SUSTAINABLE FINANCE, PRIVATE SECTOR AND JUST TRANSITION

Brief

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The EU is the principal destination of African Exports (surpassing even the intraregional African trade), with the added bonus that Europe's imports are more diverse than those of the USA and China. European investment in Africa is also extremely important for the continent. British, French, Dutch and Italian companies are the most important European investors in the African continent.

The EU wants to be a global leader in the promotion of economically, environmentally and socially sustainable development. The European Green Deal is Europe's structural response and new growth strategy. It sets out ambitious targets to transform the EU into a modern, resource-efficient and competitive economy.

The focal point of the global green transition that Europe intends to lead is the fight against climate change. Signed in 2015, the Paris Agreement is an international milestone agreement that was approved by nearly all nations. This agreement intends to significantly reduce global greenhouse gas emissions in an effort to limit the global temperature increase in this century to 2 degrees Celsius. The Paris Agreement is anchored on individual Nationally Determined Contributions (NDC), NDCs that include climate related targets for greenhouse gas emission reductions. NDCs were the key to securing the adoption of the Paris Agreement in 2015 and are instrumental to implementing it over the next decades. NDCs are universal: virtually every country that is a party to the United Nations Framework Convention on Climate Change (UNFCCC) has submitted an NDC. Within the NDCs, there are two types of targets: unconditional and conditional. The first type are the ones the country proposes to achieve regardless of external support. The second type usually includes the more ambitious goals and is dependent on access to international financial support and technology transfer.

Financing the transition and African Countries' debt

In 2009, wealthy countries agreed to channel $100 billion a year to countries in the Global South to help them deal with climate change. The pledge, usually described as developed nations mobilizing finance for developing ones, aimed to reach this target by 2020. A decade after Copenhagen, arguments still raged over whether the $100 billion goal was close to being met.

Renewable-energy systems and sustainable transport receive the biggest share of climate financing. According to the CPI adaptation activities receive just $22 billion a year, compared with $436 billion for mitigation

1 This brief summarises the study with the same title published in July 2021. Both were drawn up by João José Fernandes and José Luís Monteiro for the Portuguese NGDO Platform as part of the Presidency Project - 'Towards an Open, Fair and Sustainable Europe in the World'.

activities. Another problem with the current climate finance initiatives is that the flow of money is clearly governed by traditional "for profit" priorities. According to Oxfam, 80% of the approved volume of projects is financed by loans.

The number of critically indebted countries in the Global South has significantly risen again, to 132 out of 148 countries in 2020. Twenty-one countries are in partial default, while others are on the verge of defaulting. The pandemic has had a particularly negative impact on developing countries and emerging economies. Constituting one of the most severe results of the lockdowns and other restrictions imposed on public life, the economy of the Global South has suffered a dramatic decline.

The number of countries whose debt indicators have significantly deteriorated since 2016 exceeds by far the combined total of those countries with indicators that have remained the same or even improved. This is true for all regions of the world, but it is especially critical for Africa and Latin America. The share of government revenues that goes into paying foreign debts nearly tripled between 2011 and 2020, reaching a staggering 17.4 per cent.

Future loss and damage for developing countries is estimated at 428 billion USD annually in 2030, and at USD 1.67 trillion in 2050, if global temperatures rise by 3°C. Extreme action must be taken if Europe wants to assist developing countries escape this vicious cycle that intertwines debt, lack of resilience and climate damage.

Mozambique is an example of this intersection between debt and climate change. One of the poorest countries in the world, and already sinking under huge debts, including secret loans that the government had not disclosed, was devastated by two cyclones in 2019 (Idai and Kenneth) — the damage amounted to around half the country's national budget. The UN humanitarian appeal totaled $620m (less than half of it had been funded in 2020). As a result, Mozambique was forced to take on an IMF loan of 118 million USD to begin rebuilding (all this before Covid 19). After disasters, countries often have to finance rebuilding and recovery through loans, increasing their debt burden and squeezing public services. It is the poorest people who are hardest hit — especially women, who as primary caregivers tend to fill the gaps in public services.

