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The EU Parliament Position on the CSDDD : Towards Requiring Meaningful Stakeholder Engagement?

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It is a pleasure to welcome Dr Caroline Omari Lichuma on Rights as Usual (Caroline.lichuma@uni.lu; @Carollichuma on Twitter). Caroline is a Postdoctoral Researcher at the University of Luxembourg . She received her LLB from the University of Nairobi, her LLM from New York University and her PhD from the Georg-August University of Göttingen. Her current research is in the broad area of Business and Human Rights with a focus on national, regional and international efforts to increase corporate accountability for human rights and environmental abuses. She is particularly interested in the intersection between Third World Approaches to International Law (TWAIL) and BHR. This post is hers.

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Background

On the 1st of June 2023, the EU Parliament finally adopted its long-awaited position on the EU Corporate Sustainability Due Diligence Directive (CSDDD) with 366 votes in favour, 225 against and 38 abstentions. The legislative drafting process now proceeds to the trilogues, where attempts will be made to reconcile the Parliament's position with that of the EU Commission and the EU Council in order to arrive at a final text of the directive.

The question of meaningful stakeholder engagement in the EU CSDDD has (pre)occupied scholars and civil society since the EU Commission released its draft in February 2022. This continued even after the Council's draft in December 2022. Critics have argued that contrary to international standards contained within the United Nations Guiding Principles on Business and Human Rights (UNGPs) as well as the OECD Guidelines for Multinational Enterprises (OECD Guidelines), the commission's proposal lacks a systematic approach to stakeholder engagement across the Human Rights Due Diligence (HRDD) process. In addition, concerns were raised about the "where relevant" formulation found in Articles 6 and 8 of the draft directive, requiring covered companies to engage with stakeholders only where relevant. Adding on to these concerns, I have elsewhere argued that a comparison of the Commission and Council positions reveals that not enough has been done in both these drafts to create the necessary architecture for meaningful stakeholder engagement in reality, given the wide discretion granted to in-scope companies. Relatedly, using a Third World Approaches to International Law (TWAIL) lens, I have previously illustrated how the EU CSDDD contributes to participatory injustice given its failure to include global south rightsholders in the processes of HRDD law making and implementation. This has serious implications for the creation and entrenching of a European epistemic and interpretive hegemony in BHR that does not do enough to "center the unique cultural, historical, and political experiences as well as lived realities of rightsholders from the Global South."

The EU Parliament's Position: Taking Critics Seriously?

Looking at the amendments proposed in the Parliament draft allows for some cautious optimism in as far as the progress towards meaningful stakeholder engagement is concerned. Amendment 34 sets the stage by introducing into the text of recital 27 a requirement that covered companies must engage with affected stakeholders throughout the due diligence process. Amendment 60 provides more detail by introducing a new recital 44c focusing on ongoing meaningful engagement. One notable development present in Parliament's draft is the category of affected stakeholders. Covered companies are required to engage in genuine dialogue with these stakeholders and/or other relevant stakeholders such as civil society or human rights and environmental defenders where necessary. Stakeholders are to be given access to information with reasons for any refusal, and affected stakeholders must be protected from retaliation and retribution including by maintaining confidentiality and anonymity. Particularly welcome are attempts to inject policy coherence into the process of meaningful stakeholder engagement by aligning it with existing EU legislation applicable to rights to information, consultation, and participation.

As regards the operative provisions of the draft directive, a number of amendments are relevant. Amendment 121 introduces the category of affected stakeholders into the definitions laid out in Article 3(1)(n). Affected stakeholders are conceived of as 'individuals, groups or communities that have rights or legitimate interests that are affected or could be affected by the adverse impacts stemming from a company's activities or actions or the activities or actions of entities in its value chain.' The legitimate representatives of such stakeholders are also granted standing. Additionally, adopting a formulation introduced in the Lara Wolter's draft, the Parliament draft proposes amendment 122 creating a new Article 3 (1) (na) recognizing vulnerable rightsholders. These are affected stakeholders whose situations are compounded by marginalization due to intersecting factors such as 'sex, gender, age, race, ethnicity, class, caste, education, indigenous peoples, migration status, disability as well as social and economic status.'

