

# INSIDE JOB:

How business lobbyists used the Commission's scrutiny procedures to weaken human rights and environmental legislation



A proposed EU law that seeks to hold companies accountable for human rights abuses, climate change, and environmental destruction has been watered down severely by corporate lobbyists, with assistance from the European Commission's own business-friendly, 'Better regulation' agenda, which includes the Regulatory Scrutiny Board (RSB).

The RSB's deregulatory mission helps to ensure the costs of social and environmental damage caused by corporations are paid for by society, not the companies themselves.

As a result a law originally intended to limit corporate impunity, requiring companies to exercise 'due diligence' along their global supply chains, and provide affected people with access to justice, has been left full of major loopholes.

## CHAPTER 1: Introduction

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From chocolate supply chain slavery, to climate change denial, it is sadly not hard to think of numerous examples of how European companies have been involved in human rights atrocities and environmental devastation – either directly or through their subsidiaries or suppliers.

To name just two from recent decades; remember Rana Plaza – the incident where an eight-storey building collapsed over the heads of thousands of textile workers, killing more than 1100 workers who produced clothing for 29 brand fashion names? Or Shell polluting the Niger Delta with oil spills, destroying the livelihoods of thousands, and causing huge environmental damage? Examples of such corporations taking real accountability for their actions, however, are sadly few and far between.

To avoid more cases such as these, European companies have

a responsibility to identify and assess, prevent and mitigate, and be accountable for human rights abuses and environmental degradation – in other words, to apply the principles of ‘due diligence’. However, proposals for how to ensure this happens have been a contested battleground for decades. For a very long time, businesses have actively promoted their own self-made voluntary approaches – often developed at an industry level – but results have been meagre and insufficient. Consider for instance, that in 2022, one campaign run by a single chocolate company, Tony’s Chocolonely, promises ‘slave-free chocolate’, in an explicit attack on broader voluntary industry initiatives from most of the rest of the industry that simply cannot guarantee the chocolate bar you buy was not produced by slave labour along the supply chain. In the battle for corporate accountability, climate change may be the starkest example of all. Recently a human rights

tribunal in the Philippines concluded that polluting companies are ‘morally and legally liable’ for the impacts of climate change, in particular due to their wilful obfuscation of climate science, and obstruction of global transition to clean energy<sup>1</sup>. Yet this commission, despite conducting global hearings, does not have the power to hold the companies legally responsible.

This is why human rights atrocities and environmental damage caused by companies’ action (or inaction) need to be tackled through legislation. Boards and directors need to make sure the companies actively prevent abuses from happening, and they must be held accountable and liable if they fail to take the necessary steps.

1. Isabella Kaminski, The Guardian, Filipino inquiry finds big polluters ‘morally and legally liable’ for climate damage, 6 May 2022, <https://www.theguardian.com/world/2022/may/06/filipino-inquiry-finds-big-polluters-morally-and-legally-liable-for-climate-damage>

On 23 February 2022 the European Commission finally published a legislative proposal on how to ensure that European companies employ due diligence when they operate abroad to prevent, remedy, or compensate for human rights abuses and environmental and climate harm – whether through their own operations in other countries, suppliers and subcontractors, or other companies in their global value chains. This is the directive on “corporate sustainability due diligence” or CSDDD<sup>2</sup>.

For decades there has been a global debate about how to tackle the problem of corporate abuse, not least at the UN level where a number of resolutions and conventions have been adopted over the years. The EU was never a front runner on the matter of binding rules, bearing in mind a hostile European attitude to the proposed ‘Binding treaty on transnational corporations and human rights’ proposed in the UN in 2014 by a coalition of low- and middle income countries<sup>3</sup>.

**But since 2020 we have seen an internal debate in the EU about legislative measures that would strengthen enforcement of human rights and environmental obligations for companies based in or operating from its territory.**

It all looked so promising in 2020, when the Commission floated its first ideas. Ambitious, even.

The momentum picked up with the adoption by the European Parliament of a report featuring a ready-to-use template for a CSDD directive in March 2021. But in the end, the legislative proposal presented by the Commission in February 2022 was weak to say the least.

For a start, it is focussed on the adoption of “code of conducts” and contractual clauses by companies, replacing concrete actions against abuse by mere administrative paperwork. It leaves considerable leeway for companies to evade taking real action, remedying harms, and compensating victims. Inefficient industry initiatives are allowed to play a big role in the implementation of the rules, and the number of companies covered by the proposal in the first place, is very low, bringing the EU proposal far below the level of ambition required by international agreements, which requires all companies to be covered. Many well-known barriers that victims face when bringing legal claims against companies are not addressed, leaving future claimants with close to no chances to ever access justice. The climate paragraph does not oblige companies to implement an emissions reduction plan in line with the Paris Agreement,

including absolute emission reduction targets for the short, medium and long-term, and it lacks means to enforce such plans through civil liability. Finally, the proposal does not include the whole value chain in its scope, rather it limits companies' responsibility only to their “established business relationships”, a vague notion that could potentially exclude many shady suppliers and subcontractors.

2. European Commission, Proposal for a Directive of the European Parliament and the Council, on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM(2022) 71 final, 23 February 2022. [https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0001.02/DOC\\_1&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0001.02/DOC_1&format=PDF)  
3. For more information on the proposed binding treaty see: <https://www.stopcorporateimpunity.org/binding-treaty-un-process/>

In this report we take a deep dive through the process to develop the Commission's proposal to show how this remarkable shift came about; our analysis reveals staunch resistance from the lobby apparatus of big business at every step of the way. Ever since the Commission's first ideas were floated in a consultation launched in October 2020,

**BUSINESS GROUPS HAVE VOICED STRONGLY OPPOSED OPINIONS, AND DONE THEIR UTMOST TO PUSH THE COMMISSION TOWARDS A MORE LENIENT PROPOSAL AT A HIGH NUMBER OF LOBBY MEETINGS<sup>4</sup>.**

But they have also had tremendous help from the inside. The power given to the Regulatory Scrutiny Board (the RSB, explained in detail below) – an opaque body set up to oversee the Commission's legislative proposals, in particular to minimise supposed 'extra regulatory burdens' on companies – has become the trump card for big business many expected it to be<sup>5</sup>.

The RSB rejected the Commission's proposals around the CSDDD directive twice, thereby helping the ideas of business lobby groups gain the upper hand.

This development highlights the significance of the Commission's so-called 'Better regulation' procedures. With the RSB, the Commission has introduced a new layer of bias against regulating business in the public interest and the whole 'Better regulation' framework needs a substantial overhaul.

More immediately, however, it is crucial that the flaws and the scars in the CSDDD proposal are tackled.

Member state governments in the Council and members of the European Parliament (MEPs) must live up to their international obligations and adopt a truly effective European system to prevent and remedy human rights abuses and environmental destruction throughout the global value chains of companies operating in the EU and to make firms accountable and liable when they do wrong.



4. Corporate Europe Observatory, Friends of the Earth Europe & European Coalition for Corporate Justice, Off the hook, June 2021. <https://corporateeurope.org/en/2021/06/hook>

5. Corporate Europe Observatory, Recipe for disaster: a pro-business scrutiny board to prevent laws that hurt corporate profit, May 2015. <https://corporateeurope.org/en/power-lobbies/2015/05/recipe-disaster-pro-business-scrutiny-board-prevent-laws-hurt-corporate-profit>

## CHAPTER 2: Decent ambitions to begin with

Ever since EU Justice Commissioner Didier Reynders announced in April 2020 that he would present a legislative initiative to require European companies to comply with mandatory human rights and environmental 'due diligence', and impose duties on companies' boards and directors, it was clear this would be met with hostility by many business groups.

### When the Commission launched its consultation in October 2020, business groups reacted with fury.

In particular, the consultation questionnaire<sup>6</sup> indicated that measures scorned and feared by business groups seemed set to become part of a future proposal. When these same ideas were then supported by a high number of respondents, not least a high number of citizens, alarm bells started ringing in corporate board rooms. The Commission's original intentions included the following six important areas:

1

### Industry's own voluntary initiatives were deemed inefficient, hence the need for European rules

The Commission offered no space for industry's own voluntary initiatives – in fact the whole endeavour owed a lot to the fact that it deemed them inefficient. The world has seen plenty of industry driven initiatives to address environmental and human rights concerns, yet over the years so many of these voluntary approaches have proved flawed, hence, there is no mention of them in the questionnaire. And as far as the level of ambition of the "content of possible corporate due diligence duty", i.e. the obligations, overall respondents, including many business respondents, picked the most ambitious option<sup>7</sup>. It looked as if only a few defended the flawed instruments of the past.

2

### The rules should cover not only Tier 1 (direct suppliers), but the whole value chain

On the same note, there is no indication in the questionnaire about how far into the value chains companies would be compelled to accept obligations and responsibility. But nor is there any intention of a reduced approach, such as covering only the direct suppliers (called Tier 1), visible in the questionnaire. If a final version was to have such a limited scope, it would in many cases miss a high number of services or goods that contribute to the final product, and it could make it easy for companies to circumvent their obligations.

6. European Commission (DG JUST), Consultation Document – Proposal for an Initiative on Sustainable Corporate Governance, October 2020: [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance_en)

7. European Commission (DG JUST), Sustainable corporate governance initiative, Summary report – public consultation, page 6. [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance/public-consultation\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance/public-consultation_en)

### 3

## **The scope should not only be the biggest companies, but all companies**

As for which European companies should be covered, or rather which size of companies, the Commission did ask whether small and medium businesses (SMEs) should be excluded, but that was not a popular option, judging by the summary report on the consultation. Whereas NGOs were favourable to SMEs being included, alongside capacity-building provision for them, businesses were largely in favour of lighter reporting requirements for SMEs. Very few supported a full exclusion of SMEs<sup>8</sup>.

### 4

## **Rules on directors' duties should be mandatory and make directors liable**

Highly contentious was the Commission's idea to impose obligations on companies' boards and directors to have them "identify stakeholders' interests" or manage risks. The ideas also included obligations for boards and directors to ensure the integration of sustainability risks into companies' strategies. While non-business respondents and respondents from individual businesses were supportive of such an idea, industry associations were strongly against. Only when it came to enforcement of "director's duty of care" did the business associations and individual companies express the same concern<sup>9</sup>.

8. Summary report, page 7.

9. Summary report, pages 5-6.

## 5

### **Victims should have access to courts in the company's home country**

There is also the question of enforcement and access to justice. Should communities or workers negatively affected by a company's operations be able to sue companies in the courts of the company's home country? On this point, businesses were clear and unified in a rejection of access to courts, whereas NGOs as well as citizens were equally supportive of access to courts and a system of supervision that could include fines for companies<sup>10</sup>.

