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Corporate Sustainability Due Diligence Directive Guidelines

Response to the Open Public Consultation

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Introduction

ClientEarth welcomes this opportunity to provide input on the upcoming Commission guidelines on the Corporate Sustainability Due Diligence Directive ("CSDDD" or "the Directive"). This submission aims to support the European Commission in providing practical guidance to companies, Member State authorities and other key stakeholders on how to best implement and enforce human rights and environmental due diligence obligations. It sets out factual and material analysis focusing on the environmental component of the CSDDD with a view to complementing the responses set forth in the questionnaire. To that end, we have organised our contribution in the following four sections: (1) Human rights and environmental impacts; (2) Identification of adverse impacts; (3) Prioritisation; and (4) Remediation.

More generally, the effective implementation and enforcement of the CSDDD require a consistent and uniform understanding of its due diligence requirements across the Union. The guidelines should therefore provide a comprehensive explanation of those requirements and the essential steps in compliance. However, guidelines cannot address every potential scenario where the requirements apply. The guidelines should therefore also recall that, in situations where the applicable requirements are unclear, a standard approach to interpretation based on established principles of EU jurisprudence should be followed to ensure an interpretation consistent with the CSDDD's context, purpose and objectives.

Human rights and environmental impacts

Response to Consultation Question No. 2

The approach used to define environmental impacts in Article 3(b) and Part I and II of the Annex to the CSDDD is complex and may be interpreted narrowly by companies, thereby undermining the Directive's preventive purpose and its contribution to the Union's just transition towards a sustainable future.

The Commission guidelines should therefore provide practical, sector-specific examples of adverse environmental impacts falling within the scope of the CSDDD, while making clear that those examples are illustrative and non-exhaustive.

The examples should reflect both categories of environmental impacts covered by the Directive: environmental impacts with human rights implications under Part I of the Annex and standalone environmental impacts under Part II of the Annex.

For environmental impacts with human rights implications under Point 15 of Part I of the Annex, the guidelines should include various examples illustrating the extent of environmental degradations affecting food, water, sanitation, health, safety, land, property and ecosystem services contributing to human well-being. The thematic reports of the UN Special Rapporteur on Human Rights and the Environment provide useful examples of business contributions to a wide range of environmental impacts affecting human rights.

The guidelines should clarify that environmental due diligence should not only depend on the existence of an immediate or clearly identifiable human rights impact. Many environmental harms are cumulative, diffuse and intergenerational; there may be a significant delay before impacts cause enough harm to a specific rights-holder to cause them to seek redress.

The guidelines should also expressly confirm that "harmful emissions" within the meaning of Point 15 include climate change impacts arising from anthropogenic greenhouse gas (GHG) emissions, including relevant Scope 3 emissions. This interpretation follows from the text, purpose and broader legal context of the CSDDD, and is reinforced by recent international, European and national judicial developments (see specific section below on this). The guidelines should provide examples of climate-related impacts from GHG emissions as well as interpretative guidance on climate due diligence obligations of in-scope companies, consistent with the OECD Guidelines[1] and the UN Working Group's guidance on business and human rights in the context of climate change.[2]

The guidelines should also include specific examples illustrating how impacts on ecosystem services – such as pollination, water regulation, soil fertility and carbon sequestration – may impair the natural processes on which people and communities depend for health, livelihoods, resilience and subsistence. Examples should capture impacts that may not be readily covered by Points 15(a) to 15(d), such as the loss of pollination services.

For Point 16 of Part I of the Annex, the guidelines should include examples of business practices in which the eviction or taking of land, forests, or waters, including through deforestation, and other activities affecting those areas, may generate environmental impacts that interfere with the human rights of individuals, groups or communities, in particular Indigenous People.

The tables below illustrate ways in which business activities may contribute to environmental degradation falling within Points 15 and 16. The examples are intended to indicate the types of situations that should be discussed in the guidelines.

For standalone environmental impacts under Part II of the Annex, the guidelines should also provide concrete examples to illustrate how State-facing environmental obligations listed in the Annex Part II can be translated into workable corporate due diligence expectations. The guidelines should clarify that the conventions listed in Part II of the Annex delineate areas of environmental impacts in which companies must conduct due diligence, rather than limiting corporate action to formalistic situations where a treaty rule or national law has been breached.

The examples chosen should capture as much as possible the breadth of the triple planetary crisis – climate change, biodiversity loss and pollution – which business activities may exacerbate. At a minimum, the examples should cover the non-exhaustive list of adverse environmental impacts under the OECD Guidelines,[3] i.e. climate change, biodiversity loss, air, water, and soil pollution, degradation of land, marine and freshwater ecosystems, deforestation, and harmful generation and mismanagement of hazardous substances and waste.

