COMMENTS PAPER

31 May 2022

Corporate Sustainability Due Diligence proposal

INTRODUCTION

BUSINESSEUROPE is the leading advocate for growth and competitiveness at European level, standing up for companies across the continent and actively campaigning on the issues that most influence their performance. We speak for all-sized enterprises in 35 European countries whose national business federations are our direct members.

Business supports the EU Green Deal and the Sustainable Finance agenda (both at the basis of the current proposal) and is committed to the transition to a climate-neutral economy by mid-century, and that this commitment also means leveraging private investments.

European companies fully understand the importance of becoming more sustainable and of addressing risks that can occur in their supply chains. Companies recognise the advantages of a harmonised EU framework on due diligence, which is also applicable to third-country companies operating in the EU. However, key conditions must be met related to workability, proportionality, legal certainty and level playing field.

The regulatory framework needs to be in line with, and complement, established tools such as the OECD Guidelines for Multinational Enterprises (OECD guidelines)[1], United Nations Guiding Principles on business and human rights (UNGPs)[2], the existing or in-the-making European climate and environmental policies (e.g., the Corporate Sustainability Reporting directive proposal or CSRD) as well as sectoral schemes that strengthen the role and engagement of European companies as ambassadors of European values across supply chains. Coherence with other EU due diligence measures (adopted or ongoing) is paramount to avoid duplication.

[1] See, https://www.oecd.org/daf/inv/mne/48004323.pdf and OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf
[2] See, https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf

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A holistic approach is necessary, that will encourage and help European companies to contribute to more sustainable supply chains. Due diligence should, according to international frameworks, be considered as a positive measure – not as a means of punishment. Due diligence has value in identifying problems and risks, to start a process towards identifying solutions. The proposal should therefore focus on process requirements rather than performance requirements, to create real change and not simply a box ticking exercise. European initiatives on due diligence must be enabling and educational in nature rather than punitive and prescriptive. It is essential to keep seeing enterprises in their very nature – as creators of growth and employment – to not jeopardise economic prosperity, which is a pillar perspective of sustainability. Without competitive companies there is no wealth, investment, innovation, employment nor tax revenue to finance and support progress in sustainability. A non-workable due diligence framework would seriously damage Europe as a business location and harm the competitiveness of European companies, thereby endangering the full goals of sustainability.

BUSINESSEUROPE below outlines the main focus areas for business in the European Commission's (hereafter "the Commission") proposal for a Directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (hereafter "the proposal"), alongside suggestions for improvements.

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KEY MESSAGES

- Business supports the aim to have an EU due diligence framework that is effective, **workable**, creates **a level playing field** and does not hold European companies responsible for factors beyond their control. Unfortunately, the current proposal would not deliver on these goals.

- By extending the scope of the legal obligations to the whole value chain including the financial sector (triggering spill over-effects), expanding disproportionately civil liability, and unjustifiably mixing due diligence with corporate governance, the proposal sets an inefficient system based on **unrealistic expectations** on companies harming their competitiveness. In line with the most ambitious national laws in the EU, due diligence obligations **should not be extended to downstream activities** such as customers and users and should remain primarily focused on first-tier direct suppliers.

- **Better regulation principles must be upheld**. The Commission's own Regulatory Scrutiny Board pointed to serious flaws in the impact assessment, twice, which have not been appropriately addressed upon publication of the proposal.

- There needs to be a shift from the apparent punitive nature of the provisions to a more engagement- and learning-oriented one which recognizes that **companies want and can be catalysts for the positive sustainability transition** by building a due diligence system, within the limits of a supply chain approach on a **risk-based model.** A system of **"stay and behave" rather than "cut and run"** must be incentivised.

- The proposal **needs to target a better level playing field in its different dimensions**. It leaves too much room for Member States to add-on, which could lead to a patchwork of rules undermining one of the initiative's main objectives: fighting legal fragmentation. If we want European companies to remain competitive on a global arena, while at the same time enabling them to promote sustainability and human rights in an impactful manner, the framework needs to **be more harmonised** between Member States and ensure a better level playing field in relation with **third-country companies**.

- The **material norms** listed in the Annex which could be violated by adverse impacts, and make up a key element of the proposal, should be redrafted to make them applicable and to avoid mixing the role of states and companies.

- The Commission proposal includes a **lot of complex, unwieldy, unclear and, to some extent, completely new terminology** compared to existing international frameworks and guidelines (UN/OECD) that companies have worked with the last ten years. Legal certainty and a clear view on legal responsibilities and expectations are essential to enable companies to work for sustainability and keep applying a long-term perspective to their operations.