## 6

### **There should be strong climate obligations to ensure business complies with the EU's climate obligations**

The CSDDD proposal was announced in the European Green Deal, the Commission's flagship policy to address climate change. Commissioner Reynders argued from the beginning that 'climate' will be an important element in the proposal, for instance in a speech in the European Parliament in April 2020<sup>11</sup>. The problem definition in the Commission's first Impact Assessment report from 2021 includes climate change as one of the environmental issues to be addressed in the proposal. The second Impact Assessment also refers several times to climate change.

10. Summary report, page 7.

11. Speech available here: <https://responsiblebusinessconduct.eu/wp/2020/04/30/speech-by-commissioner-reynders-in-rbc-webinar-on-due-diligence/>

# THE BUSINESS AGENDA DEVELOPS

Interestingly many individual companies that responded to the Commission's questionnaire publicly declared themselves in favour of an ambitious approach, perhaps because their reputation was at stake. Industry associations, on the other hand, fiercely opposed the proposal, even if individual members were positive. Such corporate lobby groups often do the 'dirty work' and unpopular lobbying on behalf of industry. But as we shall see, they also wanted to defend their own sectoral self-regulation schemes. The release of the consultation in October 2020 fired them up. In the following months, they issued a series of aggressive statements, and paid the Commission several visits<sup>12</sup>.

## **The demands of the most hostile business groups, which include BusinessEurope, Eurochambres, and the French associations MEDEF**

(Mouvement des entreprises de France, which represents employers) and AFEP (Association Française des Entreprises Privées, which represents some of the biggest French multinationals such as

Carrefour, Engie, TotalEnergies, and Veolia), included a demand for full recognition of industry-run, voluntary initiatives.

According to these groups, businesses should be allowed to fulfil their obligations under the new rules in self-regulation frameworks developed by the companies themselves, often in the framework of an industry association.

As for the number of companies to be covered by the rules, they were to be kept as low as possible. Business groups cited fears that SMEs would be overburdened should they be covered. MEDEF and AFEP were very vocal on this point, echoing their successful campaign to weaken a similar 2017 French law in the same way<sup>13</sup>. Furthermore, they argued that businesses should only be obligated to fulfil procedural obligations and should not be liable for outcomes i.e. it should be about means (having particular processes in place), not results (whether they actually make a difference on the ground). This argument was vehemently rejected by human rights groups as it could lead to a mere 'ticking-the box exercise' in which companies

stick to certain trivial procedures with little relationship to the challenges on the ground. Finally, the lobby groups strongly rejected the ideas expressed in a report commissioned by the Commission on 'directors duties'<sup>14</sup>, which supported introducing legal responsibilities for boards and directors.

12. Corporate Europe Observatory, European Coalition for Corporate Justice & Friends of the Earth Europe, Off the hook. June 2021. <https://corporateeurope.org/en/2021/06/hook>

13. Corporate Europe Observatory and Observatoire des multinationales. Under the influence: the distorted priorities of the French EU Council Presidency. December 2020. <https://corporateeurope.org/en/under-influence-distorted-priorities>

14. EY. Study on directors' duties and sustainable corporate governance.

July 2020. <https://op.europa.eu/en/publication-detail/-/publication/e47928a2-d20b-11ea-adf7-01aa75ed71a1/language-en>

# PAKISTAN: KiK Textilien and the fatal factory fire

KiK Textilien und Non-Food GmbH is Germany's largest textile discounter chain, operating approximately 3500 stores across central and eastern Europe. KiK contracted a Pakistani textile company operating a factory in Karachi, Pakistan, but in September 2012, 258 workers died and hundreds were seriously injured when a fire broke out in the garment factory. Due to lax fire safety measures, workers were at first unaware of and then trapped by the fire. In 2020, Anti-Slavery International and European Coalition for Corporate Justice reported that, victims sought justice in the European courts, but failed due to a number of serious barriers to justice including the application of Pakistani law; unreasonable time limitations and the absence of collective redress. KiK, in its role as the major buyer, should have been obliged to seek to ensure respect for internationally recognised human and labour rights at the factory, and should have been unable to defer this responsibility to a third-party auditor. Victims' families and survivors should have had a legal right to access justice without the aforementioned barriers, when seeking the right to claim compensation against KiK<sup>1</sup>.

1. Information taken from: Anti-Slavery International and European Coalition for Corporate Justice. What if? Case studies of human rights abuses and environmental harm linked to EU companies, and how EU due diligence laws could help protect people and the planet. September 2020. <https://corporatejustice.org/publications/evidence-for-mandatory-human-rights-due-diligence-legislation/>

# LOBBYING AT THE NATIONAL LEVEL

It may seem like a paradox that while business associations attacked the first ideas of the Commission so vehemently, practically all of them argued for the Commission to present a proposal which would harmonise obligations for companies across the EU. However, this should be seen in the light of business campaigns to water down the requirements. They would like to see clear rules that apply in all member states – but not ambitious rules. All arguments are applied in order to have a minimum of obligations. Also, in light of upcoming European rules, it is not an unusual move for companies to engage heavily in debates over national rules to make sure that the outcome can be used as an argument to prevent EU level rules from going further than existing national laws.

In France AFEP seems to have been successful in persuading the French Government to work for an EU level initiative that would be weaker than the French law, which could lead to a dilution of the French domestic rules. It is not that the French law, itself a target of a comprehensive lobbying campaign when it was prepared, is impressive. In fact, Amnesty International France found little visible impact in a 2019 analysis of the legislation, two years after it came into force. Even well-known clothing brands Zara and H&M had not

taken the necessary steps to comply with the law, in that they had not produced a vigilance plan<sup>15</sup>. Still, the French law includes rules on liability, now evidenced by legal cases brought against TotalEnergies for its conduct in Uganda, where civil society groups from Uganda and French environmental and human rights groups are attacking the oil company for acting in breach of their obligations under French law, arguing that TotalEnergies failed to prevent human rights violations and environmental harm<sup>16</sup>. Similarly, a Mexican indigenous community has taken Electricité de France to court for not taking precautions in connection with a windpark project on indigenous lands<sup>17</sup>. It would have been promising if the French companies and even the French Government had supported such an approach at the European level.

In Germany, the European debate has overlapped with the discussion and adoption of a national due diligence law. There, as in France, the number of companies the law touches is limited – as of 2023, only companies with more than 3000 employees will be covered, with the scope widening to companies with 1000 employees in 2024.

**German business lobby groups have done their utmost to use the German law as a lever to keep European ambitions in check.**

When the European Parliament adopted its position on corporate due diligence via an own initiative report in 2021<sup>18</sup>, it was suggested that the European law should cover companies starting from 250 employees. Opposing this, the centre-right party political business association Mittelstands- und Wirtschaftsunion (MIT) wrote immediately to the German industry ministry, that “if that were to happen, it would mean throwing the success of the Ministry at the negotiations on the German law overboard<sup>19</sup>”.

**It is not unusual for big business lobby groups to support the adoption of weaker rules at the national level to use them as a lever to fight high ambitions at the EU level.**

In some cases, they argue that with national rules in place, there is either no need for European legislation, or that the national rules should be acknowledged as one way of implementing EU rules. Hence, the biggest and probably the most powerful German lobby group, Bundesverband der Deutschen Industrie’s (BDI) succinct answer to the question in the Commission’s consultation about the need for an EU initiative on due diligence on human rights and the environment: “No action necessary<sup>20</sup>.”

15. Amnesty International France, 21 February 2019. <https://www.amnesty.fr/presse/rapport-deux-ans-apres-ladoption-de-la-loi-sur-le>

16. For more information see: <https://www.amisdelaterre.org/communiqué-presse/victory-total-uganda-case-the-french-supreme-court-recognizes-the-jurisdiction-of-the-civil-court/>

17. For more information see: <https://www.business-humanrights.org/en/latest-news/edf-lawsuit-re-indigenous-rights-in-mexico-filed-in-france/>

18. European Parliament. Report with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)). 11 February 2021.

[https://www.europarl.europa.eu/doceo/document/A-9-2021-0018\\_EN.html](https://www.europarl.europa.eu/doceo/document/A-9-2021-0018_EN.html)

19. Armin Paasch & Karolin Seitz, Deutsche Wirtschaftslobby gegen wirksames EU-Lieferkettengesetz, Global Policy Forum & Miseroeor, February 2022.

20. Ibid.

# CORPORATE GOVERNANCE ENRAGED BUSINESS GROUPS

However, one issue was to fire up some business groups more than any other. And one Danish business group was instrumental in pushing the matter, thanks to generous assistance from the Danish Ministry of Industry, Business, and Financial Affairs.

It was first and foremost the Commission's proposals on corporate governance that fired up Danish business groups. The mere idea, expressed in the Commission's consultation questionnaire, to demand that directors are required by law to identify and promote not just the interests of the company's shareholders, but its "stakeholders" too, including employees, and to set up adequate procedures to achieve that aim, sparked the outrage of Danish business leaders. Furthermore, it was hinted in the questionnaire, that executive remuneration schemes should take into

account whether directors and board members were actively seeking to take the interests of employees into account, and whether, for example, carbon emission reductions should have an impact on the same. The corporate governance element of the Commission's plans made the Confederation of Danish Industry (Dansk Industri, DI), Denmark's largest business organisation, fly off the handle. Luckily for them, DI is a powerful organisation in its home country, and often a more outspoken voice for business interests than the confederation it belongs to, Dansk Arbejdsgiverforening (Association of Danish Employers). With 18,000 companies in manufacturing and services as members, it is a regular guest in ministries – and in this case it secured the full support from the Danish industry ministry.

As the Danish Government was preparing its contribution to the Commission's consultation, the ministry reached out to DI to discuss the matter in depth. Another Danish business association, Dansk Erhverv, chipped in too, but DI was clearly the main ally. When the draft was prepared, the ministry asked DI for comments, and its enthusiasm was unreserved.

**Danish business group DI was more than happy with the Danish contribution to the consultation.**

**"I don't recall reading a contribution to a consultation from the Danish Government with greater pleasure. You have had a strong pen on that text [smiley emoji]. It opens the door to really good cooperation going forward." To this, the civil servant in the ministry replied: "Yes, I thought you would be pleased. We can probably find a good way forward together on this case."**

**Titel:** Re: Specialudvalgshøring (Bred kreds) - Frist 9/12 - Høring vedr. EU-initiativ om god selskabsledelse og due diligence

**Sendt:** 04-02-2021 19:02

Hej Søren

Takker. Mindes ikke at have læst et høringssvar fra en dansk regering med større fornøjelse!

