



# Hearing the human

**ENSURING DUE DILIGENCE LEGISLATION EFFECTIVELY AMPLIFIES THE VOICES OF THOSE AFFECTED BY IRRESPONSIBLE BUSINESS**

“ *Business enterprises must... be obliged to consult with defenders under the EU initiative... Now is the time for the EU to give new life to its founding principles by delivering a strong law that could help reduce the number of lives lost in defence of human rights.*”

[Mary Lawlor](#), Special Rapporteur on the situation of human rights defenders

The European Union (EU) is home to some of the world’s largest multinational companies, playing a key role in today’s global economy and value chains. Yet many of these companies are involved in environmental damage and human rights abuses worldwide, including against those who are at the forefront of protecting our rights and shared planet: [human rights defenders](#) (HRDs).<sup>1</sup> To support the inclusion and safety of HRDs in the EU’s Sustainable Corporate Governance Initiative, [Business & Human Rights Resource Centre](#) (the Resource Centre), [Front Line Defenders](#), [Indigenous Peoples Rights International](#) & [ProDESC](#), with the support of the [ALLIED](#) coalition, held regional online workshops in Africa, Asia and Latin America. The analysis and recommendations below derive from the two workshops and a roundtable, including views expressed by over 60 participants from diverse civil society organisations and communities.

The EU’s Sustainable Corporate Governance Initiative, including mandatory human rights and environmental due diligence (mHREDD), [offers an opportunity](#) to prioritise environmental protection, human rights and long-term business sustainability, including the safety of HRDs. By recognising the value of early and constructive engagement with rights-holders and HRDs as a powerful tool to identify actual and potential adverse impacts, EU companies can avoid significant problems and costs further down the line.

<sup>1</sup> Human rights defenders as individuals or groups who act to promote, protect or strive for the protection and realization of human rights and fundamental freedoms through peaceful means.

Human rights and environmental due diligence is about preventing and addressing harm. Engaging rights-holders and HRDs - including freely selected representatives of local communities, Indigenous Peoples, workers' representatives (including those of women workers), representatives of civil society organisations, trade unions, national human rights institutions (NHRIs) and others - is therefore critical to moving due diligence beyond a top-down, 'check-box' exercise defined by company views, towards a process which truly responds to rights-holders' concerns and can deliver positive outcomes for people and the planet. In short, genuine due diligence depends on meaningful stakeholder engagement, which in turn must address retaliation risks and attacks on rights-holders and HRDs, as well as [limitations](#) to their civic freedoms.

Why is this important? In its [HRDs database](#) and 2020 briefing, [In the Line of Fire](#), the Resource Centre found at least one in three attacks recorded against HRDs were linked to a lack of meaningful participation, access to information and consultation, or the failure to secure free, prior and informed consent (FPIC) of indigenous communities. EU-wide mHREDD has the potential to address this lack of meaningful and safe engagement and FPIC processes by mandating them as part of due diligence, thus addressing one of the main drivers of violence against HRDs.



## Case study Kenya

In Kenya, members of a community-based organisation filed an appeal at the National Environmental Tribunal challenging an Environmental Impact Assessment licence grant allowing the construction of a coal-fired power plant. The plant would be located near an ecologically sensitive area, exposing the communities and their environment to negative impacts. The Tribunal found the project proponents failed to conduct adequate public participation meeting the Constitutional and statutory threshold. The Tribunal also found the public hearing held regarding the project did not count as a consultative meeting to explain the nature of the project and its impacts. Throughout the process leading to the lodging of the appeal, the affected communities tried various strategies to engage meaningfully in this project – including petitioning relevant administrative institutions to obtain information on the project and submitting written and oral comments on the environmental impact assessment – but they were in turn exposed to a high level of threats.