To face the burden of poverty, indebtedness, climate change emergencies and the impact of the Covid 19 pandemic, the study concludes that most measures conceived for a pre pandemic scenario are either inapplicable in today's world or would fall incredibly short of what developing countries in Africa and in the rest of the world need. With the current situation, it is clear that most African countries will not be able to implement the Nationally Determined Contributions that they proposed within the Paris Agreement.

In order to counterbalance this complex and interconnected crisis, the study recommends several actions:

- The **EU countries must comply** with their committed **funding level in climate finance agreements.** It is also indispensable that funds and assistance are channeled in the form of **grants and not loans that will further lock developing nations in a cycle of debt related** poverty.
- The **EU countries need to remember** and remind other developed nations **that the commitment in the Paris Agreement was for additional funding, not for the rebranding of traditional ODA.**
- **Multilateral and bilateral funding for developing countries must focus increasingly on adaptation instead of mitigation**, which is more easily financed with market instruments.
- There is a need for **far greater transparency** of climate finance at a global level, and the **EU should champion** this in all international forums. Therefore, at the next COP, the EU should start by, pushing parties to agree on a **fixed set of rules and accounting standards under the UN Framework Convention on Climate Change** (UNFCCC). These rules should reflect the real value to the developing nations of the funds provided (grants cannot be counted in the same way as loans).
- The **European Union should champion for a global debt workout mechanism under the auspices of the United Nations,** in order to overcome the persisting weaknesses of the current disorderly, opaque, and inequitable way in which sovereign debt crises are resolved.

Sustainable Finance in Africa -The Case for Green Bonds

Significant financial resources are required to adapt to climate change risks and to develop a sustainable and inclusive development path. The low level of available public finance, even when we consider international aid (ODA and environmental aid) transfers, conditioned by a looming external debt crisis, does not allow making an adequate investment effort to face the urgent needs.

An ambitious contribution from private sector finance is commonly considered imperative if significant progress is to be made. At same time, the infrastructure gaps that need to be closed present an opportunity for governments and private sector actors to integrate sustainability into the design and execution of development projects. There is a considerable number of projects and industries in need of green financing. According to the best estimates available, at least 600 million people in Africa do not have access to electricity, and the continent lags behind the other continents in the efforts towards the renewable energy path. There are also huge infrastructure deficits in transport, the provision of clean water and sanitation, flood protection, irrigation, and roads.

In order to contribute to fulfilling the financing gap, green finance markets are being engaged in the international efforts to fund climate transition and sustainable development. The green finance market has reached its most substantial milestone yet, with 1.002 trillion USD in cumulative issuance since market inception in 2007. The trillion milestone was passed in early December 2020. Green instruments have originated from a record sixty-seven nations and multiple supranational institutions. Investment in the Energy Sector comprises the largest component of the trillion. Financial Corporates are the largest source of issuance at 205.6 billion USD. Green loans account for a further 28.9 billion USD of the market.

One of the main instruments in green financial markets are the green bonds. In Africa, as of October 2019, green bonds in excess of 2 billion USD had been issued. Of the 17 green bond issues, approximately 35% by value (422 million USD) was climate certified. South Africa leads the way with a cumulative US$ 1.56 billion in green bonds issued since 2012. Energy-related projects have so far accounted for the largest share of the cumulative amount invested. The outlook for the green bond market in Africa is promising. It is likely that many more states will consider or are already considering issuing green bonds to fund climate-related initiatives.

The African Development Bank has also played an active role in mobilizing capital to support sustainable and inclusive green growth in Africa. Funds totalling about 12 billion USD were mobilized between 2011 and 2015 to support climate-friendly projects.

These recent trends show that green bonds are commonly considered a useful tool for mobilizing additional capital to finance sustainability challenges in Africa. It is both promising and encouraging that various existing frameworks have made it possible for some African states to issue green bonds in recent years. Nevertheless, important barriers to further developing the green bond market in Africa still persist:

- **Absence of clear and common frameworks.** First, there is a general lack of clear frameworks for achieving a general consensus on what "green" constitutes. Processes and criteria for issuing green bonds are not uniform across Africa. South Africa is the only African state with a sustainable finance taxonomy in development. The lack of clear guidelines on the developing African green bond market is likely to deter many potential investors and issuers from entering the market.