Stærk pennefører I har haft på den sag 😊

Åbner for et rigtig godt samarbejde i sagen fremadrettet. Glæder mig 😊

God aften.

Mvh  
Lars

The contribution of the Danish Government to the Commission's consultation sets a clear priority: the rejection of the measures proposed by the Commission on corporate governance. The proposal will restrict "the ability of the directors to act in the way they deem most effective, or by stripping the directors of instruments at their disposal," the contribution reads<sup>22</sup>. On due diligence, the government is very concerned with the effect the proposal may have on the competitiveness of European companies, and suggests a number of ways to lower ambitions, including purely voluntary measures for SMEs, a big role for implementation and enforcement via industry's own initiatives and a dislike or distrust in rules that would allow victims to sue companies in the courts of their home state<sup>23</sup>. In other words,

**despite Denmark's reputation for strong allegiance to human rights and environmental as well as climate protection, that is not reflected in its role on the EU proposals.**

As for Danish businesses, there are plenty of examples of lack of due diligence. Danish watchdog Danwatch often reports about companies that seem to ignore serious atrocities committed by their direct suppliers. In the first months of 2022, for instance, Danwatch revealed that four Danish pension funds had invested in a goldmine in Tanzania where police forces are accused of killing locals<sup>24</sup>. And a Danish supplier of medicine to hospitals had purchased large quantities of medicine from an Indian manufacturer responsible for massive pollution<sup>25</sup>.

In the latter case, the Danish supplier's director was taken aback when informed that his company actually has a responsibility under UN and OECD guidelines which obligates them to due diligence.

And in fact, big Danish companies do not seem to be well advanced in that area.

**A short report on larger companies written by the Danish Institute for Human Rights, concluded that most companies show a low level of commitment<sup>26</sup>.**



22. The contribution can be read here: <https://www.ft.dk/samling/20201/almdel/EUU/bilag/282/2330726.pdf>

23. The contribution can be read here: <https://www.ft.dk/samling/20201/almdel/EUU/bilag/282/2330728.pdf>

24. Danwatch, Danske pensionsmillioner investeret i guldmine i Tanzania, der anklages for at være skyld i drab, 24 March 2022.

<https://danwatch.dk/danske-pensionsmillioner-investeret-i-guldmine-i-tanzania-der-anklages-for-at-vaere-skyld-i-drab/>

25. Danwatch, Danske pensionsmillioner investeret i guldmine i Tanzania, der anklages for at være skyld i drab, 24 March 2022.

<https://danwatch.dk/danske-pensionsmillioner-investeret-i-guldmine-i-tanzania-der-anklages-for-at-vaere-skyld-i-drab/>

26. Danish Institute for Human Rights, Documenting business respect for human rights - a snapshot of large Danish companies, September 2020.

[https://media.business-humanrights.org/media/documents/\\_20\\_00345-60\\_Documenting\\_Business\\_Respect\\_for\\_Human\\_Rights\\_2020\\_504132\\_1\\_1.pdf](https://media.business-humanrights.org/media/documents/_20_00345-60_Documenting_Business_Respect_for_Human_Rights_2020_504132_1_1.pdf)

# GETTING ORGANISED

DI did not wait for the conclusion of the Commission's consultation on CSDDD to make its next moves. It went on to get in touch with Danish MEPs, the Danish Commissioner Vestager, and in the framework of BusinessEurope (the European employers' association and one of Brussels' biggest lobbyists), it worked with other employer organisations to "influence governments, Commissioners and MEPs as much as possible"<sup>27</sup>.

The ministry soon jumped on the bandwagon and only a few days later, it produced a draft "non-paper" on the matter, for which it sought support from other governments in the EU Council. In the non-paper, the Commission was urged to only move forward with due diligence and scrap the proposals on corporate governance: "The focus should be on encouraging companies to work with sustainability, not limiting their ability to act in the manner they see fit," the paper said. However, in this plea for a "market based transition to sustainability," it comments on elements in the due diligence part as well, including by cautioning the Commission not to include rules that would make companies "accountable for not involving certain stakeholders enough"<sup>28</sup>. The non-paper, however, did not receive a rapturous welcome from other member states. The ministry was particularly concerned with the lukewarm response from the Netherlands, and asked DI if its sister organisation, VNO-NCW, could provide support by putting pressure on the Dutch government. A few days later, DI returned to the ministry to ask if they had particular names in the relevant Dutch ministry that VNO-NCW should contact<sup>29</sup>.

To find support, and to help build a coalition between member states, DI also worked with VNO-NCW to set up a meeting between business groups from 11 member states (Sweden, Germany, Norway, Finland, Ireland, France, Belgium, Austria, the Netherlands, Denmark, and Italy) and civil servants from Sweden, Denmark, Finland, Belgium, France, and Germany.

The purpose of the meeting was to discuss approaches to due diligence and corporate governance. In other words, an assembly of business groups and representatives from member state ministries seemed to be collaborating early on to prevent the Commission's more ambitious proposals seeing the light of day.

The non-paper itself, circulated in February 2021, was a very modest success with only the Finnish and Estonian governments opting to co-sign. However, according to an email from DI to the ministry, it helped ensure other governments looked closely at what was coming from the Commission<sup>30</sup>.

27. Email from Lars Frolov-Hammer (DI) to the Danish Ministry of Industry, Business and Financial Affairs, 23 February 2021.

28. Danish Ministry for Industry, Business and Financial Affairs, Fostering sustainable and responsible businesses through due diligence, non-paper on due diligence and corporate governance, February 2021.

29. Emails between the Danish Ministry for Industry, Business and Financial Affairs and DI, March 2021.

30. Email from DI to the Danish Ministry for Industry, Business and Financial Affairs, 17 March 2021.

# BRAZIL:

## Bayer Monsanto and pesticide poisoning

Bayer Group is a huge chemical company headquartered in Germany. After buying agrochemical giant Monsanto for US\$66 billion in 2018, Bayer Group became the largest pesticide and genetically modified seed producer in the world. In 2020, Anti-Slavery International and European Coalition for Corporate Justice reported that every year, thousands of Brazilian farm labourers and people from rural communities become ill or die from contact with highly toxic pesticides, while Brazilian biodiversity and wildlife are being severely affected by the toxic spraying of agrochemicals. Bayer benefitted from Brazil's weak pesticide regulations and contributed to lobbying efforts to approve chemicals that are harmful for people and planet. It is imperative that Bayer is obliged to ensure respect for internationally recognised human and labour rights and environmental standards in its global value chain, and to stop contributing to the poisoning of farm labourers, rural communities, and their ecosystems through hazardous products that have been found unfit for sale in countries where adequate standards apply<sup>2</sup>.

2. Information taken from: Anti-Slavery International and European Coalition for Corporate Justice. What if? Case studies of human rights abuses and environmental harm linked to EU companies, and how EU due diligence laws could help protect people and the planet. September 2020. <https://corporatejustice.org/publications/evidence-for-mandatory-human-rights-due-diligence-legislation/>

# UNUSUAL CAUTION WITH LOBBYISTS

The priority given by DI to liaising with governments and other lobby groups was highly effective. When lobby groups see a proposal in the making they don't like, the first thing they do is to knock on the door of the relevant Commissioner, their Cabinet, and the people responsible in the Directorate-General for Justice and Consumers (DG Just) for drawing up the text. That did happen. Throughout 2021, lobby groups asked for meetings with officials and issued invitations to seminars and conferences in large numbers. But Commissioner Reynders was not very interested in holding such meetings, nor were his associates in the Cabinet or in DG Just.

**The Commissioner and his staff received more than 100 requests – either for a meeting on the Commission's premises, online, or at an external meeting – but turned down almost all of them.**

When developing the proposal in the first four months of 2021, DG Just officials had only one meeting, namely with EY (Ernst & Young, the consultancy that had produced the Commission's report on corporate governance and directors' duties). DG Just apparently wanted to focus on producing the impact assessment i.e. the first rough outline of the proposal.

Overall, in response to an access to documents request, DG Just produced only six minutes from lobby meetings held on the CSDDD file. Meanwhile the Commissioner and his cabinet held 30 meetings on the topic in 2021. But even this seems to reflect a decision to restrict lobbying on the file, as they received over 100 emails from lobbyists requesting meetings. Instead many lobbyists received a reply that the Commission needed "time to work on our expected initiative", a reply that seemed to suggest such lobby meetings were not considered helpful<sup>31</sup>.

To this extent DG Just's approach, which presumably considered that the consultation had delivered the external inputs needed, could be welcomed. Such a 'lobby purdah' can help to protect policy-making from short-term corporate lobbying. This may help explain why at this stage, in the first four or five months of 2021, the growing concern of many powerful business lobby groups did not have a discernible impact on the Commission's position. And it may also explain why these lobbyists then looked elsewhere for support.



31. A list of lobby contacts received by DG Just during 2021 on the CSDD file is available here: <https://corporateeurope.org/sites/default/files/2022-05/Reply%20to%20Ms%20Cann%20docx.pdf>

# CONTACTING THE 'BETTER REGULATION' PEOPLE

DI was clearly unsatisfied to discover that its efforts had had little impact on the Commission. Correspondence between DI and the ministry shows severe disappointment when the two had gathered information on the Commission's intentions, going forward after the consultation.

**At this point, another element in the DI campaign was deployed; it set out to "activate the people in the Commission who work with Better Regulation,"**

preferably through BusinessEurope as "it would send a stronger signal<sup>32</sup>".

"There is no sound evidence that any of the [measures proposed by the Commission] would be effective, some of them are even likely to be counterproductive<sup>33</sup>", DI's Kim Haggren wrote to Michael Wimmer, Director for Strategy, Better Regulation & Corporate Governance at the European Commission. In March 2021 DI turned its attention to the Commission's Regulatory Scrutiny Board and in the following months, this track was to prove more successful than any other followed by the lobby groups.

**Business groups like DI were in no doubt that the proposal was in breach of the EC standards on Better Regulation, and they didn't hold back with the language.**

**Title:** Danish Industry calls attention to gross non-compliance with Better Regulation principles in the SCG initiative  
**Sendt:** 10-03-2021 11:15  
**Bilag:** image003.png; DI letter about BR problems with SCG proposal to Director Wimmer SecGen.pdf;

Dear Mr. Wimmer

Please find attached a letter for your attention on a matter of the greatest importance for the Confederation of Danish Industry - and for the entire businesses sector in Europe as far as I can see from various consultation responses.