For stakeholder engagement to be meaningful and enable identification of and action on salient human and environmental risks, it must (a) inform all stages of ongoing due diligence throughout operations, value chains, and project life-cycles, including risk identification and analysis, as well as measures to prevent, mitigate and cease adverse impacts and remediate affected people, and (b) be safe, so that HRDs and rights-holders can speak out about adverse corporate impacts without suffering retaliation. The risk of acts of retaliation – which can include, but are not limited to judicial harassment (such as arbitrary detentions and [strategic lawsuits against public participation](#) or SLAPPs), intimidation, stigmatisation, death threats, beatings and violence, disappearances and killings – aggravates any opportunity for meaningful engagement. The EU directive should guarantee an 'open-door policy' for HRDs and rights-holders who wish to engage with companies regarding their human rights impacts. The directive should include language on and prohibit reprisals and require companies to conduct meaningful and safe stakeholder engagement across their operations and value chains, effectively engage with business relationships to ensure zero-tolerance for attacks against HRDs, and take additional steps outlined in the recommendations below.



## Case study

### Nepal

In Nepal, a land rights campaign has long denounced the encroachment by a business complex onto a traditional pond and lands of Indigenous Newar communities in the Kathmandu tourist district of Thamel. The land dispute has been in and out of the courts since the 1970s. Locals and rights advocates are awaiting a Supreme Court decision after concerns were raised over previous rulings which favoured private interests. While the land dispute was pending at the courts, the construction of the business complex was rushed through and eventually completed. The Chhaya Center complex now houses 200 retail stores, including high-end brand outlets, multiplex theatres, corporate offices, casinos, and a five-star hotel, the largest revenue source for the business complex. Locals and human rights activists who have been organising demonstrations against alleged illegal encroachment on Indigenous lands say their efforts with public authorities and UN human rights mechanisms have fallen on deaf ears. Meanwhile, the business complex has filed a legal case in contempt of court against the lead activist and researcher who spearheaded the campaign. Workers' unions at the business centre also made public threats against the activist over his opposition to the complex.

The safety of HRDs, in turn, should be integrated into any risk assessment and follow-up measures as part of a company's ongoing due diligence process from its earliest stages. Many EU companies operate in and source from contexts where there is a higher likelihood they will cause, contribute to, or be directly linked to harm against HRDs, including attacks and acts of retaliation. [Disengagement](#) is only a last resort and can have its own adverse human rights impacts. A [report by Global Witness](#) found 2020 to be the most dangerous year on record for HRDs, with all but one of 227 recorded killings of land and environmental defenders taking place in countries in the global South and almost a third connected to resource exploitation. The Resource Centre's own research has recorded over [3,400 attacks](#) against HRDs raising concerns about business-related human rights impacts since 2015, (co-)perpetrated by government, business or other actors. With the right provisions on safe and meaningful stakeholder engagement and on addressing retaliation risks, EU-wide mHREDD and corporate accountability legislation could significantly mitigate current risks to and impacts on HRDs and rights-holders, as well as enabling companies to better identify and address other environmental and human rights risks.



## Case study

### Mexico

In Mexico, an Indigenous Zapotec community has been defending its territory since 2004 against the arrival of transnational companies in the Isthmus of Tehuantepec region to build wind farms without respecting the communal ownership of the land and the human rights of Indigenous Peoples, in particular the right to self-determination and free, prior and informed consent. The imposition of the projects has also led to the stigmatisation, persecution and harassment of defenders and community leaders. In October 2018, a federal court in Mexico delivered a historic ruling in favour of the community, ordering the Mexican authorities to carry out a consultation to meet the highest international standards regarding one wind farm operated by a state-owned company based in Europe. Following an unsuccessful process before the French OECD National Contact Point in 2018, in October 2020, the community filed a civil lawsuit in Paris against the company for violation of their human rights under the French 'Loi de Vigilance'. The community argues the company is responsible for contributing to violations of their rights by failing to identify risks and implement protective measures in the project's development.

## Evolving expectations about safe and effective stakeholder engagement

Human rights and environmental due diligence is the ongoing risk management process businesses should undertake as part of their responsibility to respect human rights and the environment. Under the United Nations Guiding Principles on Business and Human Rights (UNGPs), the process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses and communicating how impacts are addressed.