- **Lack of Capacity.** The dynamics of developing a green bond market are complex and require sound technical expertise. There is a general lack of capacity in Africa, especially within the regulatory agencies and stock exchanges.

- **Supporting regulation.** The supporting regulation to enable the market to take off at a reasonable pace is lacking or insufficient. A resilient and robust economy and financial sector performance supported by robust regulatory policies are necessary conditions for absorbing shocks and mitigating risks.

- **Lack of African verifiers.** An independent second opinion assessment is often required to verify that asset identification and selection meet eligibility criteria. This external service does not come cheap as Second Party Opinion and external reviewers are accredited private sector consultants. There are no known qualified verifiers in Africa capable of offering such services.

- **Lack of Incentive Structure.** There is a shortage of fiscal incentives attached to green bonds in Africa. Currently, only Kenya provides fiscal incentives for issuing infrastructure bonds.

Green Bond shortcomings in transparency and risk of greenwashing

The recent growth of green bonds is driven by the polycentric architecture of the Paris Agreement. In this polycentric approach to climate governance, non-state actors, such as corporations, complement the legal and policy frameworks set by the UNFCCC. There is evidence suggesting that, among other innovative financial instruments, green bonds can make a considerable contribution to achieving the Paris Agreement and the Sustainable Development Goals. Nevertheless, there remain obvious shortcomings in transparency, reporting by issuers and benefits to companies. Therefore, the risk of greenwashing is very high and can jeopardize the social and environmental utility of green bonds. Two shortcomings are particularly relevant:

Missing climate targets:

- Only a few companies restate climate targets in their green bond reporting.

- Frequently the climate targets reported are not based on science.

Shortcomings in reporting practices

- Few companies disclose whether proceeds have been used to refinance already existing projects with previously reported emission reductions.

- There is a lack of information about the share of green bond financing at the project level.

- There is mismatching information about the ‘use of proceeds’ and impact.

- The lack of reporting of project or portfolio co-ownership can be another issue in attributing emission reduction to green bond financing.

- There is a variation in the methodologies that companies use to measure greenhouse gas emissions eliminated. Only a minority of issuers mention that they use the Greenhouse Gas (GHG) Protocol

and the UNFCCC's methodology for measuring emission reduction from investments in renewable energy or energy efficiency.

- Related to the issue of lack of harmonized methodology to measure the impact of green bond financing is the absence of third-party verification of allocation and the lack of impact reporting by half of all issuers.

Recommendations to foster the transparency and the additionality of green bonds

In order to foster transparency and the additionality of green bonds, we call on the EU, international organisations, country and market regulators to build their actions from these recommendations:

- Future political action on green bonds should force issuers to be explicit about how they want to use green bonds in their transition towards carbon neutrality. The proposed EU GBS is an important step in that direction, but it needs implementation. According to the proposal, issuers must report on the environmental impacts using metrics and thresholds that are developed in the EU Taxonomy of sustainable economic activities.
- Harmonized impact methodologies are key in ensuring that post-issuance reports of green bonds become more credible and comparable. In this sense, we advise the EU to make extra efforts in the harmonization with other international initiatives, setting common minimum agreed and comparable frameworks, metrics and methodologies.
- A common set of impacts, together with third-party verification of impact reporting is also a basic requirement to build trust in the market and reduce the risk of greenwashing.
- A policy framework for the accurate measurement and reporting of GHGs, to clearly signal to the private sector a stringent mandatory GHG emission control and global market-based instrument, must be enforced. The EU should lead the definition and adoption of such a framework.
- Public policy should compel issuers of green bonds to set science-based emission reduction targets, clearly define how green bonds will help them in achieving these targets and report on progress by using transparent and harmonized impact methodologies and metrics. Setting a benchmark for impact reporting to help align the green bond market with the Paris Agreement would build trust and reduce the risk of greenwashing.
- Raising the bar and scientific demands for impact reporting and external verification will inevitably increase the costs of issuing green bonds. One way to address such incremental costs would be

to simplify the requirements for smaller companies, in a way similar to the current practice with environmental system certifications.