I would appreciate if you took the time to look into the concerns we have not just with the substance – which is in the end a political decision - but in particular the process with which the Commissions upcoming legislative initiative "Sustainable Corporate Governance" is being handled by DG JUST.

We are strong supporters of the EU Better Regulation principles and therefore need to raise alarm when they are so blatantly violated, as seems to be the case here, especially when the consequences for our businesses will be dramatic.

I stand at your disposal for any further discussion on the topic.

Regards,

**Kim Haggren**  
Senior director, Legal Affairs & Compliance

32. Email from DI to the Danish Ministry for Industry, Business and Financial Affairs, 17 March 2021

33. DI, letter to Michael Wimmer, European Commission, , March 2021.

## CHAPTER 3: Enter the Regulatory Scrutiny Board

Even before the Commission's Regulatory Scrutiny Board (RSB) formally entered the process to evaluate the expected impacts of the CSDDD file in April 2021, corporate lobbies had been busy setting out their positions to the Board. But what is the RSB, and what role does it play in assessing Commission legislative proposals?

The Commission's Regulatory Scrutiny Board was set up in 2015 as a consequence of the Juncker Commission's wide-ranging so-called 'Better regulation' reform and it replaced the Impact Assessment Board. 'Better regulation' might sound good, but it is in fact a deeply problematic concept which has transformed the Commission's law-making role.

**"Better regulation" is clever PR for a generally corporate-friendly process which rebrands regulations as 'burdens', and aims to remove some of these 'burdens',**

while making sure that new rules are as narrow as possible and don't affect competitiveness i.e. corporate profits. It's about ensuring that the costs of social and environmental damage caused by corporations are paid for by society, not the companies themselves. Unsurprisingly, big business interests are fully onboard with 'Better regulation'<sup>34</sup> and its chilling effect on the regulatory process, and it is continually cited in corporate lobby materials as a reason and tool to weaken or scrap new rules<sup>35</sup>. 'Stakeholders' and 'consultation' are heavily emphasised in 'Better regulation' but this further plays into the hands of business interests with the resources, capacity, and technical knowledge to dominate such processes<sup>36</sup>.

'Better regulation' is the wrong narrative and the wrong policy for the EU. With the impacts of austerity, the climate crisis, and the pandemic, what we need is an EU that protects citizens, human rights, and the environment, not one that rolls back or minimises regulation. The European Environmental Bureau and NEF (the New Economics Foundation) have persuasively argued that we need to "reprotect Europe"<sup>37</sup>. In this report, we will refer to 'Better regulation' as de-protecting Europe.



34. See for example: [https://www.buinessurope.eu/sites/buseur/files/media/position\\_papers/internal\\_market/2021-07-15\\_pp\\_better\\_regulation\\_position\\_paper.pdf](https://www.buinessurope.eu/sites/buseur/files/media/position_papers/internal_market/2021-07-15_pp_better_regulation_position_paper.pdf)

35. See, for example, corporate lobbying on EU chemicals policy as documented by Corporate Europe Observatory: <https://corporateeurope.org/en/2020/09/will-eu-commission-stand-firm-against-toxic-lobbying-pressure> or <https://corporateeurope.org/en/2019/06/toxic-lobbying-titanium-dioxide-label-debate-continues>

36. For a more in-depth understanding of 'Better regulation' and its origins check out this background: Corporate Europe Observatory. 'Better Regulation': corporate-friendly deregulation in disguise. Updated 17 February 2020. <https://corporateeurope.org/en/better-regulation-corporate-friendly-deregulation-disguise>

37. David Powell, Patrick ten Brink, Francesca Carlsson, Emily Scurrah, Frank van Lerven, Adrian Bua. Reprotecting Europe: The European Green Deal vs the war on regulations. 23 January 2020. <https://neweconomics.org/2020/01/reprotecting-europe>

# THE RSB'S ROLE

As part of the Commission's drive on 'Better regulation' and to de-protect Europe the Regulatory Scrutiny Board (RSB) was set up and designed to have huge power over the Commission's law-making.

**The RSB has two specific roles, to evaluate existing EU legislation to see if it is still 'fit for purpose', and secondly (and most importantly for this report) to review the expected impacts of upcoming legislation.**

Every time the Commission plans to introduce a new directive or regulation, a report on an impact assessment of the proposal must gain the approval of the RSB. These reports on impact assessments (a controversial tool originally promoted by the tobacco industry)<sup>38</sup> are drafted by Commission staff and spell out the problem that the proposed legislation is targeting and how the proposed new rules will tackle it. The environmental, social, and economic impacts of the proposal must be spelled out (although it is well-known that it is easier to map economic impacts than social and environmental ones) and the impacts on small and medium businesses (SMEs) must also be explored. But crucially the "impacts on competitiveness" are also emphasised, handing companies a key tool with which they can argue that a proposal goes too far, will disadvantage affected companies, and hit profits<sup>39</sup>.

**The RSB has the right to veto or approve every legislative proposal's impact assessment report.**

Rejected reports can be reworked by the Commission and resubmitted to the RSB for a second opinion, but if that also fails to attract the support of the RSB, only the College of Commissioners can overcome the RSB's veto.

Additionally the RSB holds "upstream" meetings whereby Board members meet with officials preparing a proposal and its impact assessment. These meetings likely provide an additional moment for 'Better regulation' de-protecting Europe principles to be embedded at an even earlier stage in the proposal's development.

While the Commission is at pains to argue that the RSB does not come to an opinion on the legislative proposal itself (as it 'only' evaluates a report on an impact assessment of the proposal), this is disingenuous because the impact assessment explores the expected effects of proposed new EU rules. If the impact assessment report is rejected, it is highly likely that the proposal on which it is based will have to change to receive RSB approval.

**The RSB has rejected more than 40 percent of first round reports in recent years<sup>40</sup>.**

This indicates that a substantial proportion of Commission proposals are likely to have been altered (or rather diluted) in terms of ambition, scope, or detail by the time they are finally published. Certainly they will at a minimum have been delayed by the RSB process. The Commission also argues that the RSB's findings are only recommendations. But the language the Board uses such as "The lead DGs must revise the report in accordance with the Board's findings and resubmit it for a final RSB opinion"<sup>41</sup> or "The Board's opinion is in principle final.

The DG should seek political guidance on whether, and under which conditions, this initiative may proceed further"<sup>42</sup> are a clear indication of the influence it wields over the scope and direction of Commission proposals for new laws. It is therefore no wonder that

**the Commission itself has said of the RSB: "No regulatory oversight body in the Member States is given this degree of influence"<sup>43</sup>.**

38. See 'So, what's the problem with impact assessments?' in Corporate Europe Observatory, 'Better Regulation': corporate-friendly deregulation in disguise. Updated 17 February 2020. <https://corporateeurope.org/en/better-regulation-corporate-friendly-deregulation-disguise>

39. European Commission. Better Regulation guidelines. November 2021. [https://ec.europa.eu/info/sites/default/files/swd2021\\_305\\_en.pdf](https://ec.europa.eu/info/sites/default/files/swd2021_305_en.pdf)

40. According to [https://ec.europa.eu/info/sites/default/files/swd2021\\_305\\_en.pdf](https://ec.europa.eu/info/sites/default/files/swd2021_305_en.pdf)

# WHO'S WHO ON THE RSB?



The full RSB is composed of seven unelected, appointed members, each serving a three-year term, although one member has been on the Board since 2016<sup>44</sup>. Four members are temporarily seconded from elsewhere in the Commission, while there are three external appointments. They are paid as either full-time Commission staff or temporary agents. Alongside the RSB's secretariat which is staffed by the Secretariat-General of the Commission, it is clear that the RSB is fully embedded within the Commission, even though it is often described as "independent"<sup>45</sup>.

A look at the online CVs of the current members of the RSB indicates that most have economics or business administration backgrounds, while the current chairperson spent 10 years as head of the Commission's translation service. RSB members' expertise<sup>46</sup> is supposed to cover "macroeconomics, microeconomics, social policy and environment policy (so as to cover the three pillars of sustainable

development)" but it is not clear where the required social and environmental expertise lies<sup>47</sup>. This adds further weight to concerns that 'Better regulation' prioritises corporate concerns and economic arguments over public interest, social, and environmental arguments to re-protect Europe. This is a particular worry considering the Von der Leyen Commission's focus on the European Green Deal, which is generating numerous legislative files with an environmental theme.

The backgrounds of former members of the RSB reinforce this concern<sup>48</sup>. Only one stands out as bringing a different perspective, likely to challenge the 'Better regulation' orthodoxy, Isabelle Schömann, formerly of the European Trade Union Institute and now at the European Trade Union Confederation (ETUC), and who has written critically about 'Better regulation'<sup>49</sup> and the need for a robust CSDDD file<sup>50</sup>.

41. European Commission. Decision of the President of the European Commission on an independent Regulatory Scrutiny Board. 23 January 2020. [https://ec.europa.eu/info/sites/default/files/rsb\\_decision\\_23\\_01\\_2020\\_en.pdf](https://ec.europa.eu/info/sites/default/files/rsb_decision_23_01_2020_en.pdf)

42. European Commission. Regulatory Scrutiny Board. Opinion - Impact Assessment / Sustainable Finance Initiative. 26 April 2018.

43. European Commission. Communication from the Commission to the European Parliament, the Council, the European and Social Committee and the Committee of the Regions - Better Regulation: Joining forces to make better laws. April 2021. [https://ec.europa.eu/info/sites/default/files/better\\_regulation\\_joining\\_forces\\_to\\_make\\_better\\_laws\\_en\\_0.pdf](https://ec.europa.eu/info/sites/default/files/better_regulation_joining_forces_to_make_better_laws_en_0.pdf)

44. According to [https://ec.europa.eu/info/law/law-making-process/regulatory-scrutiny-board/members-regulatory-scrutiny-board-0\\_en](https://ec.europa.eu/info/law/law-making-process/regulatory-scrutiny-board/members-regulatory-scrutiny-board-0_en) Bernard Naudts has served on the RSB since 2016.

45. European Commission. Decision of the President of the European Commission on an independent Regulatory Scrutiny Board. 23 January 2020. [https://ec.europa.eu/info/sites/default/files/rsb\\_decision\\_23\\_01\\_2020\\_en.pdf](https://ec.europa.eu/info/sites/default/files/rsb_decision_23_01_2020_en.pdf)

# TROUBLING LACK OF ACCOUNTABILITY AND TRANSPARENCY

The accountability of the RSB is to the Commission President and is therefore extremely narrow; it is certainly not accountable to citizens, MEPs, or even member states.