According to the UNGPs, the due diligence process should involve effective consultation with potentially affected groups and other relevant stakeholders, including HRDs, informing all stages of the process (UNGP 18). Remediation of harms which have already occurred is a distinct but closely related requirement for companies under the UNGPs. Engagement with rightsholders and HRDs forms a crucial basis for corporate assessments and decisions as to where action is most urgent across operations and supply chains and how to adequately and effectively address on-the-ground, actual, and potential impacts and vulnerabilities. This is recognised and elaborated upon in a recent [guidance paper](#) by the UN Working Group on Business and Human Rights, which stressed “HRDs need to be seen as key partners, who can assist businesses in identifying key human rights impacts, and should be part of a business enterprise’s stakeholder engagement, and due diligence processes, instead of being seen as annoyances, troublemakers, obstacles or threats to be disposed of.” The Organisation for Economic Co-operation and Development (OECD) has also highlighted in its [Due Diligence Guidance for Responsible Business Conduct](#) that companies are expected to respect the right of stakeholders to freely express their views throughout the life cycle of an activity, and that engagement is not a one-off endeavour.

## Why is mandating safe and effective stakeholder engagement crucial for mHREDD legislation?

“ Many times, the consultation has to be positive. [Business and governments] never accept a negative answer. If there is a negative answer, they look for another consultation until they find the result they are looking for. You have to take into account the HRDs’ position and others in the community, not just the invitees. It seems that many times the conclusion is already made beforehand.”

**Participant in the consultation in Latin America, September 2021**

Mandating safe and effective engagement with stakeholders, including HRDs, as part of due diligence, addressing the shortcomings of current approaches, and recognising and addressing the risks rightsholders and HRDs face when reporting on corporate misconduct or raising opinions that are critical of or oppose business projects, are essential for the success of the upcoming legislation. The perils of a lack of safe and meaningful engagement were discussed during two consultations with over 60 HRDs.

## Key take-aways from the consultations:

- ➔ **Meaningful and safe stakeholder engagement is key to moving EU companies' due diligence beyond a top-down compliance approach:** While references to zero-tolerance to retaliation in policies and codes of conduct are welcome and needed, too many large companies rely on passing general human rights requirements to their suppliers through contract clauses alone, if at all, which are then 'controlled' by third-party auditors, despite well-documented [shortcomings](#). Often this focuses on parts of the supply chain where lead firms have the closest commercial relationships, i.e. the first tiers, rather than companies taking action [wherever the most salient risks occur](#) for people and the planet across their whole operations and value chains – something for which rightsholder and HRD input is vital. The role of a lead firm's own business model and practices in driving abuse further down the supply chain is often neglected, as are measures [beyond auditing](#) and contractual enforcement to more actively support and enable direct and indirect suppliers to respect human rights, and build and use different forms of leverage.
- ➔ **Most companies are not engaging with rightsholders and HRDs, and current forms of engagement used by some companies are often ineffective:** The consultations and our research have shown a lack of engagement, or inappropriate engagement processes, lead to divisions in communities and a disregard or active exclusion and intimidation of and attacks on critical stakeholders in both lower and the higher tiers of the supply chain.
- ➔ **The level of direct rightsholder and HRD engagement by many EU companies in their operations and value chains has been low:** This translates into incomplete risk assessments, ineffective mitigation of human rights and environmental risks and a substantive lack of remediation and reparation by companies for individuals or groups which have already suffered harm. This contributes to civil society's strong call to improve access to judicial remedy before courts, and calls for '[ground-truthing](#)'.

Given the EU interest in the success of this legislation and commitments by the [EU](#) and its member states to support and protect HRDs (as demonstrated e.g. through the [EU's Human Rights Defenders Guidelines](#)), it is crucial to seize this opportunity to mandate better, ongoing engagement processes.

In doing so, EU legislation would create welcome conditions for EU companies to:

- ➔ **Identify actual and potential adverse impacts they cause, contribute to, and are directly linked to at an early stage:** Engaging with rightsholders and HRDs early on and in good faith is one of the most effective ways of identifying actual and potential impacts which companies may be involved with across their operations and value chains, potentially saving them much larger problems and costs down the line.
- ➔ **Respond to rightsholders' and communities' concerns as they arise:** Due diligence should respond to rightsholders' and communities' concerns from before the onset of and at every stage of an economic project and business activity.
- ➔ **Address harms and provide remedies:** HRDs – both individuals and groups – can provide information on any adverse human rights impacts EU companies are involved with across their operations and business relationships, and through products or services. This information is invaluable for defining preventive measures, ceasing and mitigating actual harms, and providing remedy to affected people.