The "Just Transition" for Earth and Humanity Resilience

The transition to a zero-carbon world has the potential to bring immense benefits; Actually, there is no reason to think that a zero-carbon economy would be any less prosperous in the long run than a high-carbon one. However, it would also cause profound disruption, dislocation, and loss to many, at least in the short term. Because of new climate related government policies, new technologies, and associated economic changes, a variety of groups will experience numerous kinds of losses.

Due to the normative and political issues raised by the prospect of potential losers from the low-carbon transition, civil society groups—from the international labour union movement and major multinational environmental NGOs to ad hoc local groups—are increasingly mobilizing to provide policy advice and on the ground assistance for the purpose of transition. Much of this activity is being organized around the theme of a Just Transition.

The Just Transition is not required under the climate change and low carbon transition only. There are, at least, two other major economic transformations underway: circular economy and digitalization of the economy. These rapid transformations will create winners and losers, demanding difficult trade-offs and requiring an ethical approach to compensate the losers and positively discriminate in favour of the poor people, communities and countries.

At the international level, the structural transition to a circular economy will influence and reshape trade relations, value chains and flows of primary raw materials between countries. Most importantly, import and export demand for primary materials, secondary materials and waste may decrease in certain economies. Low- and middle-income countries that are heavily dependent on extractive industries stand to lose out in the medium to long term. At the subnational level, in regions relying on extractive industries, the risk of lost jobs will also demand social welfare policies, retraining and new job creation.

Economic digitalization and the disruptive new technologies offer the prospect of improving productivity and the quality of work. For example, blockchain technology is being used to ensure traceability, transparency and ethical global supply chains through data monitoring. If combined with good management practices, digital tools have the potential to enhance the quality of life of workers in all sectors. However, there is also increasing evidence that some innovative and disruptive business models are assigning little priority to workers' rights or social protections. **Policymakers and all stakeholders need to ensure that digitalization**

leads to overall better living conditions and more equality in societies. An inclusive technological diffusion is required for a just transition.

Just Transition and Pro Poor Approach to Planetary Stewardship

Despite the concrete global appeals to promote Sustainable Development Goals and implement a just transition to a net zero carbon emissions economy, we do not believe that the current volunteer approaches are sufficient to successfully manage all trade-offs between environment, social welfare and economy. On the contrary, following the best scientific evidence, **we recommend the establishment of a powerful state and non-state actor's governance, across all scales of governance, abiding by a principled and oriented pro-poor planetary justice transition** and the following three tenets:

- **I.** That the poor and marginalized majority shall not be made worse off;
- **II.** That the lot of the poor must improve;
- **III.** That the poor be recognized as legitimate participants (whether directly or via representation) in decisions on planetary stewardship.

These three tenets have both a distributive/substantive and a representational/procedural component and are an extra layer of legitimacy to pursue local and global planetary stewardship efforts. **Five concrete and convergent steps must be taken to fulfil such a pro-poor transition agenda:**

- **First,** promote robust international institutional frameworks that explicitly focus on supporting the interests of the poor in the design and implementation of climate mitigation strategies and plans.
- **Second,** pro-poor policies are also crucial for ensuring the integrity of local socio-ecological systems.
- **Third,** promote broad social coalitions, including the middle classes in order to change the overconsumption basis of the economic systems and promote pro-poor planetary justice.
- **Fourth,** invest in key sectors that are central to securing the basic dignities for the world's poor and marginalized majorities.
- **Fifth,** ensure, by legal and institutional means, that international support is not funnelled into serving the interests of global corporations or the political and economic elites in the Global South.