- Although **small and medium-sized companies (SMEs)** are formally not in the scope, they will be largely impacted in many ways which makes it paramount to get the framework right.

- References to **flanking supporting measures** and to **sectoral schemes** are welcomed but more emphasis, clarity and recognition should be given to these important tools.

- The proposed **rules around a general directors' duty of care rely on wrong premises** and risk leading to unnecessary and adverse interference with national company law systems, breaching the principle of subsidiarity. These rules are neither justified by the Commission's own impact assessment, nor do they fit a general due diligence framework.

SPECIFIC COMMENTS AND SOLUTIONS

I. What is necessary for a balanced EU framework on corporate due diligence

I.1. Making the framework effective, workable and proportionate

A supply chain approach is the only one manageable and realistic

The proposal applies to value chain operations which covers both the downstream and upstream operations of a company. It covers companies own operations, operations of their controlled subsidiaries, and entities with whom the company has an established (direct or indirect) business relationship. The directive makes no distinction between operations in the EU and operations outside of the EU.

European companies are keen to be part of the multifaceted effort towards global sustainability and work actively to include it as a core of their business strategies and business models. European companies also fully stand behind the EU's objective to ensure respect for human rights and the environment through a harmonised regulatory approach to due diligence.

Nevertheless, it is very challenging, if not practically impossible, for a company to control its whole value chain, upstream (supplier side) as well as downstream (e.g., clients, retailers, product in use). Such an approach is unlimited both in scope and in time. The Commission's own study from 2020[3] that influenced a big part of the Impact Assessment covered mainly supply chains, not value chains. It is not in the hands of a company to control and take legal responsibility for a customer's action. In fact, the most ambitious national laws in the EU on due diligence do not extend to downstream relationships. Relevant rules can already be found in other fields of EU law regarding downstream operations, for example, in terms of export control of sensitive materials (e.g., dual-use goods, military goods). As the text currently stands, a European exporter could find himself in the situation where his liability is engaged even if he benefits from an export license granted by a Member State.

Such a far-reaching scope would also directly affect the competitiveness of European companies if they were bound by law to carry out these types of demands on customers in

[3] https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en

their third-country operations for instance with public customers (e.g., public administrations), while foreign companies in the same market do not do the same or local authorities do not facilitate access to information. In addition, it would for many companies with dynamic customer-supplier relations create adverse effects on the way they operate (e.g., by putting up requirements for companies to do due diligence on each other simultaneously).

To ensure feasibility and a realistic possibility of achieving the objectives of the proposal, mandatory (and comprehensive) provisions should be limited to those parts of the supply chain with which companies have a direct contractual supplier relationship (primarily first tier). This is more efficient and effective as well as in line with other national mandatory frameworks (e.g., France, Germany). This is without prejudice to companies applying the OECD Guidelines and UNGPs to their interactions in value chains, something they can continue to do either individually or via sectoral and other non-mandatory initiatives.

The scope needs to be proportionate, viable and risk-based

The proposal targets companies with more than 500 employees and turnover of above EUR 150 million. Other companies between 250-500 employees and net turnover of EUR 40 million operating in specific sectors (agriculture and food, mining, garment, and footwear, forestry, and fishing, etc.) would be phased in four years after entry into force. SMEs with fewer than 250 employees are exempted. Third-country companies covered when meeting specific (EU generated) turnover thresholds of EUR 150 million or 40 million depending on certain circumstances. It extends to operations of business partners whether direct or indirect (beyond the first tier).

In its current form, the proposal would create one of, or even the most, stringent mandatory due diligence framework in the world regarding material reach and sizes of companies covered. The EU's ambition to be a model-setter need to be carried out in a realistic way to generate uptake elsewhere in the world. It is not reasonable to hold European companies liable for issues that are outside of their control.

European companies are already operating in a challenging supply chain context, not least due to the Covid-19 pandemic but also the war of Russia in Ukraine which has aggravated the situation even further. On this point, and as vigorous and complex sanctions on Russia are currently being implemented, it is clear that due diligence is a very complicated process for companies, which are confronted with conflicting legislation and the need to diversify.

The proposal refers[4] to numerous requirements that appear highly onerous, for example, reviewing periodically across the whole value chain, with annually as the maximum length of review, assessing baseline environmental conditions at value chain sites as well as business relationship's business model and strategies, including trading, procurement, and pricing practices. This would seem to counter an effective risk-based approach, which underpins the current OECD guidelines and UNGPs.

Inclusion of temporary agency workers for the calculation purposes of the worker thresholds in Article 2(3) is not appropriate as it could lead to an erratic situation where a company is a few months in and others outside of the scope. In some systems, temporary agency workers are employees of the agency, not the client company.