“ Strengthening protection of HRDs is a key priority for the next decade of the business and human rights agenda. One of the best ways of moving forward is mHREDD that serves as a vehicle to safeguard HRDs through requirements to consult with them, as well as through ensuring proper access to effective remedy as part of due diligence laws.”

Anita Ramasastry, UN Working Group on Business and Human Rights

## Recommendations to the European Commission, EU Parliament (EP) & Council of the EU

As a first step, legislative bodies should take into account all recommendations regarding addressing risks of retaliation made in the EP’s [adopted legislative text](#) from February 2021. In addition, the directive should also:

### Ensure effective process and transparency for risk assessment, prevention and remedy:

- ➔ **Include a duty for companies based in the EU or active in the EU market to engage safely and meaningfully with rightsholders and HRDs to inform all stages of due diligence and remediation:<sup>2</sup>** Any assessment as to whether companies have taken all necessary measures to fulfil their due diligence duty should take into consideration whether this engagement has provided rightsholders and HRDs with access to adequate information and has taken place in a safe, strong, effective and meaningful manner. Meaningful engagement should include cooperation with civil society in sourcing countries, providing access to information, integrating input from HRDs and civil society into decision-making, providing feedback on how and why such input was or was not integrated, as well as showing that non-retaliation measures have been put in place.
- ➔ **Make clear that due diligence and corresponding requirements on stakeholder engagement should support, but not replace or undermine, existing FPIC duties and other rights established under the [UNDRIP](#) and [ILO Convention 169](#):** The needs of rightsholders should be considered when designing engagement processes so that they are accessible, culturally appropriate, safe and effective. Best practice guidance on [FPIC](#) and [collective land rights](#) should be followed, and companies should be mandated to [develop and publish detailed Standard Operating Procedures \(SOPs\) on FPIC](#), respect FPIC Protocols developed by communities (example [here](#)), and demonstrate how their process responds to these protocols.
- ➔ **Include strong requirements on remedy for affected individuals or groups, including for harms suffered from retaliation:** Companies should have effective grievance mechanisms in place and provide or cooperate in the provision of remedy. For such requirements to be effective, they should be backed up by a robust civil liability regime (see below).
- ➔ **Highlight the importance of greater supply chain transparency to enable rightsholders and HRDs to engage with a lead firm:** More transparent supply chains also form important building blocks for companies’ own due diligence. Regular identification and assessment of risks can provide starting points for appropriate responses even if individual production sites are not yet known at every stage, which should not be an excuse for inaction.

<sup>2</sup> In particular, but not limited to, risk analysis and the remedy of harm.

## Protect human rights defenders and their families, communities and organisations:

- ③ **Place a positive obligation on EU companies to prevent retaliation against HRDs across their operations and value chains:** This should include ensuring these stakeholders can express their views safely, such as through enabling anonymity, confidential treatment of complaints, and implementing strong security protocols for handling data related to HRDs. This also includes effectively communicating a zero-tolerance approach to attacks on HRDs across business relationships, including state parties, and working actively with direct and indirect suppliers to ensure conditions for safe engagement, following a risk-based approach in line with the UNGPs.
- ③ **Define reprisals and mandate analysis of reprisal risks:** Reprisals should be defined as “any detrimental action that harms or threatens anyone expressing concerns or opposition to a company’s activities or to the activities of its supply chain and business relationships”. Ongoing risk analysis as part of the due diligence process must expressly include risk of retaliation as part of mitigation and prevention measures.
- ③ **Refer to forthcoming implementation guidance on safe stakeholder engagement and risks of retaliation:** Guidance should be designed with input from HRDs from around the world, and should include analysis of the different intersections of violence faced by HRDs, including due to their gender, race, and sexual orientation, and include specific directions based on it;
- ③ **Instruct lead companies to establish baselines of engagement with HRDs:** Particularly in countries where companies operate or source from which have [closing civic space](#) and other indicators of potential reprisals, this should take place before emergencies happen and companies should report on it, as long as reporting does not put HRDs at risk.