**It is required to meet in secret with no publicly-available minutes, and it does not publish its opinions on impact assessment reports itself<sup>51</sup>.**

It is for the Commission DG concerned to publish the RSB opinion when it publishes the legislative proposal so we have little idea how the RSB handles its work and the kinds of discussions that it holds, aside from rather bland annual reports.

The RSB is not supposed to discuss individual files or proposals with lobbyists<sup>52</sup>. However, the Board is encouraged to undertake outreach to “raise awareness of its work outside the EU’s political institutions and thereby strengthen trust in the quality of the Commission’s work<sup>53</sup>”. The chairpersons of the RSB are required to publish a list of all meetings they hold with lobbyists

and 23 such meetings have been listed since the RSB was created in 2015<sup>54</sup>.

Only a few of these were held with organisations or individuals likely to have dissented from the de-protecting Europe orthodoxy.

**Instead, 90 per cent plus of these meetings were held with corporate interests and supportive think tanks.**

These include 3 meetings with BusinessEurope (a major cheerleader for ‘Better regulation’) and 2 with US big business lobby AmCham.

Further meetings are held by other members of the RSB and for the years 2020 and 2021, we have obtained a list of these via EU access to documents<sup>55</sup>.

Analysis of these meetings and events reveals further items of interest. RSB members met with the pharma industry lobby and had two meetings with the controversial European Risk Forum (now re-branded as the European Regulation and Innovation Forum), a lobby platform which includes highly risky industries such as chemicals and which is a vocal supporter for ‘Better regulation’ ideology<sup>56</sup>. From what we can see of the meetings with corporate lobbies, the discussions included the

quality of impact assessments, political involvement, the impact of the RSB, whether Commission services take on board recommendations by the RSB, and whether proposals are delayed by negative opinions. These are all very useful insights for those looking to influence the process in some form<sup>57</sup>. In addition, an RSB member spoke at the 2020 conference of the German Chambers of Commerce entitled “Less bureaucracy - more business initiative<sup>58</sup>”.

**The evidence clearly points to the RSB operating in a little bubble where its interactions are limited to the Commission or with organisations that largely support its agenda.**

46. See [https://ec.europa.eu/info/law/law-making-process/regulatory-scrutiny-board/members-regulatory-scrutiny-board-0\\_en](https://ec.europa.eu/info/law/law-making-process/regulatory-scrutiny-board/members-regulatory-scrutiny-board-0_en)

47. European Commission. Communication to the Commission: Regulatory Scrutiny Board - Mission, tasks and staff. 19 May 2015.

[https://ec.europa.eu/info/sites/default/files/communication-on-the-regulatory-scrutiny-board-mission-tasks-and-staff\\_may2015\\_en.pdf](https://ec.europa.eu/info/sites/default/files/communication-on-the-regulatory-scrutiny-board-mission-tasks-and-staff_may2015_en.pdf)

48. European Commission. Decision of the President of the European Commission on an independent Regulatory Scrutiny Board. 23 January 2020.

[https://ec.europa.eu/info/sites/default/files/rsb\\_decision\\_23\\_01\\_2020\\_en.pdf](https://ec.europa.eu/info/sites/default/files/rsb_decision_23_01_2020_en.pdf)

49. Isabelle Schömann. Making EU regulation better for all. 3 March 2021. <https://socialeurope.eu/making-eu-regulation-better-for-all>

50. All reported meetings by RSB chairpersons can be found here: <http://ec.europa.eu/transparencyinitiative/meetings/listPredecessors.do?host=242a8924-48a5-4983-b75f-fab577a950b7>

They are also available on this spreadsheet: [https://docs.google.com/spreadsheets/d/1wc3HOK2DZhtPeDh\\_ugBVOspa-RiZ2JbXgUVv025vY/edit#gid=1427934756](https://docs.google.com/spreadsheets/d/1wc3HOK2DZhtPeDh_ugBVOspa-RiZ2JbXgUVv025vY/edit#gid=1427934756)

51. Isabelle Schömann. Instilling due diligence in corporate behaviour. 28 January 2020. <https://socialeurope.eu/instilling-due-diligence-in-corporate-behaviour>

MEPs are currently looking at the accountability of the EU institutions, and rapporteur Timo Wölken recently said, “[An] area of strong concern is the severe lack of transparency of the Regulatory Scrutiny Board. Not only do we need to make the transparency register mandatory for members of the board, but we also need to significantly increase transparency when it comes to meetings with stakeholders, reviews, recommendations and opinions<sup>59</sup>.” It is an irony – considering the focus on ‘evaluation’ – that neither the Board nor the aims, scope,

and implementation of ‘Better regulation’ have undergone a rigorous evaluation since they were originally launched in 2015. Such a review is long overdue. Perhaps that was what at least some Commission staff were signalling when the RSB was apparently represented in a voodoo doll at a departmental Christmas party!

The RSB, and the ‘Better Regulation framework’ within which it operates, is a self-inflicted obstacle to re-protecting Europe, and to creative and ambitious policy-making aimed at prioritising people and planet.



52. European Commission. Decision of the President of the European Commission on an independent Regulatory Scrutiny Board. 23 January 2020. [https://ec.europa.eu/info/sites/default/files/rsb\\_decision\\_23\\_01\\_2020\\_en.pdf](https://ec.europa.eu/info/sites/default/files/rsb_decision_23_01_2020_en.pdf)

53. European Commission. Decision of the President of the European Commission on an independent Regulatory Scrutiny Board. 23 January 2020. [https://ec.europa.eu/info/sites/default/files/rsb\\_decision\\_23\\_01\\_2020\\_en.pdf](https://ec.europa.eu/info/sites/default/files/rsb_decision_23_01_2020_en.pdf)

54. All reported meetings by RSB chairpersons can be found here: <http://ec.europa.eu/transparencyinitiative/meetings/listPredecessors.do?host=242a8924-48a5-4983-b75f-fab577a950b7> They are also available on this spreadsheet: [https://docs.google.com/spreadsheets/d/1wc3HOK2DZh0tPeDh\\_ugBVOspa-RiZ2JbXgUVvi025vY/edit?usp=sharing](https://docs.google.com/spreadsheets/d/1wc3HOK2DZh0tPeDh_ugBVOspa-RiZ2JbXgUVvi025vY/edit?usp=sharing)

55. Check the spreadsheet for a full list of these meetings: [https://docs.google.com/spreadsheets/d/1wc3HOK2DZh0tPeDh\\_ugBVOspa-RiZ2JbXgUVvi025vY/edit?usp=sharing](https://docs.google.com/spreadsheets/d/1wc3HOK2DZh0tPeDh_ugBVOspa-RiZ2JbXgUVvi025vY/edit?usp=sharing)

56. For more information about the European Risk Forum, see for example: Corporate Europe Observatory. The ‘innovation principle’ trap. 5 December 2018. <https://corporateeurope.org/en/environment/2018/12/innovation-principle-trap>

57. Topics gathered from the spreadsheet of these meetings: [https://docs.google.com/spreadsheets/d/1wc3HOK2DZh0tPeDh\\_ugBVOspa-RiZ2JbXgUVvi025vY/edit?usp=sharing](https://docs.google.com/spreadsheets/d/1wc3HOK2DZh0tPeDh_ugBVOspa-RiZ2JbXgUVvi025vY/edit?usp=sharing)

# GETTING 'BETTER REGULATION' INTO THE CSDD PROPOSAL

## Better Regulation?

Corporate-friendly deregulation in disguise!



In January 2021 the RSB held an up-stream meeting with DG Just in the run-up to the finalisation of the impact assessment report. This is in line with established RSB procedure but the minutes of that meeting (obtained via access to documents), give insights into how the 'Better regulation' process starts to influence the work of specific files at an early stage. Particularly noteworthy is the emphasis on voluntary industry regulation and a chilling approach to new laws: "Board members suggested that the report should explain to what extent the voluntary self-regulatory measures taken in some Member States have

been effective. As such measures may be seen as more flexible to achieve the objectives, any move to replace them with legislative measures should be clearly argued, also taking account of stakeholder views, particularly the affected business." Also notable is the emphasis on economic arguments: "Impacts on effective competition and global competitiveness of EU business will need to be considered." The minutes do not record equivalent RSB concern for the social, human rights, and environmental impacts of the proposal<sup>60</sup>.

58. Check the spreadsheet for a full list of these meetings: [https://docs.google.com/spreadsheets/d/1wc3HOK2DZh0tPeDh\\_ugBVOspa-RiZ2JbXgUVvi025vY/edit?usp=sharing](https://docs.google.com/spreadsheets/d/1wc3HOK2DZh0tPeDh_ugBVOspa-RiZ2JbXgUVvi025vY/edit?usp=sharing)  
59. European Interest. Accountable law making needed to increase citizens' trust in EU. 18 May 2022  
<https://www.europeaninterest.eu/article/accountable-law-making-needed-to-increase-citizens-trust-in-the-eu/>  
60. Minutes of Upstream meeting RSB-DG JUST (Sustainable Corporate Governance). 13 January 2021.  
<https://corporateeurope.org/sites/default/files/2022-05/Doc%205.pdf%20upstream%20meeting.pdf>

# LOBBYING THE RSB ON CSDD

The corporate lobby opposed to CSDD was clearly well aware of the role that the RSB would play in scrutinising the purpose and scope of the file. Even before the Commission had even submitted its first impact assessment report to the RSB for an opinion in April 2021, industry was already working to ensure that its demands were heard loud and clear.

In November 2020, then-RSB chair Veronica Gaffey met with the French corporate lobby AFEP.<sup>61</sup> AFEP had approached Gaffey for a meeting specifically on the CSDD file, but the preparatory email exchanges indicate that Gaffey would instead present “the role of the RSB in the EU’s regulatory process in general terms” in line with the RSB’s ‘no meetings on specific files’ rule<sup>62</sup>. Nonetheless, AFEP later told *Mediapart* that several participants had raised the file during the meeting.<sup>63</sup> Curiously, for over one year subsequently, the meeting was listed publicly on the RSB’s web page as having been on the CSDD file, which would of course have been a breach of the RSB’s own rules. After the nature of the meeting was queried by MEPs and CSOs, the listing was then updated to describe the subject of the meeting as: “IIA of

the Commission on sustainable corporate governance and the consultation on the relevant subject. The Chair of the RSB did not discuss this proposal but provided a general presentation on the work of the Board in the EU regulatory process”. Without full minutes of the meeting (which have not been made available), it is impossible to exactly determine what was said and by whom at this meeting.