Impacts on climate change

As noted above, the guidelines should expressly state that "harmful emissions" within the meaning of Point 15 include climate change impacts arising from anthropogenic GHG emissions, including relevant Scope 3 emissions. The following support this conclusion:

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[1] OECD Guidelines 2023, p. 37 ; See also more specifically Responsible business conduct for climate action, OECD Business and Finance Policy Papers, No. 68, 2024

[2] UN Working Group on the issue of human rights and transnational corporations and other business enterprises, Information Note on Climate Change and Climate Change and the Guiding Principles on Business and Human Rights , June 2023

[3] OECD Guidelines

- **Textual interpretation.** Point 15 distinguishes between "air pollution" and "harmful emissions". That distinction would be meaningless if "harmful emissions" were limited to conventional air pollutants and excluded greenhouse gases – the most significant emission-related drivers of environmental harm.

- **Growing judicial and institutional recognition of climate change as a human rights harm.** Human rights courts and bodies increasingly recognise that climate change is not merely an environmental concern but a human rights harm. In *Klimaseniorinnen*, the European Court of Human Rights (ECtHR) held that anthropogenic climate change poses a serious threat to the enjoyment of rights guaranteed under the European Convention on Human Rights.[4] Similarly, the International Court of Justice (ICJ) confirmed that the obligation to prevent significant harm under customary international law extends to the climate system.[5] The Inter-American Court of Human Rights (IACtHR) found that businesses have obligations and responsibilities with respect to climate change and their impacts on human rights.[6] As such, States must require business enterprises to conduct due diligence, to take measures to reduce their emissions, and to address their contribution to climate change and to climate mitigation targets, throughout their operations.[7] The UN Special Rapporteur on human rights and climate change explicitly links harmful emissions, including GHG emissions and other forms of air pollution, to adverse human rights impacts. Taken together, these authorities provide strong guidance for interpreting "harmful emissions" in Point 15 as including GHG emissions, particularly because Point 15 must be read in line with Article 6 ICCPR[8] and Articles 11 and 12 ICESCR[9] (Point 15, last sentence), as well as with international law and general principles of Union environmental law (Recital 32 of the CSDDD). On that basis, "harmful emissions" in Point 15 cannot exclude GHG emissions that cause climate change: such emissions directly generate adverse impacts on human rights, including the human rights listed in Point 15 (a), (b), (d) and (e),[10] and therefore fall within the scope of Point 15. The Paris Judicial Court has recently formed the same view, holding that Point 15 "undeniably" includes GHG emissions in its scope.[11]

- **Purpose of the Directive.** The energy transition and the fight against climate change are central to the CSDDD, as reflected in Recitals 10, 11 and 12, which refer to the Union's climate adaptation strategy and the objective of limiting global warming to 1.5°C. Excluding climate-related emissions from Point 15 would be irreconcilable with that purpose.

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[4] European Court of Human Rights, Verein Klimaseniorinnen Schweiz and others v Switzerland, Judgment of 9 April 2024, para. 436 (Klimaseniorinnen)
[5] International Court of Justice, Advisory Opinion on the obligations of states in respect of climate change, 23 July 2025, para. 273 (ICJ Advisory Opinion)
[6] Inter-American Court of Human Rights, Advisory Opinion on the impacts of climate change on human rights, 29 May 2025, para. 346 (IACtHR Advisory Opinion)
[7] Ibid, paras. 346-347
[8] General Assembly resolution 2200A (XXI), International Covenant on Civil and Political Rights, December 1966 (ICCPR)
[9] General Assembly resolution 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, December 1966 (ICESCR)
[10] IACtHR Advisory Opinion, paras. 87 and 89-93
[11] Tribunal Judiciaire de Paris, 34ème chambre, N°RG 22/03403, Notre Affaire à Tous and others v. TotalEnergies SE, 25 June 2026, para. 144

- **Consistency with EU law and international standards.** EU instruments such as the European Climate Law, the Emissions Trading System Directive, the Industrial Emissions Directive, the Corporate Sustainability Reporting Directive, the EU Deforestation Regulation and the EU Taxonomy Regulation all treat climate change as environmental concerns of the highest importance and have the objective, operationalised in different ways, of reducing GHG emissions. Article 2(2) of the European Climate Law in particular obliges "The relevant Union institutions and the Member States [to] take the necessary measures at Union and national level, respectively, to enable the collective achievement of the climate-neutrality objective set out in paragraph 1, taking into account the importance of promoting both fairness and solidarity among Member States and cost-effectiveness in achieving this objective." Guidelines facilitating common understanding and harmonised implementation of EU legislation are a relevant type of measure for supporting an EU climate commitment-compatible application of the CSDDD. International standards such as the OECD Guidelines[12] and UN Working Group's guidance on business and human rights in the context of climate change[13] similarly expect companies to consider climate-related impacts as part of their human rights and environmental due diligence.