## Supervision and enforcement of the Sustainable Corporate Governance Initiative:

- ③ **Ensure corporate engagement with communities and HRDs is visible to EU Delegations and member state embassies abroad.** In specific cases, delegations and embassies should assist a potential administrative supervisory body<sup>3</sup> to assess the quality of a company’s due diligence, including stakeholder engagement, in cooperation with NHRIs and civil society. They should also play a role in disseminating information to local stakeholders about the new law and its engagement and protection requirements. To ensure policy coherence, an addendum should be added to the [EU Guidelines on HRDs](#) reflecting these developments.
- ③ **Enable and support victims of reprisals and retaliation to seek remedy to restore them to their original situation;** in cases of fatalities, enable victims’ families to seek remedy.
- ③ **Include a robust civil liability mechanism to ensure affected people outside the EU can bring cases before European courts,** under EU law, against EU companies involved in human rights and environmental harms, including acts of retaliation. Criminal liability should be established in cases related to severe forms of retaliation (i.e. bodily harm or fatalities, also to HRDs).

## Scope and reach of the Sustainable Corporate Governance Initiative:

- ③ **Mandate EU companies to conduct due diligence across the entire value chain,** particularly given the occurrence of many retaliatory actions, as well as other human rights and environmental abuses in lower tiers of the supply chain.
- ③ **Apply obligations to all companies based in the EU, or active in the EU market, from all sectors including finance, and including small and medium-sized enterprises.**

<sup>3</sup> Provided there will be administrative supervision of the law, as a complement to civil liability for harms.

## EU member states, when implementing the Directive, should:

- ➔ **Establish the burden of proof falls to the company.** Where instances of retaliation and other abuse have been reported or brought to court, or other monitoring and enforcement mechanisms, the burden of proof should not fall to the individual or group that claims to have been subject to retaliation or other attacks or abuse.
- ➔ **Ensure authorities designated to supervise the enforcement of the legislation have dedicated policies on how to protect individuals (complainants or others) from retaliation.** Staff handling these cases should be knowledgeable about these risks and use security practices for handling cases in consultation with those concerned.
- ➔ **Engage with HRDs during the development of their national mHREDD legislation.**

## Further reading

- > Tove Holmström: [“Don’t shoot the messenger’: Protection against reprisals under the proposed EU DD legislation”](#) and [“Addressing risks of retaliation in the forthcoming EU Directive on mDD”](#)
- > Office of the United Nations High Commissioner for Human Rights (OHCHR): [EU mHREDD: Recommendations to the European Commission](#)
- > [Open letter](#) from organisations representing indigenous peoples, forest communities and HRDs
- > Matthew Mullen: [“Why rightsholder consultation is the gateway to effective HRDD”](#)
- > German Global Compact Network & TwentyFifty: [“Stakeholder engagement in HRDD”](#)
- > [OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector](#)
- > Investor Alliance for Human Rights, Business & Human Rights Resource Centre, International Service for Human Rights: [“Safeguarding Human Rights Defenders: Practical Guidance for Investors”](#)
- > Shift: [“Meaningful Engagement with a Affected Stakeholders”](#)





This brief is jointly authored by the **Business & Human Rights Resource Centre**, **Front Line Defenders**, **Indigenous Peoples Rights International (IPRI)** and **ProDESC**, with input on case studies from **Natural Justice** (Kenya) and the **Community Empowerment and Social Justice Network (CEMSOJ)** (Nepal).

We are grateful for the review of **Global Witness** and **Tove Holmström**, independent expert on responsible business conduct, focusing on retaliation. The briefing and related activities are also part of the work of the **Alliance for Land, Indigenous and Environmental Defenders (ALLIED)**, and possible thanks to funding from **Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ)** commissioned by the Government of the Federal Republic of Germany, and **Ford Foundation**.