Meanwhile in March 2021 Danish business lobby DI wrote a detailed letter setting out its critique of the CSDDD as indicated by the Commission’s consultation<sup>64</sup>, then echoed by the Confederation of Swedish Enterprise (Svenskt Näringsliv, or SN) in a similar missive<sup>65</sup>.

and queried the evidence base relied upon by the Commission, especially for the corporate governance elements of the proposal. The letter closed by stating that it had “very high regard for the work of the RSB”. Gaffey’s reply is fairly bland but likely provided some reassurance to the corporate lobbies, stating that the RSB would scrutinise “all evidence underpinning the proposal, including supporting studies and stakeholders’ input<sup>66</sup>.”

**Both corporate lobby groups flew red flags designed to resonate with the RSB: DI referred to “gross non-compliance with the Better Regulation principles”**

61. Meeting reported here: <http://ec.europa.eu/transparencyinitiative/meetings/meeting.do?host=242a8924-48a5-4983-b75f-fab577a950b7&startDate=01-10-2018>

62. Exchanges between AFEP and RSB: <https://corporateeurope.org/sites/default/files/2022-05/Emails%20between%20Afep%20and%20RSB.pdf>

63. *Mediapart*. A Bruxelles, le lobbying en zone grise des grandes entreprises françaises. 9 February 2022. 64. Letter from DI to RSB 10 March 2021: <https://corporateeurope.org/sites/default/files/2022-05/Letter%20from%20DI%2010.3.2021.pdf>

64. Letter from DI to RSB 10 March 2021: <https://corporateeurope.org/sites/default/files/2022-05/Letter%20from%20DI%2010.3.2021.pdf>

65. Letter from Swedish Enterprise to RSB 15 March 2021: <https://corporateeurope.org/sites/default/files/2022-05/Letter%20from%20Swedish%20Enterprise%2015.3.2021.pdf>

66. Letter from RSB Gaffey to DI 18 March 2021: <https://corporateeurope.org/sites/default/files/2022-05/Letter%20from%20Gaffey%20RSB%20to%20DI%2018.3.2021.pdf>

# NIGERIA: Shell's shameless pollution and empty excuses

Shell is ravaging the Niger Delta through its decades-long quest for oil. In 2020, Anti-Slavery International and European Coalition for Corporate Justice reported that pollution caused by the activities of its subsidiary SPDC is having a devastating effect on both the ecosystem and people living in this area. Victims of Shell's irresponsible business conduct sued the company before Dutch courts, but claimants have faced endless legal barriers, challenges and uncertainty. Shell should be required to put in place a risk-based due diligence process to tackle human rights and environmental risks and impacts along its global value chain, including those by SPDC. But the story of Shell and SPDC has also exposed the weakness of current EU law in allowing victims of corporate harm effective access to remedy and justice. A recent final Dutch court ruling in a case brought by Milieudefensie/Friends of the Earth Netherlands and four Nigerian farmers against Shell found in the activists' favour, but this case has been underway since 1991<sup>3</sup>. It is imperative that communities damaged by companies based in the EU are able to access a far quicker route to justice and compensation<sup>4</sup>.

3. Deutsche Welle. Shell to pay \$111 million for 1970 Niger Delta oil spills. 12 August 2021. <https://www.dw.com/en/shell-to-pay-111-million-for-1970-niger-delta-oil-spills/a-58697881>

4. Information taken from: Anti-Slavery International and European Coalition for Corporate Justice. What if? Case studies of human rights abuses and environmental harm linked to EU companies, and how EU due diligence laws could help protect people and the planet. September 2020. <https://corporatejustice.org/publications/evidence-for-mandatory-human-rights-due-diligence-legislation/>

# RSB'S NEGATIVE OPINION (the first one)

The RSB had one internal meeting to discuss the Commission's CSDDD impact assessment report before it issued its negative opinion in May 2021, telling DG Just that it "must revise the report in accordance with the Board's findings and resubmit it for a final RSB opinion".

The RSB's four overriding concerns in its negative opinion overlapped with those of the corporate sector, but also reflected the problems with the de-protecting Europe process and approach<sup>67</sup>.

## RSB concern 1:

**"The problem description is vague and does not demonstrate the magnitude and likely evolution of the problem. It does not provide clear evidence that EU business (including SMEs) do not sufficiently address sustainability opportunities, risks and impacts."**

In fact, there is huge evidence of the problem of human rights abuses and environmental harm committed by EU companies around the globe such as child labour, forced labour, toxic dumping, and pollution<sup>68</sup>. Media reports, civil society publications, government studies, and even court cases show the plethora of the negative impacts of business activities on human rights and the environment. That is why EU member states including France, Germany, the Netherlands, and Belgium are discussing or have already approved mandatory human rights due diligence laws.

## RSB concern 2:

**"The policy options are too limited and do not adequately reflect the available policy choices in terms of company and sector scope, content of measures and range of delivery instruments. The added value and likely effectiveness of several of the measures are unclear."**

This concern plays right into the hands of business interests.

Business almost always argues for softer approaches, self-regulation, or voluntary corporate schemes when faced with the possibility of binding, enforceable legal duties or targets.

As Paul de Clerck of Friends of the Earth Europe argued at the time: "This [RSB opinion] is outrageous, given the wealth of evidence about human rights violations involving EU companies and the well documented failure of two decades of voluntary business initiatives to address sustainability and human rights problems."

67. European Commission. Regulatory Scrutiny Board. Opinion - Impact Assessment / Sustainable Corporate Governance. 7 May 2021.

68. See for example: Anti Slavery International and European Coalition for Corporate Justice. What if? Case studies of human rights abuses and environmental harm linked to EU companies and how EU due diligence laws could help protect people and the planet. [http://corporatejustice.org/wp-content/uploads/2021/03/asi\\_eccj\\_report\\_final.pdf](http://corporatejustice.org/wp-content/uploads/2021/03/asi_eccj_report_final.pdf)

## **RSB concern 3:**

**“The assessment of proportionality is insufficient. Costs and benefits are not sufficiently presented.”**

The RSB flagged its concerns especially around the inclusion of SMEs within the scope of the proposal. One of the drivers of the whole ‘Better Regulation’ mission is to review the impact of EU law on SMEs. But SMEs make up 99.8 percent of all companies in the non-financial sector field, and while of course the impacts of the CSDDD proposal on SMEs as compared to larger companies should be recognised, SMEs are prevalent in many high-risk sectors and participate in global value chains. As we will see later, this RSB criticism about the inclusion of SMEs had a major impact on the ultimate scope of the CSDD file.

## **RSB concern 4:**

**“The report does not sufficiently integrate differentiated stakeholder views.”**

A constant corporate lobby criticism of the Commission’s approach to this file has been that it did not take on board the criticism that industry and others expressed in the consultation. But turkeys do not vote for Christmas and it is unsurprising that industry would oppose a potentially far-reaching overhaul of its supply-chain responsibilities. Criticism should be focused on the inadequate way that the input from hundreds of thousands of citizens to the Commission consultation was handled, as emphasised by an ongoing case taken to the European Ombudsman by civil society. While the Commission acknowledged that over half a million citizens provided input into the consultation, it failed to mention any of the main points brought in by these citizens, notably the need for strong enforcement

and access to EU court for victims. Over 100,000 of these contributions were not taken into account in the total number of responses received, and were mentioned on the public consultation website as a single response<sup>69</sup>.

The negative opinion of the RSB points to the problems embedded in the de-protecting Europe concept.

**A flawed process produced an impact assessment report which was rejected by a flawed body. And the only ones to celebrate were big business.**

While the RSB’s rejection of a Commission impact assessment report is not, in itself, unusual – remarkably it happens in about half of all cases<sup>70</sup> – for the CSDD file it was the start of a major overhaul.

69. See European Ombudsman case 1956/2021/AMF: <https://www.ombudsman.europa.eu/en/doc/correspondence/en/150177>

70. According to the RSB’s Annual Report 2020, the annual rejection rates of first-round impact assessment reports since 2015 have been 48%, 42%, 43%, 28%, 100% (only one impact assessment scutinated), and 46% in 2020. [https://ec.europa.eu/info/sites/default/files/rsb\\_report\\_2020\\_en\\_1.pdf](https://ec.europa.eu/info/sites/default/files/rsb_report_2020_en_1.pdf)

## CHAPTER 4:

# Rejection emboldens resistance

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The rejection of the Commission's impact assessment by the RSB in May 2021 emboldened the opponents in the business community. The Commissioner behind the proposal, Reynders, appeared to have been dealt a blow and it seems as if the negative opinion was instrumental in the subsequent Commission decision to have Internal Market Commissioner Thierry Breton join as co-lead on the proposal.

**Breton is a deeply controversial figure who joined the Commission straight from his previous role as Chief Executive of French multinational Atos<sup>71</sup>.**

To Breton, legislation and regulation should all be about supporting businesses, big business in particular. The decision to bring him into the CCSDDD file was received with scepticism by civil society as many expected he would ensure that business interests would be better protected in the proposal.

The RSB negative opinion also dealt industry new cards, including more time. And the following months would be spent pursuing the same ends as they did before the proposals were presented to the Board. With a new commissioner on board, new

doors would be opened. While DG Just continued to keep a very low frequency of meetings with lobbyists, Breton's staff in DG Grow (DG Internal Market, Industry, Entrepreneurship and SMEs) would prove more available to lobbyists. From June to November 2021, they were paid numerous visits by lobby groups that had previously focused on Reynders and his Cabinet. The contentious issues we outlined in chapter 2 were brought up with the new players in the game (see the table).



71. Corporate Europe Observatory. Thierry Breton, the corporate commissioner? 10 November 2019. <https://corporateeurope.org/en/2019/11/thierry-breton-corporate-commissioner>

# LOBBY TABLE

What they wanted from the Single Market Commissioner  
Views expressed with DG  
GROW and Breton, May-  
December 2021 according to  
the minutes

Absence of a view does not  
mean it is not held, but that it  
is not included in the minutes.