The consistency across recent climate jurisprudence provides a clear normative framework on the duties of the EU and Member States in mitigating climate change under international law, including through the regulation of private actors' GHG emissions. Failure to include climate due diligence requirements in the CSDDD would run counter the EU's (as well as Member States') own duty to safeguard human rights affected by climate change, risking a breach of its binding international obligations. As such, the guidelines represent a pivotal opportunity to uphold an interpretation of the Annex grounded in international law and consistent with the Directive's text and purpose, thereby enhancing legal certainty and ensuring a coherent approach across the Union. A failure to clarify in the guidelines that GHG emissions fall within the scope of due diligence requirements under the Directive may also create inconsistency with the views on corporate climate accountability that European courts are already reaching, potentially creating the perception of a diversity of climate accountability standards across EU jurisdictions instead of supporting a harmonised approach along the direction of travel established by climate jurisprudence and EU climate targets..

Examples of environmental impacts falling under Point 15 of Part I of the Annex

Examples of business practices	Environmental degradation and other impacts on natural resources	Impacts on human rights and ecosystems services

[12] OECD Guidelines 2023, p. 40, para. 77
[13] Working Group on the issue of human rights and transnational corporations and other business enterprises, Information note on climate change and the Guiding Principles on Business and Human Rights, June 2023, p. 6, para. 17

An aquaculture company operates farms in mangrove-rich areas, contributing to their degradation. Mangroves are critical marine ecosystems that provide fish habitat, protect against flooding and coastal erosion, and contribute to climate change mitigation.[14]	Climate change: emission of greenhouse gases; destruction of sinks and reservoirs of greenhouse gases Biodiversity loss: marine ecosystem degradation and habitats destruction	Regulating services: climate regulation and water purification Provisioning services: habitats of locally consumed fish Rights to food, security, clean water and life of local communities
A fish farm operates in an area of high biodiversity value. The high density of fish, together with uneaten feed and chemical use, leads to the accumulation of organic matter on the seabed, creating anaerobic conditions and eutrophication. These impacts degrade marine resources and may contaminate seafood harvested by local communities, including fish, clams, mussels, and crabs.[15]	Biodiversity loss: marine ecosystem degradation and habitat destruction; invasive alien species Pollution: use of chemicals and substances of concerns, including persistent organic pollutants; plastics and microplastics; waste and wastewater disposal.	Regulating services: carbon sequestration; water filtration and purification; sediment stabilisation; habitat provision Provisioning services: food Rights to food, health, water Right to culture
An agricultural company extracts large quantities of water from an aquifer to irrigate its crops, reducing water levels in local communities' shallow wells, and causing some to dry up.[16] *Note that the most water-intensive crops are cotton, rice, sugarcane, soya and wheat.*[17]	Biodiversity loss: extensive use of groundwater and surface water	Regulating services: water regulation Provisioning services: fresh water Right to water, food, health, property
An agricultural company uses chemical herbicides and pesticides in its operations, which leads to a decrease in pollination and, in turn, to poor quality and quantity of crops.[18]	Biodiversity loss: impact on species (decline of bee populations) Pollution of soil and water	Regulating services: pollination Provisioning services: food Right to food, water, health
An agricultural commodities trader purchases crops that have been grown on land which has recently been illegally deforested or converted.[19]	Biodiversity loss: deforestation and loss of native ecosystem Climate change: deforestation and forest degradation is the second largest source of greenhouse gas emissions globally	Regulating services: climate and water regulation Provisioning services: food, fresh water, medicine Right to water, food, health, property, clean environment
A petrochemical plant releases hazardous substances into the environment through spills, leaks and improper waste disposal,	Climate change: emission of greenhouse gases	Regulating services: water purification

[14] ClientEarth, The hidden cost of farmed shrimp from Ecuador, July 2023
[15] WWF, Farmed Salmon | Industries
[16] The New Scientist, Groundwater levels are dropping fast all over the world, January 2024; NPR, California's Farmers Are Pumping Too Much Water From Their Wells, July 2021
[17] Agremo, Water usage in agriculture, March 2022
[18] ClientEarth, Legal risks related to biodiversity loss in the seafood and agriculture sectors, September 2023, p. 14
[19] ClientEarth, Agricultural giant Cargill faces legal complaint over deforestation and human rights failings in Brazil, May 2023

contaminating drinking water, people and food sources.	Pollution of soil and water	Provisioning services: food, fresh water, Rights to food, water, health
A textiles manufacturer releases toxic chemicals into rivers and waterways during production, contaminating drinking water and agricultural land with heavy metals, chemicals, and other toxic substances. This causes health risks and crop losses.[20]	Biodiversity loss: freshwater-use change and degradation of freshwater ecosystems Pollution of water: use of chemicals and substances of concern, including persistent organic pollutants	Right to health, food, water, clean environment