In order to implement this pro-poor approach to just transition, one of the remaining major challenges is the participation and voice of the poor in the democratic processes of deliberation and decision-making. A special recommendation to the UN and International Organizations, the European Union, national governments, private sector actors and civil society organisations is the need to truly reform the representativeness

of the poor in deliberative and decision-making processes across the international, regional, national and local scales. In order to do so, we must promote a more inclusive democratic behaviour in the **procedural, distributional and discursive representation.**

Recommendations and Guidance for policymakers in a principled just transition

Policymaking is a process that requires a procedural interactivity with a diverse range of stakeholders, particularly the poorest and most affected by climate change, digitalization and circular economy policies. Therefore, instead of identifying the "first-best" ideal solutions a priori, the procedural representativeness and inclusive decision-making approach highlights the negotiated "second or third-best" options that stakeholders can agree on, in order to guarantee a broad alliance for the transition path. In order to navigate this participatory and inclusive decision-making process, **three selection criteria are well placed as guidance for policymakers, in a principled just transition:** I) "fairness", II) "transformative political potential", and III) "expected effectiveness".

Environmental, Social and Corporate Governance and Human Rights Due Diligence

The Policy Context for an EU Sustainability Corporate Governance (EU SCG)

The political guidelines of the EU Commission foresee a strong focus for the EU to deliver on the UN Sustainable Development Goals, and the EU submitted its strategy for climate neutrality by 2050 to the United Nations Framework Convention on Climate Change in March 2020. On April 21st, 2021, the Council's and the European Parliament's negotiators reached a provisional political agreement setting into law the objective of a climate-neutral EU by 2050, and a collective, net greenhouse gas emissions reduction target (emissions after deduction of removals) of at least 55% by 2030 compared to 1990. The Communication on the European Green Deal sets out that "sustainability should be further embedded into the corporate governance framework, as many companies still focus too much on short-term financial performance compared to their long-term development and sustainability aspects." Sustainability encompasses encouraging businesses to frame decisions in terms of environmental (including climate, biodiversity), social, and human impact for the long-term, rather than on short-term gains. The sustainable corporate governance initiative was listed among the deliverables announced in the Action Plan on a Circular Economy, the

Biodiversity and Farm to Fork strategies and would be part of the renewed Strategy on Financing Sustainable Growth. The Communication “Europe's moment: Repair and Prepare for the Next Generation” also announces this initiative with the objective of “[ensuring] environmental and social interests are fully embedded into business strategies”, in the context of competitive sustainability contributing to the Covid-19 recovery and to the long-term development of companies. The initiative is complementary to the review of the Non-Financial Reporting Directive, which requires certain large public--interest companies to disclose sustainability-related matters.

Until now, the preferred approach to encouraging multinational companies to assume a key role in ESG Governance and Human Rights Due Diligence has been based on voluntary action. It was expected that multinational companies would voluntarily carry out due diligence in order to avoid reputational damage and improve their standing with workers and customers. Several international frameworks have been established as guidance, to encourage multinational companies to prevent negative human rights impacts, and when they occur, to mitigate and remedy them. In 2011, the United Nations Human Rights Council unanimously endorsed the Guiding Principles on Business and Human Rights (UNGPs) establishing the first global framework outlining the duties and responsibilities of governments and business enterprises, to prevent, address and remedy the impacts of globalised business activity on human rights. The UNGPs are based on three pillars that outline how states and businesses should implement them:

- **Pillar I:** The state duty to protect human rights
- **Pillar II:** The corporate responsibility to respect human rights
- **Pillar III:** Access to remedy for victims of business-related abuses.

Of the 31 guiding principles outlined, principles 17 to 21 refer to the human rights due diligence to be carried out by companies. **Academics and civil society organisations have criticised the UNGPs on account of their voluntary nature, showing that most companies do not voluntarily undertake human rights due diligence.** Recognising the fact that the voluntary approach promoted by the UNGPs is insufficient, international negotiations in the UN framework on the drafting of an international binding treaty on business and human rights have started. In the current stage of negotiations, the draft treaty puts mandatory due diligence at the heart of its approach. It requires 'State Parties [to] adopt measures necessary to ensure that all persons conducting business activities, including those of transnational character, to undertake human rights due diligence'.

