

After the EU Corporate Sustainability Due Diligence Directive is before the UN Treaty

An EU mandate for negotiations on an international agreement on business and human rights

By Karolin Seitz

The European Union (EU) is on the verge of introducing an EU Corporate Sustainability Due Diligence Directive (CSDDD). An agreement among the EU institutions involved is to be reached by the end of 2023. This also brings the EU's active participation in negotiations at the United Nations (UN) level on an international legally binding instrument on business and human rights, also known as a "UN treaty," ever closer. After all, it is in the EU's interest that high standards apply not only to EU-based companies and that a level playing field is created worldwide. What role has the EU played in the UN treaty process so far? What is the process leading to an EU negotiating mandate, and what could such a mandate look like?

When the UN Human Rights Council successfully voted in June 2014 to establish an [intergovernmental working group](#) to elaborate an international legally binding instrument on business and human rights, all industrialized nations, including the EU Member States, came out against the corresponding resolution ([HRC Res. 26/9](#)). In the following years, EU Member States continued to be skeptical to dismissive of the process, repeatedly raising procedural objections, and even attempting to eliminate the funds earmarked for the intergovernmental working group during negotiations on the UN's budget in 2019.

EU Member States are represented in the process by the European External Action Service (EEAS) and coordinate their positioning in the Council Working Party on Human Rights (COHOM). In the absence of a negotiating mandate, the EU representation has so far only participated in the sessions of the intergovernmental working group as an observer, and has only contributed general statements.

The positions of individual EU Member States have gradually changed, not least as a result of national legislative initiatives in several EU Member States (including France and Germany) to regulate due diligence. France contributed to the discussions of the intergovernmental working group for the first time in 2016 with its own statement. Germany spoke up for the first time during the seventh session in October 2021.

Finally, in 2022, France and Portugal even declared their membership in the so-called "Friends-of-the-Chair" group, a sub-working group to develop consensus proposals.

While the European Parliament (EP) had already called for EU entry into UN treaty negotiations in several resolutions, in 2020 the EU Council, in its conclusions on EU priorities in UN human rights fora for the year, said it would merely "follow closely" the "discussions on a legally binding instrument." A year later, it announced that it would "participate actively (...) in the UN discussions."

The February 2023 **Council conclusions** now state:

“The EU will continue cooperating with the OHCHR and the UN Working Group on Business and Human Rights to promote the implementation of the UN Guiding Principles on Business and Human Rights (UNGPs) globally. It will continue supporting the adoption of National Action Plans and developing a comprehensive EU Framework for UNGP implementation, taking as a reference the UN UNGP Roadmap for the next decade of business and human rights. The EU will strengthen its engagement in the UN fora and actively participate in UN discussions on a legally binding instrument on business and human rights, and stands ready to work with the Chair of the Open-ended Inter-governmental Working Group (OEIGWG) and the Friends of the Chair, as well as other partners, to explore ways for a consensus-based instrument that can effectively enhance the protection of victims and create a global level playing field.”

Since the EU Commission presented a **proposal for an EU Corporate Sustainability Due Diligence Directive** (CSDDD) in February 2022, it has been clear that there will also be regulation of value chains at EU level. With the **EU Council** having taken a position on the Commission proposal in December 2022 and the **European Parliament** following to do so in June 2023, an agreement on the EU directive is foreseeable and expected by the end of 2023. An EU negotiating mandate for the UN treaty process is thus within reach. The EU declared an explicit readiness for such a negotiating mandate in spring 2023. After all, it is in the interest of the EU Member States that not only companies based in the EU have to comply with corresponding standards.

Complementarity of CSDDD and UN Treaty

As a **study** by Nadia Bernaz, Markus Krajewski, Kinda Mohamadieh, and Virginie Rouas, among others, makes clear, the UN treaty would be complementary to the CSDDD. By establishing human rights, environmental and climate-related due diligence obligations globally, the agreement would not only strengthen the effectiveness of the CSDDD globally, but would also create similarly

high standards worldwide, and thus a level playing field for companies. Moreover, multilaterally negotiated rules enable **greater global acceptance** than national and regional corporate due diligence regulations can offer.

While the EU directive will primarily establish due diligence obligations for companies, the UN treaty could make important provisions for improved legal protection for people affected, and would thus complement the EU directive well (see “Possible contents of an EU negotiating mandate”).¹

Division of competences between EU and EU Member States in the negotiations

The future international agreement will include areas that are within the exclusive regulatory competence of the EU.² This includes, for example, all envisaged regulations that will affect European trade policy or competition policy. Other areas, especially when it comes to regulating the European internal market, are within the shared competence of the EU and EU Member States. The CSDDD expands the EU’s regulatory competence in the area of due diligence. Some regulations provided for in updated draft treaty from August 2023, such as those on applicable law and jurisdiction, will have an impact on other existing EU regulations. Other provisions, such as those relating to procedural law, statute of limitations or judicial cooperation, are within the exclusive competence of the Member States.

As this is a mixed agreement, both the EU and all individual Member States must sign the final agreement.