Examples of environmental impacts falling under Point 16 of Part I of the Annex

Examples of business practices	Environmental impacts	Relevant human rights
An aquaculture company operates intensive fish farming in a coastal area inhabited by Indigenous communities. Its use of net pens generates significant pollution from fish waste, uneaten feed, and chemicals used to control diseases and parasites, contributing to water pollution, impacts on local fish stocks and fisheries, and habitat degradation. These impacts interfere with traditional fishing practices on which Indigenous communities depend for subsistence and cultural identity, making it more difficult to fish using customary methods and thereby affecting cultural practices, the transmission of traditional knowledge, and the connection to ancestral lands and waters.	Biodiversity loss: marine ecosystems degradation and habitats destruction Pollution: use of chemicals and substances of concerns, including persistent organic pollutants; plastics and microplastics; waste and wastewater disposal	Right to self-determination, including their right to freely dispose of their economic resources Right to culture
An industrial waste facility operates near a local farming community and burns and buries waste. Emissions containing heavy metals and other pollutants settle over homes, rice fields, vegetable gardens, and surface water, while ash and buried waste contaminate soil, drains, streams and the watershed. As a result, community members become ill, suffer respiratory, skin and other health problems; crops are contaminated, yields decline, and produce can no longer be sold due to fears of contamination. Their water supply is contaminated, and they must buy bottled water for drinking, cooking and washing. They are no longer able to use their land for farming, and many are left without a livelihood.	Pollution of air, soil and water: waste and wastewater disposal	Right to an adequate standard of living, incl. health, food, adequate housing
A multinational agribusiness company acquires vast areas of land in a rural area to establish extensive monoculture plantations for export crops such as soy, palm oil, or sugarcane, which require excessive water usage. This	Biodiversity: land-use change, soil degradation, deforestation, destruction of habitats,	Right to land and resources Right to self-determination, including the right

[20] ScienceDirect, A critical review of hazardous waste generation from textile industries and associated ecological impacts, January 2023

acquisition often involves the displacement of smallholder farmers and Indigenous communities.	depletion of water resources	not to be deprived of means of subsistence Right to culture
A large industrial fishing company engages in overfishing in the coastal waters traditionally used by small-scale fishing communities for subsistence fishing.	Biodiversity: depletion of fish stocks, destruction of marine ecosystems	Right to marine resources Right to self-determination Right to culture

Identification of adverse impacts

Response to Consultation Questions No. 4, 5, 8 and 9

The guidelines should clarify that the identification of actual and potential adverse impacts is not a box-ticking exercise, but the foundation for effective risk-based due diligence. This is the same as with any meaningful risk assessment exercise – risks cannot be avoided, minimised or mitigated if they remain unknown and invisible. Fit-for-purpose risk mapping and assessment is an essential process to safeguard the future viability of European businesses and ensuring they are prepared for a future where stakeholder expectations – including customers, clients, investors, financiers, business partners, governments and communities – and operational imperatives will continue to be shaped by the physical realities of climate change and biodiversity loss.

Companies should be expected to focus attention and resources where they are most needed: on the most severe and likely actual and potential adverse human rights and environmental impacts connected to their own operations, their subsidiaries and their chains of activities, regardless of where those impacts occur in the value chain or how many "tiers" away they are.

For environmental impacts, the guidelines should make clear that companies must identify and assess such impacts even where their implications for individual rights-holders are not immediate or obvious. As mentioned above, environmental degradation often accumulates over time until reaching a point where human rights impacts become apparent. It can affect a wide range of rights, including the right to a healthy environment. The guidelines should therefore recommend that companies look forward and consider both short-term and immediate impacts, and longer-term and cumulative impacts. They should also assess transboundary and global impacts, since environmental harms such as pollution, biodiversity loss and climate-related impacts do not stop at national borders.

The guidelines should also provide further guidance on the two-step identification exercise and the information request limitations under Article 8.

First step – the scoping exercise. The guidelines should clarify that this essentially requires companies to develop an understanding as complete as possible of their own operations and chains of activities in order to identify general areas of actual or potential adverse impacts. The guidelines should also clarify that “areas” should not be understood only geographically: they may also include particular value chain segments, production countries, procurement categories, products or services. In light of the definition of risk factors, companies should consider sector-specific, product- or service-specific and geographic-specific risks along their chain of activities, including risks associated with the country or region of a business partner.

The scoping exercise should also require companies to (a) map the geographical locations of their own activities and of relevant activities in their chains of activities, (b) identify the activities in their chain of activities undertaken at those locations and – fundamentally – the manner in which those activities are actually undertaken by their business partners, (c) identify the extent of (potential and actual) environmental and human rights impacts of the activities undertaken at those locations, and (d) identify the proximity and exposure of potentially affected rights-holders to those impacts. This should include people who depend on land, water, air, climate and biodiversity for their lives or livelihoods, and those who are entitled to lands, territories and resources, whether or not their rights are formally recognised by local governments.

The outcome of this first step should be a preliminary and comprehensive list of actual and potential adverse environmental impacts caused, contributed to or linked to the company’s activities, products or services at each point along its entire chain of activities, together with an assessment of how each environmental harm may be connected to actual or potential adverse human rights impacts.

