POLICY BRIEF

Downstream due diligence

A must-have for the EU's Corporate Sustainability Due Diligence Directive

Why is Downstream Due Diligence important?

Downstream due diligence refers to a company's efforts to prevent, mitigate, and remediate actual and potential human rights and environmental impacts associated with the company's product or service that occur *after* the company manufactured or delivered the product or service for usage or disposal by a third party. To be in line with the **risk-based approach** codified in the **United Nations Guiding Principles (UNGP)** and the **OECD Guidelines for Multinational Enterprises**, it is essential for businesses to conduct downstream due diligence.

For some sectors, the most severe risks are in the downstream rather than the upstream value chain. A risk-based approach would prioritise these risks. For a **level-playing field between all sectors**, companies need to consider the upstream and downstream value chain equally in their risk-based approach.

Examples of business relations with severe adverse impacts in the downstream value chain:

- surveillance technology supplied for state surveillance that violates human rights
- mining machinery delivered for mines that cause severe environmental devastation
- supply of pesticides that endanger the health of the population in the areas where they are used
- financing of a plantation for which people were forcibly evicted without adequate compensation

Downstream due diligence is effective in addressing risks of human rights violations and environmental damage. **Downstream due diligence is particularly important in situations where upstream due diligence fails to prevent or mitigate a severe risk of harm.**

Example:

In most cases, corporations that source resources from mines do not start their business relationship until a mine is operating. This limits their ability to effectively address risks that occur during the opening phase of mines, such as forced displacement or environmental degradation. However, suppliers of key machinery for the opening phase of mines can use their leverage to address these risks (see this study and this case study by Germanwatch and this case study by Swedwatch for more details).

GERMANWATCH INITIATIVE LIEFERKETTENGESETZ.DE SOMO SWEDWATCH HEINRICH BÖLL STIFTUNG

How can companies conduct downstream due diligence?

It depends on the sector and the company's position in the value chain how companies should conduct downstream due diligence. However, their measures should always be in line with the six steps of due diligence elaborated by the OECD.[1] This means, for example, that companies should:

- develop clear downstream due diligence processes and protocols, including a multi-level escalation procedure for cases of human rights violations or severe environmental impact *(see step 1 – embed in policy)*;
- conduct risk mapping and prioritisation in line with the UNGP and OECD guidelines, taking into account sector, product, country, and client-specific risks *(see step 2 – identify)*;
- conduct a 'know your customer' risk analysis of potential clients, customers, and other downstream business relations before entering into new or renewing existing business relationships. Where appropriate, include binding agreements on prevention and/or mitigation measures in contracts (*see step 3 – prevent and mitigate*);
- use leverage with downstream business partners to encourage the party causing the risk or impact to cease doing so. If leverage is insufficient, seek to build leverage, for example by collaborating with other business, labour, or civil society actors who have a stake or interest in the situation (*see step 3 – prevent and mitigate*);
- establish the highest available standards for the company's products and services, in particular with regard to emission intensity, product safety, and environmental impact *(see step 3 – prevent and mitigate)*;
- track the implementation and results of downstream due diligence efforts and communicate to the public, and in particular to rights holders, how downstream risks and impacts are being addressed *(see step 4 and 5 – track and communicate)*;
- use leverage to encourage downstream business partners causing or contributing to impacts to provide remedies. Enable affected rights holders to raise complaints by providing access to, and cooperating with, legitimate remediation mechanisms *(see step 6 – remediate)*.

For more detailed recommendations for companies on downstream due diligence, see this study on the mining equipment industry by Germanwatch and a related case study as well as 3 case studies by Swedwatch (Case 1, Case 2, Case 3).

[1] http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf, p.21

Key recommendations regarding the CSDDD

- The CSDDD must respect the existing international consensus regarding the need for due diligence to **cover the whole value chain, both upstream and downstream**, as required in the OECD Guidelines and UNGP and recently echoed by the ILO, OHCHR, and a range of businesses.[2] As such, the scope should not be reduced by constructs such as 'established business relationships' or 'chain of activity'. **The introduction of the term 'chain of activity' would be a major limitation** of the scope of the CSDDD, even if specific provision were introduced for the finance sector. Downstream value chain risks are diverse and not limited to merely a few sectors (see above).

- The proposal should not be diluted in response to claims that downstream due diligence is not feasible.
  - *Firstly,* **various case studies and publications[3] clearly demonstrate the feasibility of downstream due diligence.**
  - *Secondly,* the Commission's CSDDD proposal already stipulates that companies only have to take 'appropriate measures' with respect to their due diligence, thus ensuring proportionality and protecting companies from unrealistic expectations. The EU proportionality principle also applies and protects them from unreasonable claims.
  - *Thirdly,* a **strong risk-based approach ensures that only the sectors that actually have significant risks in the downstream value chain will have to address that part of their value chain,** while others will continue to focus on their upstream activities.

  Any concerns should rather be addressed through the provision of sector-specific guidance on downstream due diligence.

- **No differentiation should be established between downstream and upstream due diligence obligations.** Instead, risks in the upstream and downstream value chain should be assessed in a **risk-based approach** and **prioritised in line with the UNGP / OECD Due Diligence Guidance.**

- The **definition of risk sectors** as defined in Art. 2 (1) b) of the Commission's Proposal **should be broadened:** At present, they do not include companies supplying or providing services to these risk sectors. As a result, the lower thresholds for these companies would not apply to equipment manufacturers supplying the extractive sector, for example.

[2] See https://media.business-humanrights.org/media/documents/EU_business_statement_Feb_2022.pdf

[3] See for example: https://www.somo.nl/setting-the-record-straight/, https://www.somo.nl/urgent-need-for-eu-legislative-action-to-keep-european-surveillance-tech-out-of-iran/, https://swedwatch.org/wp-content/uploads/2021/01/91myanmar181003final.pdf, https://swedwatch.org/wp-content/uploads/2017/03/Silent-Approval-Borneo-full-report.pdf, https://swedwatch.org/wp-content/uploads/2021/01/fuel-for-conflictfull-report.pdf or https://www.germanwatch.org/en/87937

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