draft texts, any natural or legal person can bring complaints before the supervisory authority.<sup>18</sup> The same standing of environmental defenders and civil society organizations should be expressly established in the context of internal complaints procedures.

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<sup>17</sup> See also Parliament's Report, recital 59b (new).

<sup>18</sup> Art. 19(1).

## 6. I welcome the robust multi-tiered complaints procedure and broad range of remedial measures

### A. Complaints procedures

I strongly welcome the multi-tiered complaints and oversight procedure envisaged in the proposed Directive, starting from internal complaints procedures under article 9 to the extensive authority and powers of the supervisory authority under article 19 and the concurrent competence of national courts under article 22. In this context, I strongly welcome the fact that the Parliament specifically clarified that it is not necessary for a stakeholder to first bring a complaint under the complaints procedure under article 9 of the Directive before being able to submit a claim to a supervisory authority or a national court.<sup>19</sup> While there can be benefits to resorting first to an internal complaints procedure, such procedures unfortunately are not always effective. In such circumstances, it can prove vital for a stakeholder to be able to seek direct recourse to supervisory authorities and courts. I therefore support this clarification in the Parliament's Report.

On a related note, I also strongly welcome in this context article 9(3)b (new) of the Parliament's Report, which provides for protection from retaliation for those bringing complaints and for confidentiality of the identity of the persons submitting the complaint.<sup>20</sup> Consistent with article 3(8) of the Aarhus Convention, environmental defenders face significant risk of penalization, harassment and persecution for seeking to make their voices heard. Article 9(3)b (new) in the Parliament's Report directly acknowledges this risk and aligns the Directive with the existing obligations of Parties to the Aarhus Convention. I therefore strongly welcome this important addition.<sup>21</sup>

At the same time, I express concern about existing hurdles for affected stakeholders to effectively trigger such oversight. First, when bringing a complaint to supervisory authorities, both Parliament and Council retained the original language from the Commission's proposal requiring a "substantiated concern" in order to be able to submit a complaint to the supervisory authorities. The draft text, however, does not provide for any definition as to what amounts to a "substantiated concern", thereby creating significant uncertainty. The requirement to submit a "substantiated concern" therefore should be deleted throughout the proposed Directive.<sup>22</sup>

Second, in relation to claims for civil liability before national courts, the Council's General Approach regrettably introduces a requirement for the stakeholder to show fault ("intentionally or negligently") and has retained the Commission's proposal to limit civil liability to violations of articles 7 and 8 of the proposed Directive.<sup>23</sup> Each of these conditions impose serious limitations on the possibility to hold companies liable before national courts. Indeed, in many cases it will prove exceedingly difficult to establish fault of the company to the required standard set under national law. I thus support the approach taken by the Parliament, which neither includes a fault element nor limits civil liability to violations of articles 7 and 8. The Parliament also specifically acknowledges that it is not just a company's failure to prevent or bring to an end adverse impacts that can give rise to liability, but also a failure to remediate

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<sup>19</sup> Parliament's Report, art. 9(4)b (new).

<sup>20</sup> Parliament introduced a similar provision on the protection of the identity of the complainant in relation to complaints to the supervisory authority under art. 19(1)a (new).

<sup>21</sup> See also Parliament's Report, recital 42.

<sup>22</sup> See also e.g. art. 19(5).

<sup>23</sup> Council's General Approach, art. 22(1); see also recital 56.

such impacts.<sup>24</sup> This critically acknowledges the duty to remediate as a standalone obligation that in itself can trigger liability for a failure to comply.