The guidelines should clarify that the “reasonably available information” that is meant to inform the scoping exercise should be understood, consistently with OECD due diligence guidance, as including: desk-based research from public reports by UN bodies, media, civil society organisations, government agencies, trade unions, business associations and National Human Rights Institutions; information generated through industry or multi-stakeholder initiatives; stakeholder information obtained through grievance or complaints mechanisms; and relevant internal company sources.[21] For example, where there is consensus that a particular environmental impact is severe and gives rise to a reasonably foreseeable risk of interfering with human rights – either immediately or in the medium to long term, it must automatically form part of the scoping exercise.[22] Companies should assess the accuracy and credibility of the information they use by verifying and considering the robustness of the underpinning methodology and reliability of the information it produced, identifying gaps in either the potential impacts considered, stakeholders consulted, or the data collection process used to produce it, verifying and considering the credibility of its source, and by comparing information from different sources for consistency, and engaging with stakeholders to test it and corroborate it. Given that comprehensive and chain of activities-specific information will rarely, if ever, be available for companies at this stage, the guidelines should explicitly state that the absence of information must not be treated as an indication of the absence of risk. Instead, the contrary should be assumed; where activities are undertaken that *could* contribute to adverse environmental or human rights

[21] OECD Guidelines 2018, p. 63
[22] For example, the UN Special Rapporteur on Human Rights and the Environment published several thematic reports illustrating businesses’ contribution to a wide range of environmental impacts affecting human rights

impacts, operators should assume those risks exist unless and until they can be ruled out by reliable and verifiable information supported by credible evidence.

Second step – the in-depth assessment. For the in-depth assessment of identified impacts, which should enable companies to correctly prioritise where necessary and to design appropriate measures, the guidelines should clarify that companies must move beyond headquarters-based desk research and engage, where necessary, with business partners and affected stakeholders across their chain of activities to obtain accurate and reliable information on the nature and extent, causes, severity and likelihood of the identified adverse impacts.

The guidelines should clarify that the stricter conditions on information requests (requests should be targeted, informed by the results of the scoping exercise, and limited to information that is necessary for the in-depth assessment; where requests concern business partners with fewer than 5,000 employees, companies should seek information from them only when it cannot reasonably be obtained by other means) should not be understood as preventing companies from obtaining the information needed for effective due diligence. Rather, it should encourage a proportionate approach that combines targeted information requests with other methods and tools, including site visits, audits, technical monitoring, satellite and geospatial data,[23] digital traceability systems, voluntary data-sharing arrangements with key suppliers, and credible third-party information.

Meaningful **stakeholder engagement** should be identified as one of the methods with the greatest added value. Consultation with potentially affected rights-holders and other relevant stakeholders is essential to understand the perspective of those affected, capture lived experiences of rights impacts, and identify evidence that may not be visible through desk research, pre-existing third party studies, or quantitative datasets alone. In the environmental context, companies should consult stakeholders located wherever the potential or actual impacts of land degradation, water or air pollution, climate change or biodiversity loss may reach. Given the global scope of climate-related physical harms, this may include rights-holders in areas that are particularly vulnerable to climate change.

Where direct consultation with affected rights-holders is not possible, companies should consult credible and independent experts with deep experience of working with the affected groups, civil society organisations, trade unions, community-based groups, national human rights institutions, environmental human rights defenders and recognised scientific bodies or reports, including those addressing pollution, climate change and biodiversity loss.

Additionally, **data collected by public administrations** can improve companies' ability to identify, mitigate and address adverse impacts across their chains of activities. Such data can enhance the consistency and objectivity of due diligence assessments, while reducing compliance costs and avoiding duplication of efforts. At the same time, the completeness and reliability of public data may vary across jurisdictions. In some cases, users may therefore require access to underlying data and independent

[23] UNDP, Human Rights Due Diligence and the Environment: A Practical Tool for Business, 2024, pp. 31-32 set out a non-exhaustive list of spatial data layers and tools to assess the current and projected state of the environment in geographical locations of a business' own activities and activities of its value chain in connection with a business' operations, products, or services

analyses to verify findings in pre-existing data. In practice, however, obtaining such information often requires lengthy procedures and may result in partial access or refusal. Where possible, environmental data should be made available without the need for formal access requests. Especially when public data is particularly relevant for effective due diligence, the guidelines should recommend that Member States facilitate access. Particularly valuable datasets include environmental complaints and citizen reporting, environmental inspection reports, and records of administrative sanctions, fines and enforcement actions. For risks related to deforestation, biodiversity loss, land-use change, and impacts on Indigenous Peoples and local communities, land, forestry and geospatial data can be especially important.