The OECD Guidelines for Multinational Enterprises (2011 update) and the International Labour Office's ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (2017 update) also set voluntary standards for companies regarding due diligence. The OECD Guidelines, which are backed by 44 governments, mainly from developed countries, is the only instrument to outline business responsibility for all relevant thematic areas, including human rights and labour rights, as well

as information disclosure, the environment, bribery, consumer interests, science and technology, competition, and taxation. They were initially drafted in 1976 and have been revised several times. The last update introduced a new human rights chapter in line with the UN Guiding Principles on Business and Human Rights and a new approach to due diligence and responsible supply chain management.

In a resolution of 17 April 2020 on EU coordinated action to combat the Covid-19 pandemic and its consequences, the European Parliament expressed its conviction 'that corporate human rights and environmental due diligence are necessary conditions in order to prevent and mitigate future crises and ensure sustainable value chains'.

Existing EU legislation and other initiatives: The need for a Binding Approach

The EU has adopted binding legislation and voluntary initiatives to address human rights and environmental violations in the sectors traditionally worst affected, such as the extractive industries, timber, garment and leather industries. The EU has also been actively involved in international initiatives, such as the Kimberley process, to stop the trade in 'blood diamonds' (diamonds extracted by armed groups and traded to finance deadly conflicts), as well as in OECD efforts to design guidance for various sectors (European Parliamentary, Research Service, 2021).

There are several examples of mandatory due diligence legislation in EU and non-EU countries, but they focus on specific sectors (extractive industries —– US 2010 Dodd-Frank Act Section 1502) or on particular human rights violations, such as child labour (Dutch law) or forced labour (United Kingdom 2015 modern slavery law). The only national legislation to adopt a cross-sectoral approach is the French 2017 law on the duty of vigilance, which requires all large French companies (with over 5 000 employees in France and over 10 000 in the world) to undertake due diligence with regard to the companies they control, and all their contractors and suppliers. The French law requires companies to develop a vigilance plan in consultation with trade unions. Companies that do not fulfil their due diligence obligations are liable to sanctions and payment of damages. The plans should contain a mapping of risks, regular risk assessment procedures, mitigation and prevention actions, an alert mechanism and a monitoring mechanism. A February 2020 assessment of the application of the law made by the French government found that whereas some companies have made real progress, others do not yet apply the law effectively. Companies can be held civilly liable if they do not comply with the law, but the fines initially provided for in the draft law have been invalidated for reasons of unconstitutionality. In numerous other EU Member States, there are various civil society initiatives as well as legislative proposals calling for mandatory due diligence.

While the EU enforces strict due diligence obligations for minerals and timber at a cross-sectoral level, alongside the obligations of disclosure

provided for in the NFRD, the EU has until now followed the voluntary approach proposed by the international frameworks, mainly the UNGPs, with respect to human rights due diligence. This approach is considered largely insufficient.

Academic research demonstrates that commonly used due diligence tools are not very effective at improving the respect for rights. Civil society organisations have presented similar findings. In December 2019, over 100 NGOs demanded human rights and environmental due diligence legislation. These organisations and networks from all over Europe and other regions stressed their demands for binding rules on corporate respect for human rights and the environment on the occasion of the Finnish Presidency "Conference on Business and Human Rights: towards a common agenda for action". Representatives of the EU institutions, Member States, civil society and companies discussed how the European Union can effectively implement business respect for human rights.

The civil society statement makes it clear that current EU policy and legislation fails to adequately address the pressing challenges linked to human rights and environmental impacts of corporate global operations. The absence of cross-sectoral rules in the EU requiring companies to identify and address those impacts prevents companies from being held legally accountable when they neglect their responsibilities. Moreover, it makes it impossible for victims of corporate malpractice to seek remedy in courts.

The reliance on a voluntary approach to promote business respect for human rights and the environment has proven insufficient and does not prevent violations of human rights and environmental damages.