Procedure for an EU negotiating mandate

The procedure for negotiating EU agreements with international organizations is governed by Article 218 of the **Treaty on the Functioning of the EU**. Accordingly, the EU Commission must submit a recommendation for a negotiating mandate, accompanied by an impact assessment, to the EU Council. An analysis of the distribution of competences is also necessary. In a further step, the Council of Foreign Ministers, advised by the Council Working Party on Human Rights (COHOM), must adopt the recommendation and authorize the

¹ <https://www.cidse.org/wp-content/uploads/2022/10/Complementarity-study-on-EU-CSDDD-and-UN-LBI-October-2022.pdf>

² *Ibid* (S. 9–12)

EU to start negotiations. In this step, the Council also determines the negotiating directives (the so-called EU negotiating mandate) and the negotiator or the head of a negotiating team. Since the UN treaty is a mixed agreement, the individual EU Member States are expected to be part of the team, in addition to the European External Action Service. The European Parliament will be informed at all stages of the process.

Other existing EU mandates for current international negotiations, for example on an international [pandemic treaty](#) and an international [plastic treaty](#), are rather general and can be fleshed out in the course of the negotiations, once the details of the scope and content of the future agreements are also foreseeable. In the UN treaty on business and human rights process, unlike the aforementioned processes, the EU would not enter the negotiations from the beginning, but at an advanced stage of the process. After about 10 years of existence of the process, an updated draft treaty was published on 1 August 2023. An EU negotiating mandate would therefore also have to take this draft treaty into account.

Possible contents of an EU negotiating mandate

With the European Parliament also having adopted its position on the Commission's draft CSDDD on June 1, 2023, the trilogue negotiations between the European Parliament, the EU Council and the EU Commission have begun. An intersection between the positions of the three institutions on the regulations is already foreseeable. The upcoming EU directive will include at least the following elements:

- » It will apply to companies that have at least 500 employees and annual global turnover of at least 150 million euros. The EU Commission and EU Council agree on these thresholds. The European Parliament is calling for a scope of application for companies with 250 or more employees and an annual turnover of 40 million euros or more. It is therefore possible that the threshold will be lowered in the trilogue negotiations. The scope of application also includes companies with public participation.
- » It provides for measures to help small and medium-sized enterprises (SMEs) implement the requirements, including information portals and websites with guidelines, financial support, and templates for contractual clauses to prevent re-

sponsibilities from being shifted to suppliers further down the value chain.

- » It will introduce due diligence requirements for companies based on the UN Guiding Principles on Business and Human Rights (UNGPR), with compliance to be monitored by a regulatory institution.
- » The due diligence obligations will cover human rights, environmental and climate protection.
- » They are also to apply without gradation to suppliers in the lower value chain.
- » The directive will establish civil and administrative liability regimes.

This foreseeable intersection thus already forms a basis for an EU negotiating mandate for the UN treaty process. However, the EU negotiating mandate must go beyond the rules established by the CSDDD.

The CSDDD will create civil liability regimes for violations by companies. These are an important step in improving access to justice and remedy for people affected. However, they are not enough, as there are numerous other hurdles that currently do not allow affected persons to successfully claim their rights. Unclear jurisdictions and questions of application of the law, too short statutes of limitations, lack of collective legal action, lack of facilitation of the burden of proof in favor of victims, and insufficient protection of human rights defenders are some of such hurdles worldwide. With the exception of an overriding mandatory application that regulates the applicable law in the event of damage, the EU directive will probably not address these problems. If the EP's position were to prevail, the CSDDD would at least introduce limitation periods of a minimum ten years.

Proposals for further necessary changes at the level of the EU Member States and the EU have been made, among others, by the [European Fundamental Rights Agency \(FRA\)](#), the [European Law Institute](#), a [study](#) commissioned by the EP Legal Affairs Committee, and the [European Coalition for Corporate Justice \(ECCJ\)](#).

However, barriers to access to justice must be removed globally, judicial cooperation improved worldwide, and rules on jurisdiction and applicable law clarified internationally. The UN Office of the High Commissioner for Human Rights has made

concrete recommendations in this regard. The EU should therefore make improving access to justice worldwide a key objective in its negotiating mandate.

In addition, the EU should work toward a UN agreement that obliges the signatory states to introduce corresponding requirements for public procurement and foreign trade promotion, to take measures to comply with the UN Convention on the Elimination of All Forms of Discrimination against Women and gender equality along value chains, and to ensure that the regulations of

the UN treaty take precedence over regulations from investment protection and trade agreements. Furthermore, the EU should work toward an effective monitoring mechanism to review the implementation of the treaty in the form of an expert committee with comprehensive competences.

Finally, the EU should be guided by a number of key guidelines and principles during the negotiations. The rights and protection of disadvantaged and vulnerable groups, including human rights and environmental defenders, should be given special consideration.

Imprint

After the EU Corporate Sustainability Due Diligence Directive is before the UN Treaty

An EU mandate for negotiations on an international agreement on business and human rights

Published by:

Global Policy Forum Europe e.V.
Königstraße 37a
53115 Bonn, Germany
europe@globalpolicy.org
www.globalpolicy.org
Contact: Jens Martens

Rosa-Luxemburg-Stiftung
Straße der Pariser Kommune 8a
10243 Berlin, Germany
info@rosalux.org
www.rosalux.de
Contact: Till Bender

Author: Karolin Seitz

Editorial assistance: Till Bender, Mike Gardner

Layout: www.kalinski.media

Berlin/Bonn, August 2023

The briefing is part of a cooperation project between the Global Policy Forum Europe and the Rosa Luxemburg Foundation, funded by the German Federal Ministry for Economic Cooperation and Development (BMZ). The positions presented here do not reflect the viewpoint of the funding agency. The author is solely responsible for the content. The publication is distributed free of charge and may not be used for election campaign purposes.