The guidelines should also clarify the role of **prioritisation of impacts** under Article 8(3)(c). Companies may exceptionally sequence their in-depth assessments by first focusing on impacts linked to direct business partners only where the actual or potential adverse impacts identified during scoping are equally likely to occur or equally severe in several areas. The guidelines should clarify that this permission should not be read as endorsing a general tier-1 focus and that companies are still required to develop a sufficiently thorough understanding of impacts *beyond* tier-one business partners to determine whether the relevant risk areas are indeed equally likely and severe along their entire chain of activities. Prioritisation therefore concerns the sequencing of assessments, not the exclusion of severe or likely impacts further down the chain of activities. Where companies prioritise and assess tier-one business partners first, they should subsequently assess other identified severe and likely impacts. See also our response to Consultation Question No. 15 below.

Finally, the guidelines should specify the expected **frequency** of identification and assessment. Due diligence is a continuous improvement process. Companies should carry out identification and assessment when entering a new business relationship, following significant changes in business partners, production locations, products or services, and in any event at regular intervals. Established good practice suggests that this should occur at least every two years, while recognising that more frequent review may be necessary where risks are severe, fast-moving or emerging.

Prioritisation

Response to Consultation Questions No. 15 and 16

See our response above on the prioritisation of impacts, which relates to the sequencing of the *in-depth assessment* under Article 8(3)(c). This response focuses on the prioritisation of mitigation and remediation *measures* under Article 9 which relates to the sequencing of companies' *responses* in the event that all (potential and actual) adverse impacts identified cannot be addressed simultaneously, and which must be done according to their severity and likelihood.

First, the guidelines should reiterate that, as noted in Recital 44 of the CSDDD, the involvement, influence or proximity of the company should not factor into the prioritisation of impacts per se. Prioritisation under the CSDDD is exclusively based on severity and likelihood.

Second, the guidance should clarify that although severity and likelihood sit on equal footing under the CSDDD, severity (scale, scope or irremediable character) might be given a particular weight when prioritising human rights and environmental impacts. In particular, the guidelines should clarify that low likelihood should not by itself justify setting aside, or deprioritising, a severe potential human right or environmental impact. This approach reflects the UNGPs.[24] Major disasters such as oil spills show the danger of considering a situation too unlikely despite its catastrophic consequences for people and the environment, and failing to put in place the necessary and adequate prevention and remediation measures. This does not mean that the severity should always take precedence. Likelihood remains relevant, especially when distinguishing between impacts of equivalent severity. But low likelihood alone is not sufficient to set aside a severe potential impact.

Third, the guidelines should address the situation where the prioritisation exercise might be particularly difficult, particularly where impacts arise across different areas of environmental and human rights policy or regulation and affect different protected interests. For example, a company may have to decide whether to prioritise a serious risk of adverse health impacts on workers arising from chemical exposure or a risk of significant biodiversity loss associated with the degradation of a critical ecosystem. In such cases, the significance of adverse impacts might be hard to compare. First, the guidelines should clarify that in some instances, there may not be a need to prioritise in the first place, because these impacts may not compete for the same resources. Second, the guidelines could support companies by establishing a list of elements companies could legitimately consider when planning and organising their action (for e.g., where does leverage and level of involvement may justify quicker response, etc). The guidelines should also reiterate and make clear that ultimately companies are expected to correctly address all the adverse impacts they have identified and will be found liable if they exclude or conceal impacts solely because they are not immediately able to address them. Companies should thus clearly communicate how they are sequencing their actions, in particular where impacts are of equivalent severity and likelihood.

Finally, the guidelines should set out **additional elements to support the prioritisation exercise** under the CSDDD, including:

- **Reliance on best available evidence**. The guidelines should recommend that companies prioritise adverse impacts on the basis of credible, independent and robust scientific evidence. In line with the OECD guidelines,[25] companies should rely on the best available science, as well as prioritise data and assessments from internationally recognised scientific sources, when evaluating the severity and likelihood of adverse environmental impacts.
- **Stakeholder engagement requirements during prioritisation.** The guidelines should specify how companies should focus their stakeholder engagement on the specific prioritisation decisions being considered before the decision is taken. Engagement with affected stakeholders, their legitimate representatives, trade unions, civil society organisations, human rights defenders and independent experts can provide information on the actual scale, scope and remediability of an

[24] UN Guiding Principles on Business and Human Rights, Commentary to Principle 24 and Interpretative Guide, p 83

[25] OECD Guidelines, 2023, para. 68, p. 35

impact, the situation of vulnerable or marginalised groups, and whether risks are increasing in practice. Similarly, complaints and grievance mechanisms should be treated as important risk signals for prioritisation. A credible complaint, repeated grievances, or concerns raised by affected stakeholders or their representatives should elevate the priority of the relevant impact, even where the company considers severity or likelihood difficult to assess. Such information should trigger closer investigation, reassessment of the impact, and, where appropriate, urgent preventive or mitigating measures.