Moreover, in line with article 9(4) of the Aarhus Convention, the Parliament's Report also expressly requires Member States to ensure that the costs of the national proceedings are not prohibitively expensive and that certain procedural safeguards, including the possibility for a claimant to seek injunctive measures and summary proceedings, are available.<sup>25</sup>

I also welcome the Parliament's deletion of the requirement of "having, in accordance with national law, a legitimate interest in the matter" in order to be able to bring a claim before national courts for a supervisory authority's acts or failure to act under article 19(5). There are no legitimate grounds to require a person to show an additional "legitimate interest" when bringing a claim before national courts for a supervisory authority's acts or failure to act. Moreover, there is no definition or guidance on what a "legitimate interest" is, which creates significant uncertainty and room for (systematically) rejecting complaints for a supervisory authority's conduct, especially when brought by civil society organizations or environmental defenders not directly affected by the alleged conduct.

#### B. Remedial measures

I also strongly support the broad range of remedial measures provided under the proposed Directive during all stages of the complaints process. Both the Council and the Parliament have added significant detail and strength to the Directive's provisions on a company's duty to remediate all harm and to put the affected persons in the same position as if the adverse impact had not occurred. More specifically, both the Council and the Parliament acknowledge through their amendments that remedial measures, whether as a result of a complaints procedure, sanctions imposed by supervisory authorities or civil liability established before national courts, must go beyond financial compensation to also include public apologies and other forms of restitution.<sup>26</sup>

In this context, I specifically support the creation of supervisory authorities with the express power to impose sanctions for non-compliance under article 20 of the Directive. Providing supervisory authorities with such express powers, and setting out relevant guidance on how to exercise such powers,<sup>27</sup> is important to ensure compliance with the Directive. I therefore strongly welcome the non-exhaustive list of sanctions spelled out under article 20(2)a (new) in the Parliament's Report ("at least the following measures and sanctions shall be provided"). The measures listed in article 20(2)a reflect the broad range of remedial measures necessary to remedy adverse human rights and environmental impacts caused by a company's operations or those of its business partners and subsidiaries, while leaving room for the imposition of other sanctions depending on the circumstances of each case.<sup>28</sup>

I also strongly support both the publication of sanctions imposed on companies and the keeping of a public record of such sanctions in the three draft texts of the Directive.<sup>29</sup> This not only

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<sup>24</sup> Parliament's Report, art. 22(1); see also recital 56.

<sup>25</sup> Parliament's Report, art. 22(2)a (new).

<sup>26</sup> See Council's General Approach, art. 8(3)(f) with "remediation" defined under art. 3(t) as "financial or non-financial compensation provided by the company to person or persons affected by the actual adverse impact, including restitution of the affected person or persons or environment to the situation they would be in, had the actual adverse impact not occurred, that shall be proportionate to the significance and scope of the adverse impact and the company's implication in the adverse impact"; see also Parliament's Report, arts. 8(3)(a), 8c (new) and 20(2)a (new), and recital 41a (new).

<sup>27</sup> See e.g. Parliament's Report, art. 20(2).

<sup>28</sup> See also Parliament's Report, recital 54.

<sup>29</sup> Art. 20(4); see also Parliament's Report, art. 17(8)a (new), which requires supervisory authorities to publish the most serious non-compliance issues in their annual reports on their website.



allows the public to be aware of corporate misconduct but can also serve as an important deterrent against companies engaging in such conduct.

## 7. I recommend to broaden and clarify the scope of the Annex

Finally, while I strongly welcome the inclusion of the Aarhus Convention and its article 3(8) in Part II of the Annex, I have serious concern about the lack of clarity and limited scope of the Annex in some other respects.

### A. Violations of rights and prohibitions included in international human rights agreements covered by the Directive

I welcome the amendments to paragraphs 2 and 3 of Part I, Section 1 of the Annex introduced in the Parliament's Report. The Parliament thereby makes clear that unlawful killings or acts of torture or ill-treatment committed by private or public security guards of a company fall within the scope of the Directive, irrespective of whether the security guards acted upon the direct instruction or within the control of the company. This is highly important as it prevents companies from escaping liability for the acts and omissions of public and private security companies acting on their behalf. In my mandate, I have seen a number of cases where security guards use violence against environmental defenders. In such cases, it is critical that the company employing the services of such guards – whether public or private – be held responsible. I therefore applaud the Parliament for identifying this serious problem and for addressing it through the proposed amendments. Based on my experience, these changes have the potential to become highly relevant in the practical application of the CSDDD.