The new European Commission should thus take swift action and present a legislative proposal that establishes a mandatory human rights and environmental due diligence framework for business and that provides access to remedy for victims of corporate abuse.

Taking into account the multiple findings described above, and the fragmentation of international guidance that the EU follows, it is expected that the EU cross-sectoral legislation on mandatory due diligence should establish a single standard of care even if allowing for a sector-sensitive approach. Currently, there is a lack of conceptual and legal clarity on due diligence processes, with companies applying varying and even divergent approaches. The voluntary approach does not guarantee a level playing field and can create competitive disadvantages for companies that do undertake due diligence. According to the study ordered by the European Commission, business interviewees indicated a level playing field and legal certainty as the most important considerations of a mandatory due diligence approach. Another potential benefit is that it could address the lack of access to remedies for parties harmed by EU companies by establishing civil or even penal liability in the event that they do not comply.

Civil Society Contributions and Recommendations

Civil society organisations welcomed the recent EU Parliament report. However, the Commission should build on this report in the upcoming legislation and prepare a legislation to mandatorily apply to all businesses, as well as a stronger and harmonised due diligence obligation covering the entire value chain. The due diligence definition should build on the internationally recognised instruments, namely the UN Guiding Principles for Business & Human Rights and OECD Guidelines.

The definition given to human rights, environment and good governance must be clarified to cover the widest range of impacts across the entire value chain and match the objectives enshrined in the EU Treaties with respect to those matters.

While the report recognises the need for engagement with a wide range of stakeholders in order to establish and implement a company's due diligence strategy, the upcoming legislation should ensure that consultation is meaningful and effective.

Furthermore, enforcement mechanisms (through both public/administrative and private/civil enforcement mechanisms) in the case of non-compliance with the due diligence obligations or for harm caused must provide an effective deterrent. In this regard, we expect the Commission to consider criminal liability or equivalent instruments.

Finally, as outlined in the European Parliament report, access to justice and remedy for affected individuals and communities when harm has occurred is essential for the success of the upcoming legislation. For the latter, **we call on the Commission to establish a civil liability regime with notably strong provisions to facilitate access to justice for victims of corporate abuses at home and abroad. These must include liability for the failure to prevent harm throughout the value chain; a fairer distribution of the burden of proof for all evidentiary elements; and reasonable time limitations for transnational claims.**

Key Policy Recommendations to the EU

European civil society organisations, as well as NGOs from southern countries, especially those representing indigenous peoples, have put forward concrete recommendations, addressed to the EC, in order to reinforce a truly mandatory HRDD as a basis for a binding Corporate Sustainability Governance, while enhancing other legal instruments to guarantee civil and criminal liabilities. We summarise and support the main recommendations, as follows:

1. Business enterprises must have an obligation to respect human rights and the environment in their own operations, in their global value chains and within their business relationships.

2. Business enterprises must have an obligation to identify, cease, prevent, mitigate, monitor and account for potential and actual human rights and environmental adverse impacts through an ongoing due diligence process, in accordance with existing international due diligence standards.
3. Business enterprises must provide for or cooperate in the remediation of adverse impacts in their global value chains and within their operations and business relationships.
4. Business enterprises must be liable for human rights and environmental adverse impacts in their global value chains and within their operations and business relationships.
5. Member States must ensure robust enforcement of all the above obligations and ensure the right to an effective remedy.
6. The above provisions must apply irrespective of the law otherwise applicable to the resolution of the conflict, as described in Article 16 of Regulation (EC) No 864/2007 (Rome II).
7. This legislation must be cross-sectoral, covering all business enterprises, including financial institutions.
8. The EU Legislative Framework must establish an independent compliant and grievance system.
9. The legislation must contain robust safeguards and requirements for solid corporate actions to improve safety and protection for human rights defenders and whistle-blowers who lodge complaints against a specific company or investor.
10. Provide complementary non-regulatory measures and Policy Coherence.