Name	A prominent role for industry driven voluntary initiatives	Only direct suppliers covered, not the whole value chain	Low number of companies or SMEs excluded	Mandatory rules on directors and boards	No liability or access to courts for victims
German Chemicals association	●	●			●
BDA (German employers)			●	●	●
AMFORI	●				
Der Mittelstandsverbund (Germany)			●		●
IPC (electronics)				●	
CEEMET (metals and engineering)		●	●		●
German insurers					●
AIM (European Brands Association)		●			●
European Cocoa Association	●				●
The Responsible Business Alliance	●				●
Zentralverband des Deutschen Handwers (Germany)	●	●			●
H&M				●	
Eurometaux	●				
The Swedish Trade Federation	●	●	●		
BusinessEurope		●		●	
Antwerp World Diamond Center		●			
AmCham EU	●				
EACB (cooperative banks)				●	●
HDE European Affairs (representing retailers including METRO and ALDI)	●				
CLEPA (car industry)				●	
FESI (sporting goods)	●	●			
JBCE (Japan Business Council – exploratory talk)					
<b>TOTAL</b>	<b>10</b>	<b>8</b>	<b>4</b>	<b>6</b>	<b>10</b>

Still, on some points, there is evidence to suggest that the Commission, at least to some degree, stuck to its guns, including on the ideas on corporate governance. And if business groups believed that Breton would make all the difference, they might have been disappointed. Judging by the number of meetings Breton himself accepted with lobbyists, he hardly gave the matter priority. Only at two meetings did Breton listen to views on the file. However, bringing in Breton's Directorate General, may have made a difference.

**With a reputation for a one-sided view of its mission – to improve life for businesses – DG Grow's presence may very well have made a difference<sup>72</sup>.**

This brought the RSB in again as an important tool for the business lobby.

72. See for instance Corporate Europe Observatory, Chemical industry cheerleader: how DG Grow puts industry above public interest regulation, 16 July 2020. <https://corporateeurope.org/en/2020/07/chemical-industry-cheerleader-how-dg-grow-puts-industry-above-public-interest-regulation>

# ANOTHER ROUND WITH THE RSB

In November 2021 Danish corporate lobby DI and its Swedish counterpart SN again wrote in tandem to the RSB chair Veronica Gaffey.

DI noted with satisfaction that “the Commission has dropped its most radical ideas”, but at the same time, it criticised some Commission plans, especially on directors’ duties<sup>73</sup>. SN backed this up, referring to “politically motivated proposals being window-dressed to appear evidence-based where [the Commission] in fact mostly rely on highly disputable studies and consultations that do not meet the standards<sup>74</sup>.” Again the criticism is focused on the corporate governance elements of the proposal and both DI and SN demanded that the RSB “look very critically at the evidence for a legislative EU proposal on directors’ duties or any other intervention in well-functioning Corporate Governance models of the Member States.”

Industry also highlighted some remarks made by Commissioner Reynders in October 2021. When giving a short speech to update on the ambition of the file, DI said Reynders had expressed his intention to “clarify the duty of directors to pursue long-term value creation”, “ask directors to design a sustainability strategy for their company”, and “ask directors to manage sustainability risks<sup>75</sup>.” In other words, the very proposals that DI and others had fought hard against since the early stages, could still be on the table.

This time these industry associations receive a warmer reply with Gaffey’s reassurance that she took “good note” of their correspondence. She told DI that other concerns would form an “important element of scrutiny<sup>76</sup>”.

Other industry voices also approached the RSB. The European Confederation of Directors’ Associations wanted to find out more about the RSB’s approach on the CSDD file; as did lobby firm #SustainablePublicAffairs which represents Swedish steel firm SSAB, Dutch biotech firm Corbion, an organisation which forms part of IKEA, and Swiss aluminium products producer Novelis, among other clients. Also of note perhaps is the breakfast meeting held between an RSB member and the Swedish Government’s Permanent Representation on 28 May 2021, not long after the RSB’s first negative opinion<sup>77</sup>.

73. Letter from DI to RSB 15 November 2021: <https://corporateeurope.org/sites/default/files/2022-05/Letter%20from%20DI%2015.11.2021.pdf>

74. Letter from SN to RSB 22.11.2021:

[https://corporateeurope.org/sites/default/files/2022-05/Letter%20from%20Confederation%20of%20Swedish%20Enterprise%20%282%29%20ARES%282021%297167784\\_Redacted.pdf](https://corporateeurope.org/sites/default/files/2022-05/Letter%20from%20Confederation%20of%20Swedish%20Enterprise%20%282%29%20ARES%282021%297167784_Redacted.pdf)

75. Letter from DI to RSB 15 November 2021: <https://corporateeurope.org/sites/default/files/2022-05/Letter%20from%20DI%2015.11.2021.pdf>

76. Letter from RSB Gaffey to DI 22 November 2021: <https://corporateeurope.org/sites/default/files/2022-05/Letter%20from%20Gaffey%20RSB%20to%20DI%2022.11.2021.pdf>. Check the spreadsheet for a full list of these meetings: [https://docs.google.com/spreadsheets/d/1wc3HOK2DZh0tPeDh\\_ugBVOspa-RiZ2JbXgUVvi025vY/edit?usp=sharing](https://docs.google.com/spreadsheets/d/1wc3HOK2DZh0tPeDh_ugBVOspa-RiZ2JbXgUVvi025vY/edit?usp=sharing)

77. Check the spreadsheet for a full list of these meetings: [https://docs.google.com/spreadsheets/d/1wc3HOK2DZh0tPeDh\\_ugBVOspa-RiZ2JbXgUVvi025vY/edit?usp=sharing](https://docs.google.com/spreadsheets/d/1wc3HOK2DZh0tPeDh_ugBVOspa-RiZ2JbXgUVvi025vY/edit?usp=sharing)

# WEST AFRICA: Ferrero International, child labour and deforestation

Ferrero International is headquartered in Luxembourg. It manages a group of chocolate and confectionery subsidiaries, with its subsidiary, Ferrero SpA, headquartered in Italy. Ferrero SpA is one of the biggest chocolate producers and confectionery companies in the world. In 2020, Anti-Slavery International and European Coalition for Corporate Justice reported that, as a key buyer from the region, Ferrero should take more action to address the high risks of child labour, child trafficking and forced labour in the West African cocoa supply chain. Widespread deforestation has also been taking place to make room for cocoa plantations, causing devastation for both wildlife and the climate. The absence of binding regulation has meant there is little incentive to drive change in the sector. The negative impacts of the cocoa industry have been known for decades, and voluntary commitments, such as a 2001 protocol aiming to end child labour, have proven insufficient to transform the sector and drive all companies to meet the same standards. Ferrero should be obliged to ensure respect for internationally recognised human and labour rights in its global value chains, such as carrying-out risk-based due diligence to identify, prevent, cease, mitigate and account for its adverse impacts<sup>5</sup>.

5. Information taken from: Anti-Slavery International and European Coalition for Corporate Justice. What if? Case studies of human rights abuses and environmental harm linked to EU companies, and how EU due diligence laws could help protect people and the planet. September 2020. <https://corporatejustice.org/publications/evidence-for-mandatory-human-rights-due-diligence-legislation/>

# RSB'S NEGATIVE OPINION (the second one)

On 26 November 2021 the RSB issued its second negative opinion on the CSDDD impact assessment and, if anything, it was even more damning than the first. It noted that the CSDDD impact assessment report had undergone "significant revision", but argued that the imposition of directors' duties, and the inclusion of medium sized companies in the scope of the file, were not well justified. It also demanded more evidence for the application of science-based mandatory climate change mitigation and biodiversity targets for the biggest companies. The RSB also wanted to see more "balance" in the assessment of the impacts on "competition", "innovation", and "competitiveness" for industry.

The RSB concludes "The Board's opinion is in principle final. The DG should seek political guidance on whether, and under which conditions, this initiative may proceed further."

Not surprisingly DI cheered the RSB's second negative opinion. It was keen to take credit for what it called the RSB's two red cards for

the CSDDD proposal, and boasted: "We have been in dialogue with the Commission, EU parliamentarians, sister organisations in Europe, BusinessEurope and many others". It further stated "we have also specifically drawn the attention of the Regulatory Scrutiny Board to which Better Regulation principles were not respected and why<sup>78</sup>".

So DI claims some credit for the outcome with the RSB, but is this justified? While the RSB appears to adhere to the rule that it does not meet with lobbyists on specific files, it holds many broader discussions with like-minded organisations which are likely to strengthen its commitment to 'Better regulation' principles. And crucially on this file it was open to, and took "good note" of, written lobbying. Did the written lobbying by DI and others directly influence the negative opinions of the RSB? Or did the lobbying just reinforce the views already held by the RSB? It's hard to evaluate the precise impact of the lobbying but it is clear that there was a significant overlap of concerns between industry and the RSB.

78. Dansk Industri. To røde kort til Europa-Kommissionen: Nyt regelsæt for selskabsledelse er igen skudt til hjørne. 2 December 2021. <https://www.danskindustri.dk/di-business/arkiv/nyheder/2021/12/to-roede-kort-til-europa-kommissionen-nyt-regelsat-for-selskabsledelse-er-igen-skudt-til-hjorne/>

## CHAPTER 5:

### The final outcome - the Commission's proposal

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When the Commission presented its final proposal for the CSDDD file on 23 February 2022 it was received with disappointment by human rights groups, environmental and climate groups, and trade unions. Though relieved that at least a proposal had been finally tabled (there had been some speculation that the two negative RSB opinions might prove fatal to the whole file), civil society was disappointed that it was a shadow of the original ambition. The ETUC said:

Meanwhile the European Coalition for Corporate Justice said the proposal was “riddled with flaws and exemptions” arguing that “a dangerous loophole risks making the law ineffective in preventing harm beyond the first tier of the supply chain – and impeding victims from holding companies liable<sup>80</sup>.”

**It is a first step in the right direction. But an ambitious and future proof proposal to prevent and remedy human rights violations and environmental damage looks different ... The Commission seems to have opted for the lowest common denominator, as a baseline<sup>79</sup>.**

79. ETUC. Commission delivers “bare minimum” on Corporate Sustainability Due Diligence, 23 February 2022, <https://www.etuc.org/en/pressrelease/commission-delivers-bare-minimum-corporate-sustainability-due-diligence>

80. European Coalition for Corporate Justice. Dangerous gaps undermine EU Commission's new legislation on sustainable supply chains. 23 February 2022. <https://corporatejustice.org/news/dangerous-gaps-undermine-eu-commissions-new-legislation-on-sustainable-supply-chains/>

# THE RSB'S FINGERPRINTS

Judging by the topics we identified at the start of the report as some of the most contentious, the business community seem to have won on all counts. Crucially the RSB's two negative opinions triggered a reappraisal process within the Commission and helped to lend credence to corporate lobby demands that the initial ambition for the file needed to be substantially scaled back. The RSB's influence can be traced in the following points:

1

The proposal covers only very big companies, with more than 500 employees and a turnover beyond 150 million euros. In high-risk sectors, including textiles, minerals, oil, gas, coal, and metals, the bar is lowered to 250 employees<sup>81</sup>. But this amounts to about 1 percent of all companies, whereas the UN standards apply (proportionally) to all companies. The Commission actively admits that this is a result of the RSB's negative opinion: it removed all SMEs from the scope, and slashed the number of larger companies covered from 44,000 to only 11,700<sup>82</sup>.