The most important amendment on stakeholder engagement proposed in the Parliament draft is amendment 206 which introduces a new Article 8 (d) titled 'carrying out meaningful engagement with affected stakeholders.' The provision is significant for a number of reasons. First, it requires engagement to be 'comprehensive, structural, effective, timely and culturally and gender sensitive.' In addition, it stresses the possibility of meaningful engagement involving legitimate representatives of affected rightsholders where it is not possible to engage the latter. Notably, in order to redress the information asymmetry that is emblematic of the relationship between companies and stakeholders, covered companies are required to provide 'comprehensive, targeted and relevant information to affected stakeholders.' Furthermore, affected rightsholders are allowed to request companies for additional information, and where such a request is refused written justifications must be given. Companies are expected to set up an appropriate framework for consulting affected stakeholders that ensures meaningful engagement throughout the due diligence process as set out in Articles 5-10 of the EU CSDDD. Special mention is made of company workers and their representatives, who must be kept informed of the company due diligence policy and engaged with throughout the implementation process. Finally, companies are required to identify and address barriers to engagement and ensure that participants are not subject to retaliation or retribution. The needs of vulnerable stakeholders must be given particular attention. Crucially, amendment 154 removes the 'where relevant' formulation and requires companies to carry out meaningful engagement in accordance with Article 8 (d).

What Next? A Call for Pragmatic Optimism

It is clear that the Parliament draft has laid down the legal scaffolding necessary for building an effective meaningful engagement architecture within the CSDDD. Compared to the Commission and Council drafts, the Parliament draft has arguably, and to a large extent, incorporated the concerns of critics of these earlier versions. Nonetheless, this contribution calls for the optimism with which these developments are likely to be received to be tempered with a healthy dose of pragmatism for three reasons.

Firstly, the nature of the trilogue process means that a number of tripartite meetings between Parliament, the Commission and the Council will now follow. Only at the end of this process will it be clear what version of stakeholder engagement will be captured within the final legislative text. Thus, the final text could either be stronger or weaker than the Parliament draft in this regard. Only time will tell.

Secondly, whereas the provisions in the new article 8 (d) are promising, it is not entirely clear if these provisions grant an enforceable right to stakeholders who are dissatisfied with how the company structures and carries out its meaningful engagement obligations. Will such stakeholders be able to raise a challenge against the company either through judicial or administrative proceedings – for instance within the context of the national supervisory mechanisms to be set up in each national jurisdiction? Legal rights are meaningless unless they are capable of being translated into reality. It remains to be seen whether and how affected stakeholders will actually be able to hold companies to account for any failures in their discharge of these meaningful engagement obligations.

Thirdly, as scholars such as Surya Deva and Debadatta Bose have cautioned, we must temper the enthusiasm with which we regard the move towards enhancing corporate accountability for violations of human rights and the environment through HRDD laws such as the EU CSDDD. These laws may promise more than they are able to deliver in reality, given the structural problems that characterize the global order, such as the massive asymmetries that exist between affected stakeholders and powerful Multi-national companies (MNCs) in terms of *inter alia*, access to resources, power and influence, and information.

HRDD laws are unable (and maybe even unwilling) to confront the material conditions of a post-colonial and neo-liberal international order that have allowed errant MNCs to be what they are today. Ultimately, even if Parliament's version of the EU CSDDD is successful as regards the meaningful engagement provisions, this will be akin to treating only one small symptom while doing nothing to stop the disease.

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about me

My name is Nadia Bernaz and I am Associate Professor of Law and Governance at Wageningen University in the Netherlands. My main area of research is business and human rights. I look at how corporations and businesspeople can be held accountable for their human rights impact through international, domestic and transnational processes.

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