- **Guidance on documentation requirements for companies.** Companies should document the criteria they applied in their prioritisation assessment, the data relied upon, the reasons justifying the order in which they address their impacts, as well as the stakeholders consulted under Article 13(3)(a).
- **Non-exhaustive list of instances of incorrect prioritisation leading to sanctions.** Article 9(4) CSDDD, as introduced by the Omnibus directive, prevents supervisory authorities from penalising companies that have correctly prioritised adverse impacts and sequenced their actions in accordance with Article 9, even where this results in less severe impacts not being addressed at an initial stage. Conversely, companies may be subject to sanctions for incorrect prioritisation. The guidelines should therefore offer examples of these instances to help companies identify behaviours corresponding to non-compliance. Examples include instances where companies address less severe impacts at the level of tier-1 business partners despite risks of more significant impacts or actual impacts further in their value chain, or when assessments are based on the company's own leverage rather than on the likelihood and severity of the adverse impacts. Liability may also arise where such incorrect prioritisation leads to harm or when companies exclude or conceal adverse impacts because they are not immediately able to address them.
- **Recommended frequency for the reassessment of priorities.** Due diligence is a dynamic process. It should respond to changes in the nature, quantity and significance of risks present in company's chain of activities. Prioritisation, to be effective, should be able to account for frequently varying risk factors and should be reviewed every year.

Remediation

Response to Consultation Questions No. 23 and 24

This response focuses on remediation in the context of environmental impacts, which is defined by the CSDDD as the process of restoring the environment to the situation it would be in had the adverse impact not occurred (Article 3(1)(t)). As such, remediation practices should ***not*** be evaluated in terms of their cost-effectiveness, but rather exclusively on their ability to fully restore and/or regenerate the environment. Importantly, the guidelines should insist on the need for companies to engage with relevant stakeholders, in particular affected individuals and communities, when making decisions on remedial measures for the purpose of tailoring remediation measures to address power imbalances between businesses and rightsholders and ensure that remedial measures are appropriate to the context and type of harm.

Fundamentally, the guidelines should explicitly encourage companies, *before* deciding remediation measures, to seek advice from relevant experts on the potential that their proposed remediation measures could unintentionally exacerbate the harm, cause additional harm or worsen the situation for affected rights holders.

Potential impacts are to be addressed through prevention or mitigation, while actual impacts are to be addressed through remediation. The guidelines should make clear that prevention takes precedence over remediation, which becomes necessary only where adverse impacts could not be avoided. Under Article 12, in-scope companies are expected to remediate impacts that they have caused or contributed to, or where impacts are linked to business relationships, they must seek to ensure that remediation by business partners is effective. In case of non-compliance with their CSDDD obligations, supervisory authorities are empowered to order remedial actions.

The means of remedying environmental harm can take different forms and can influence the effectiveness of the outcome. In line with the principles of the mitigation hierarchy,[26] a widely used approach used for biodiversity impact assessment of economic development activities, also applied by the OECD,[27] the guidelines should explicitly recognise the following hierarchy of measures:

- **Preventive remedy.** Measures designed to prevent environmental harms from happening (and happening again) and, where prevention is not possible, to minimise or reduce their likelihood.
- **Restoration and/or rehabilitation practices (primary remediation).** Practices aimed at recovering and re-establishing damaged environmental resources and ecosystem structures and functions to their baseline conditions, or, where this is not technically feasible, to a stakeholder-agreed equivalent ecological condition.
- **Compensation of affected stakeholders (compensatory remediation) or offsetting of environmental impacts (complementary remediation).** Measures taken when primary remediation cannot fully restore the damaged environment. Complementary remediation aims to provide equivalent environmental resources or ecosystem services. Compensation can be used to provide a remedy to victims of human rights violations through environmental damage.

The guidelines should expressly clarify that preventive measures and primary remediation should be prioritised over offsetting, compensation or neutralisation measures. Ecological restoration is the process

[26] The mitigation hierarchy is a framework that establishes a sequential approach to managing impacts on biodiversity and ecosystem services. It prioritises the avoidance of adverse impacts, followed, where avoidance is not possible, by measures to minimise those impacts. Where impacts nevertheless occur, efforts should be made to rehabilitate or restore affected ecosystems. As a measure of last resort, biodiversity offsets may be considered where significant residual impacts remain. Within the EU legal framework, the mitigation hierarchy is reflected in both the Environmental Impact Assessment (EIA) Directive and the Strategic Environmental Assessment (SEA) Directive. Its proper application is intended to support the European Commission's No Net Loss (NNL) objective, which was established under Target 2 of the EU Biodiversity Strategy to 2020, namely to maintain and restore ecosystems and their services through measures including the integration of green infrastructure into spatial planning and the restoration of at least 15% of degraded ecosystems by 2020

[27] OECD, Handbook on Environmental Due Diligence in Mineral Supply Chains (2023), pp. 51-52

of assisting the recovery of an ecosystem that has been degraded, damaged or destroyed,[28] and should be the default remedy when actual environmental damage has occurred. Compensation should therefore not be regarded as an adequate substitute in such cases.