2

In terms of coverage of the value chain, the proposal is very restrictive as it limits 'due diligence' to 'established business partners'. While this term has not been used before, it would exclude all business relationships that are not lasting or not significant in the value chain. This may, for example, exclude private security companies operating around mines and other extractive industry sites, although there are well-known cases where these actors have committed severe human rights abuses<sup>83</sup>.

3

In line with the RSB's urging, there is now ample space for businesses to handle their core obligations under the directive through the voluntary industry initiatives that were originally deemed inefficient by the Commission. The CSDDD proposal also does exactly what business would like by setting out box-ticking obligations only (not obliging companies to take real steps to prevent harm). It also fails communities by not obliging business to meaningfully consult with affected people at all steps of the due diligence process.

4

The proposal does include access to courts for victims and liability for companies, but it is hampered by a series of limitations. It applies only to harms that can be linked to a breach of corporate obligations, yet this causal link is extremely hard for victims to prove in practice, because companies hold all the evidence. Also, companies can evade liability for indirect suppliers if they have sought contractual assurances from them. This is an easy escape route.

81. European Commission, Proposal for a Directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM(2022) 71 final, article 2.

[https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0001.02/DOC\\_1&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0001.02/DOC_1&format=PDF)

82. European Commission, Commission Staff Working Document, SWD(2022) 42 final, part 2,

[https://eur-lex.europa.eu/resource.html?uri=cellar:c851d397-9584-11ec-b4e4-01aa75ed71a1.0001.02/DOC\\_2&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:c851d397-9584-11ec-b4e4-01aa75ed71a1.0001.02/DOC_2&format=PDF)

83. See for example: Office of the UN High Commissioner for Human Rights. Transparency and oversight needed for security arrangements in extractive industries. 25 September 2019.

<https://www.ohchr.org/en/stories/2019/09/transparency-and-oversight-needed-security-arrangements-extractive-industries>

5

The RSB created more space for what they called a “more nuanced range of policy options”, including about directors’ duties and about the “delivery instrument”, in effect pushing for voluntary options, or options with greater leeway for companies to decide on the specifics. While the proposal does contain language about directors’ duties, it is a far cry from the original ideas which would have introduced legal requirements to produce a strategy for human rights and sustainability. Instead, what is proposed is that directors should “take into account the consequences of their decisions on sustainability matters, including, where applicable, human rights, climate change and environmental consequences<sup>84</sup>.”

6

While the legislation currently demands that companies need to make a proposal for climate action, it fails to make climate action part of its due diligence obligations. It also doesn’t include an obligation to agree and implement short, medium, and long-term emission reduction targets and it doesn’t allow companies to be taken to court in case of failure to reduce their emissions. Most big corporations have already made voluntary commitments, but with a proposal that does not add clear obligations, nothing is achieved.

But this poor outcome should not surprise us. The RSB is part of a policy-making architecture aimed at de-protecting Europe, which has a mandate to assess the impacts of new rules on competitiveness amongst other criteria, which interacts almost entirely with those who have bought into the ‘Better regulation’ agenda, and which does not routinely include members from environmental or social policy backgrounds. As an academic commentator recently remarked: “By requiring predictable and quantifiable effects, the RSB’s mandate is structurally conservative and privileges the status quo vis-à-vis experimental and ambitious policies such as the EU #GreenDeal and the promotion of sustainable supply chains<sup>85</sup>.”

84. For a more in-depth analysis of the text, see for instance European Coalition for Corporate Justice, European Commission's proposal for a directive on Corporate Sustainability Due Diligence - A comprehensive analysis, Legal Brief, April 2022. <https://corporatejustice.org/wp-content/uploads/2022/04/ECCJ-analysis-CSDDD-proposal-2022.pdf>

85. See: <https://twitter.com/KlaasEller/status/1490365490346213377>

## CHAPTER 6: Conclusions

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In so many ways, the plan to oblige European companies to respect, prevent, and repair human rights abuses and environmental damage as a consequence of their operations abroad could have been a real step forward. The EU has not been a global frontrunner on binding rules for companies, and at the global level we have seen the EU do its utmost to block a treaty on transnational corporations developed by low and middle income countries. In that context the initial ideas which showed the Commission in an ambitious mode were even more welcome.

However, when the final CSDDD proposal was published, environmental groups, consumer associations, human rights groups, and trade unions were all disappointed. The number of companies covered by the draft law is very low, and the scope in terms of the value chain is very small. It talks of “established business relationships”, potentially reducing the impact of the law to direct suppliers. While the Commission originally aimed to push boards and directors to draw up strategies in collaboration with stakeholders, it now seems they can to a large extent rely on voluntary industry initiatives that have delivered little in the past. Climate obligations are vague, and lack teeth to enforce them. Finally, the draft does not guarantee liability in European courts and leaves the burden of proof completely on victims.

The big question is how this all came about – how could so many ideas be torpedoed by opponents in the course of slightly more than one year?

You could point to the lobbying campaign waged by particular sectors, and not least industry associations such as BusinessEurope, Eurochambres, and those national associations such as DI which put their heart and energy into the matter – in the Danish case with full cooperation from the Danish Government. Even if they were not able to count on full support from many companies – as evidenced by the Commission’s consultation – a high level of activity and networking probably rendered them ‘the face of business’ with the Commission.

Still, their statements and their meetings with Commission officials do not fully explain the dilution of the initiative. There is no way around the overarching conclusion: the RSB was key to the business strategy.

**The two negative opinions of the RSB, which played exactly the role envisaged by the designers of the ‘Better regulation’ agenda, effectively forced a major rethink and empowered those in the Commission who wished to gut ambition from the proposal.**

They also provided lobbyists with more arguments and more time to defeat the original proposals. While the Commission originally planned to launch its proposal in Spring 2021, the RSB interventions delayed the process by at least eight months. The opinions of the RSB were also instrumental in defeating particular parts that some business groups had fought against.

With so-called 'Better regulation' the Commission has inflicted a technocratic process upon itself, and one which seems to prioritise cost-reduction and competitiveness over sustainability outcomes. One which prioritises industry demands over the voices of trade unions, NGOs, and crucially the voices of communities around the world who have faced decades of the impacts of irresponsible European capitalism in the form of pollution, low labour standards, and human rights abuses. 'Better regulation' is not fit for purpose.

**As the European Environmental Bureau and NEF have argued, we need to rethink regulation, no longer seeing it as a 'burden' but instead as a vital tool to achieve social, environmental, and equality objectives.**

A "think sustainability first" principle should guide EU law-making to help us to re-protect Europe for the challenges we face<sup>86</sup>.

As for the CSDDD, there is a long way to go. It is imperative that MEPs and member states in the EU Council go back to the original intentions of the Commission's consultation, although the lobby battle is only likely to heat up in the coming

months. *Politico* recently wrote about the latest lobbying efforts of Swedish Enterprise (SN) and other Nordic business lobby groups<sup>87</sup>.

The French Presidency of the EU Council circulated a questionnaire to member states to ascertain their positions on aspects of the CSDD file<sup>88</sup>. These show that the Danish Government continues to side with its domestic business lobbies in fighting against the inclusion of corporate governance and directors' duties, and it cites the two negative opinions of the RSB in support. Other member states raised hundreds of questions regarding the file. French President Macron is not known as a fan of France's own 2017<sup>89</sup> due diligence law, while the position of the incoming Council Presidency, the Czech Republic, is unknown.

Meanwhile in the European Parliament, in March 2022 the Parliament's centre-right, pro-business political group wrote an opportunistic letter to the Commission demanding that this and other files should be "postponed" due to the Ukraine war<sup>90</sup>.

Nonetheless, another group of MEPs has been vigilant in monitoring the file and the Parliament's own initiative report on this topic from 2021 provides a robust and largely progressive starting position for the deliberations to come.

These MEPs demanded that a far larger number of companies be in scope, that entire value chains be included, and proposed strict administrative and civil liability regimes. Unlike the Commission's proposal, it focuses on providing access to justice for victims rather than aiming at accommodating corporate interests. The European Parliament sent the European Commission a clear political message, echoing that of European citizens, to end corporate impunity.

This file is urgent. European companies have been linked to human rights atrocities and environmental disasters across the globe for decades. The climate emergency means that we need to use all available policy levers to hold polluting companies to account for failing to cut emissions. For the communities in the Niger Delta who have been battling Shell it has taken 50 years to deliver even a little bit of justice, and it is not finished even now. With the proposed UN binding treaty on transnational corporations and human rights still some way off, it is well and truly overdue for EU companies to live up to their social and environmental responsibilities via strong pan-European rules.

86. David Powell, Patrick ten Brink, Francesca Carlsson, Emily Scurrah, Frank van Lerven, Adrian Bua. Reprotecting Europe: The European Green Deal vs the war on regulations. 23 January 2020. <https://neweconomics.org/2020/01/reprotecting-europe>

87. See here for a sample of lobbying by Swedish Enterprise: <https://politico.us8.list-manage.com/track/click?u=e26c1a1c392386a968d02fdbc&id=9f2322e02d&e=c0c5bc676f>

88. Council of the EU. Proposition de Directive sur la gouvernance durable des entreprises et devoir de vigilance - commentaires préliminaires. 17 March 2022. <https://corporateurope.org/sites/default/files/2022-05/wk03989.fr22%281%29%20MS%20positions.pdf>

89. Amis de la Terre France. End of the road for transnational corporations? From a groundbreaking French law to a UN treaty. October 2017. <https://www.amisdelaterre.org/report-end-of-the-road-for-transnational-corporations-from-a-groundbreaking/>

90. See this letter: <https://www.politico.eu/wp-content/uploads/2022/03/11/2022-03-10-EPP-Group-letter-to-President-von-der-Leyen3.pdf>

## JOIN THE MOVEMENT!

Are you concerned about the CSDD file and want to help shape a strong EU law?

Join 'Justice is everybody's business', a new public campaign demanding a tough, European piece of legislation to end human rights violations and environmental harms by companies, and to guarantee access to justice for people everywhere.

The campaign's website will go live in early July, whereas the campaign itself will officially launch in early September 2022.

Watch this space:  
[www.justice-business.org](http://www.justice-business.org)



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