The EU must explore how technical and financial support to producer countries can best catalyse the recognition, protection of human rights through policy, legal and judicial reform as well as direct funding of communal and indigenous people land tenure security, forest protection, and monitoring initiatives. Additionally, the EU must ensure that other European investments and external actions in developing countries (e.g. in relation to agriculture, transportation, infrastructure, climate change and conservation) do not have negative impacts on rightsholders and territories. Progress in these areas will also contribute towards the EU's goals to address the global environmental, biodiversity and climate change crises.

Inclusiveness and emerging Innovative Business Models

A current critic of the contemporary 'age of sustainable development' argues that sustainable development does not have a transformative character. Sustainable development fails to go beyond GDP but instead includes economic growth as a goal. SDG 8 has been found to violate the sustainability objectives of the SDGs. In order to go beyond GDP or beyond short-term objectives we do need innovative business models. The urgency to engage business is, however, indisputable. Traditional efforts to address the root causes of social and economic marginalisation have scarcely disrupted patterns of persistent poverty and inequality. **We must acknowledge that placing businesses at the heart of sustainable**

development agendas poses risks. For businesses to own their role as development agents, sustainability objectives need to be at the core of how a business does business. Policy decision makers, governments, the EU and multilateral agencies as well as investors need to assess if a concrete company deserves a "license as development agent" or if, on the contrary, must be removed from the economic system.

Policy Recommendations to Support Inclusive Business for Sustainable Development

Defining Inclusive Business is a fundamental requirement if the international development community is seriously committed to engaging private business as “development agents”. In this sense, an extension of the concept of license to operate and the social license to operate can be framed as a ***“Business License to operate as a Development Agent”***. Such a tool could provide a set of criteria to guide decision makers engaging private business in the climate transition, the implementation of SDGs and the respective flow of financial architecture and other policy tools (e.g. fiscal policies).

The EU and its Members States should champion the design and implementation of a baseline assessment instrument to determine if a business model and activities are compliant with fundamental Environmental, Social and Governance (ESG) principles and performance good practices, including inclusiveness.

- The instrument, which we labelled as a “Business License to operate as Development Agent”, should be considered an extra layer to the current Social and Actuarial Licenses to Operate, and a pre-requisite to access European public finance and/or contracts for international activities, and other policy instruments aligned with the 2030 Agenda, the Paris Agreement and the European Green Deal.
- Include Southern partner countries and local, regional and global civil society organisations and networks as partners in monitoring the Business Compliance with License to Operate as Development Agent.

Furthermore, in convergence with European Confederation of NGO’s (CONCORD), we recommend that the EU and its member states champion the following steps:[2]

Monitor support to and impact of sustainable and inclusive businesses:

- The monitoring tools of external action instruments of the EU and its Member States should include quantitative and qualitative indicators on support to sustainable and inclusive business

2 For further details on CONCORD Sustainable and Inclusive Business Models, read the following two recent publications: CONCORD. (2020, December 1). Mind Our Business. https://concordeurope.org/2020/12/01/mind-our-business-amplify-the-transformative-power-of-sustainable-and-inclusive-business-models-through-eu-external-action/

CONCORD. (2020, July 9). Rebuilding better with sustainable and inclusive business models. CONCORD. https://concordeurope.org/resource/rebuilding-better-with-sustainable-and-inclusive-business-models/

models, as well as gather evidence of how the projects funded contribute to the achievement of the 2030 Agenda and the Paris Agreement. The positive development impact for local communities should be prioritised over the financial leverage or the return on investments.

Map sustainable and inclusive businesses, assess the context they operate in and help to create an enabling environment for them in partner countries.

Provide access to finance for sustainable and inclusive businesses.

Help boost sustainable and inclusive businesses: Systematically add a section or pillar on social and inclusive business in all EU-Africa and other similar EU-sponsored Business Summits.

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The Brief was carried out by João José Fernandes and José Luís Monteiro. The opinions expressed in the Brief are the sole responsibility of the consultants and do not express institutional positions or links to any institution.

Because we defend gender equality as an intrinsic value to human rights, any grammatical terms in the text referring to gender should be read and understood as equally applicable to either gender.

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