### B. Violations of rights and prohibitions included in international human rights agreement *not expressly* covered by the Directive

I am severely concerned about the lack of clarity of paragraph 21 of Part I, Section 1 of the Annex, which addresses rights and obligations contained in one of the instruments listed in Section 2 of Part I but not specifically included in Section 1 of Part 1. While, in principle, I welcome the fact that all three draft texts include a provision to ensure that the list of rights covered by the Directive in the Annex is not closed, I see significant difficulties in applying these provisions as they currently stand. First, under the Parliament's Report, paragraph 21 of Part I, Section 1 introduces a "foreseeability" requirement for any violation not already covered by Section 1. Such a foreseeability standard is overly vague and difficult to apply across jurisdictions. It could therefore strip paragraph 21 of much of its practical relevance.

Second, the Council's General Approach deletes paragraph 21 of Section 1 altogether and instead lifts it into the body of the Directive under article 3(1)(c). While I generally see advantages in doing so, the Council imposes a significantly higher standard for a violation of a right contained in one of the instruments under Section 2 of Part I of the Annex to fall within the scope of the Directive (e.g. requiring the showing of a direct impairment of a "legal interest" that could have been "reasonably" identified in a company's operations). Much like the Parliament's Report, this may result in the practical irrelevance of that provision.

This lack of certainty is particularly concerning in light of the fact that key rights are currently not included in the list of rights and prohibitions in Section 1 of Part I, most notably the right to freedom of expression. It is highly concerning that the drafters have failed to include this fundamental freedom considering its central importance in the context of corporate wrongdoing. As the draft texts currently stand, there is a serious risk that companies could escape accountability for adverse impacts on an individual's or community's freedom of

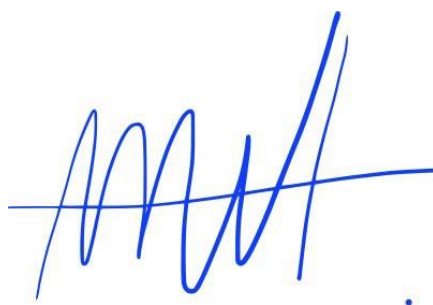
expression by arguing that such freedom does not fall within the scope of the Directive (being, on the specific circumstances of a case, not “foreseeable” – if the Parliament’s language is adopted –, or not a legal interest that could reasonably be identified in the company’s operations – if the Council’s language is adopted). It is key that the language in either paragraph 21 of Part I, Section 1 of the Annex or in article 3(1)(c) of the Directive is clarified to ensure there are no loopholes and the Directive provides comprehensive coverage.

**8. I call for transposition periods to be kept as short as possible.**

While I appreciate that companies will require time to implement the domestic legislation transposing the Directive, I am concerned that serious human rights and environmental abuses may continue to occur during the transposition periods. I therefore urge that each of the transposition periods in article 30 of the proposed Directive be kept as short as possible.

In conclusion, I would like to thank you for the opportunity to provide my comments on the proposed Directive. In light of the impending first Working Group meeting on the draft Directive, I would be most grateful if you would bring my letter to the attention of the Minister and advisors in charge of the negotiations of the draft Directive. I express my willingness to engage further with all relevant stakeholders regarding my comments if that may be helpful. I also stand ready to provide input during the further stages of the legislative process.

Please accept the assurances of my highest consideration.



Michel Forst

UN Special Rapporteur on environmental defenders under the Aarhus Convention

To: Ambassadors and Permanent Representatives to the European Union, in Brussels, of the European Union member States.

Cc: Permanent missions to the UN Office and other international organizations in Geneva of the European Union member States.