Primary remediation typically begins with a comprehensive assessment of the nature, extent, causes and extent of the damage, often involving independent experts and affected stakeholders. This assessment should inform the development of a remediation plan, outlining specific actions, timelines, and resource allocation. Implementation of these measures typically involves technical solutions for environmental restoration, such as soil decontamination or habitat reconstruction, alongside social programs for community support and compensation. Regular monitoring and reporting on progress, with transparent communication to stakeholders, are vital for demonstrating accountability. The process often culminates in independent verification of the remediation's effectiveness.

The guidelines should also provide illustrative, sector-specific examples of common remediation measures associated with common environmental impacts.

In the context of global value chains, environmental impacts may be widespread, transboundary, cumulative and result from multiple actors, making it difficult to attribute to a single company. The cost of effective remediation, which is also often urgent and technically complex, may exceed the financial capacity of individual operators, creating a significant risk that environmental damage remains only partially remediated, or not remediated at all.

To address these issues, the guidelines should recommend companies to first focus on ensuring that harm is prevented, mitigated, and remediated, while **questions of final cost allocation can be addressed separately** and, where necessary, at a later stage. The German Federal Soil Protection Act[29] provides a useful example in this regard. Rather than requiring authorities to conclusively establish liability before remediation can occur, the Act empowers authorities to impose remediation on different categories of responsible persons connected to a contaminated site, including those who did not cause the original contamination. The primary objective is to prevent environmental risks and restore environmental functions. Questions regarding the equitable allocation of remediation costs are resolved in a second instance through compensation claims among responsible parties, which will generally depend on their proportion of causation. This model rests on an important principle: environmental restoration should proceed first, liability allocation should follow thereafter. A similar approach could strengthen the effectiveness of environmental remediation under the CSDDD. When companies have contributed to adverse environmental impacts, they should cooperate in financing and implementing remediation measures while retaining compensation rights against one another. Remediation costs should then be allocated proportionately to each company's share in the responsibility for the adverse impact.

The guidelines should also provide companies with **practical guidance on how to respond to situations involving multiple contributors to environmental harm**, based on the involvement framework. Different types of involvement in adverse human rights and environmental impacts lead to different levels of

[28] GD Gann et al, International Principles and Standards for the Practice of Ecological Restoration, Section 5, Glossary of Terms
[29] German Federal Soil Protection Act

responsibility and require different responses – depending whether the company caused, jointly caused ("contributed" in OECD and UNGPs language) or is linked to the impact. Companies should understand their role and determine an appropriate response, notably by mapping the chain of causation and contribution and sequencing events, assessing and quantifying the degree of harm, evaluating their responsibility proportionally to their level of involvement, and cooperating with other actors involved through coordinated prevention and restoration plans, multi-stakeholder grievance mechanisms or joint funding arrangements for remedy such as pooled remediation funds.

With regard to the establishment of corporate remediation funds, the guidelines could draw on the examples of the International Oil Pollution Compensation Funds[30] (IOPC Funds) and the compensation regime under the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea[31] (HNS Fund). These mechanisms demonstrate that industry-funded remediation schemes can provide an effective implementation of the polluter pays principle, particularly where reliance on individual liability alone may leave environmental damage inadequately remedied.

The same logic applies to environmental harms occurring within global value chains. Where companies collectively derive benefit from value chains that create risks of or cause environmental degradation, they should contribute to ensuring the availability of adequate restoration funding. Such funds should complement individual responsibility and could support not only the remediation of actual harm, but also preventive actions. The guidelines should therefore recommend Member States and stakeholders to establish environmental remediation funds in advance and financed through mandatory contributions from value chain participants, especially when operating in high-risk sectors. Contributions should be calibrated according to objective criteria such as turnover, environmental footprint or market share.

In addition, the guidelines should provide companies with further guidance on how to use and increase their leverage to prevent and mitigate any remaining adverse impact to the greatest extent possible. Such leverage could take various forms, such as commercial leverage, through for instance contract negotiation or renewal, or leverage together with business partners or other stakeholders, such as governments, international organisations, civil society organisations, trade unions, community-based groups, national human rights institutions, and environmental human rights defenders.[32] When leverage cannot be utilised, contributing companies should consider ending the business relationship.

About ClientEarth

ClientEarth is a non-profit organisation that uses the law to create systemic change that protects the Earth for – and with – its inhabitants. We are tackling climate change, protecting nature and stopping pollution, with partners and citizens around the globe. We hold industry and governments to account, and defend

[30] The International Oil Pollution Compensation Funds
[31] The HNS Fund
[32] UNDP, Human Rights Due Diligence and the Environment: A Practical Tool for Business, p. 81

everyone's right to a healthy world. From our offices in Europe, Asia and the USA we shape, implement and enforce the law, to build a future for our planet in which people and nature can thrive together.

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