Businesses' very core is to plan ahead and strike a long-term approach to their operations (even ahead of future legislation), which the proposal makes very difficult due to its extensively and impractically broad scope.

The questionable addition of high impact sectors needs to be reconsidered

Article 2(1), point (b) prescribes companies with more than 250 employees and a net worldwide turnover of more than EUR 40 million operating in high-impact sectors to adhere by parts of the proposal. The high impact sectors listed:

> *(i) the manufacture of textiles, leather and related products (including footwear), and the wholesale trade of textiles, clothing and footwear;*
>
> *(ii) agriculture, forestry, fisheries (including aquaculture), the manufacture of food products, and the wholesale trade of agricultural raw materials, live animals, wood, food, and beverages;*
>
> *(iii) the extraction of mineral resources regardless from where they are extracted (including crude petroleum, natural gas, coal, lignite, metals and metal ores, as well as all other, non-metallic minerals and quarry products), the manufacture of basic metal products, other non-metallic mineral products and fabricated metal products (except machinery and equipment), and the wholesale trade of mineral resources, basic and intermediate mineral products (including metals and metal ores, construction materials, fuels, chemicals and other intermediate products).*

Lowering the threshold of the scope for companies operating in specific sectors is not convincing. The **list of high impact sectors is very broad** and covers most of the economy including everything produced within a sector regardless of whether the actual product or

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[4] See, Recital 30 of the proposal.

service can be deemed to have a high impact on human rights and environment. This embodies a punitive approach of sectors rather than a positive one which is meant to leverage the positive impact of European companies in the respective sectoral supply chains. The idea of high impact sectors should therefore be reconsidered. If it remains in the final text, different suggestions to make it more efficient and proportionate should be explored. For example, by:

- Limiting the list of high impact sectors to certain parts of sectors, as it was done with the Conflict Minerals Regulation where there is a clearer distinction between the operations and the operators.
- Limiting within different stages of production as not all stages nor all types of products present significant risk for human rights and the environment.[5]
- Working with lists of products with (high impact) codes, for example the HS codes used in the Combined Nomenclature or NACE codes. They provide a universal method of classifying products, and it would enable for distinction between more problematic products within a certain sector.
- Developing simplified reporting obligations accompanied by interpretation guidelines.

A flexible solution for due diligence at group level should be favoured

The proposal does not provide enough clarity on what happens to due diligence obligations **at the level of groups**. In particular the definition of “company” (Article 3, point (a)) seem to indicate that the requirements of the proposal are set at company level, not at group level, even though Article 5 refers to the possibility for groups to share resources and information within the group. This would imply that a company from a Member State with subsidiaries within the scope operating in other Member States will have to follow the possibly diverging decisions of various national supervisory authorities. Such an arrangement would not only be practically difficult to handle for the companies but also more cumbersome, for example in terms of reporting requirements (Article 11) and unnecessary costs. It would also lead to overlaps and even contradictions between companies within the same group.

Many groups already successfully and efficiently perform due diligence, and they have structured this work in different ways. Instead of setting up their due diligence and compliance functions on a (business) unit by unit basis, these functions are usually group-wide functions. Therefore, groups should have the flexibility to structure their due diligence

[5] For example, the second transformation of metal products (i.e., the manufacture of basic metal products, other non-metallic mineral products and fabricated metal products). This would amount to carrying out due diligence on products that do not present significant risks for human rights or the environment, such as hairpins and other products containing residual metal.

work according to the business model of their particular group – as long as the group performs the due diligence as required by the future directive.

A **solution at group level presents multiple advantages** which should not be overlooked:

- Avoids fragmentation of approaches within the group, helps identifying impacts across a group and prevents a reoccurrence.
- Helps fostering the general improvement of groupwide compliance management systems and measures.
- Allows synergies within the group to build trust, harmonise trainings and awareness and thus ensure the effectiveness of the due diligence policy and thereby processes.
- More coherence when it comes to disclosure mechanisms, reporting procedures and handling of reports/complaints.[6]
- Better placed to deal with differences in national legislation which will likely occur during the transposition of this proposal across all the 27 Member States. A group solution can serve to align or even go beyond the highest denominator.
- Increased negotiating leverage in the supply chain to obtain required changes.

Drawing inspiration from international standards is positive but should be adapted and properly framed

It would be beneficial to better align the proposal with existing international frameworks for responsible business conduct and due diligence, e.g., from the OECD Guidelines and the UNGPs, which are well understood and appreciated not only by business, but also other stakeholders. Nevertheless, the open, voluntary recommendations of the OECD Guidelines and the UNGPs cannot simply be transposed into mandatory law. The aim of the alignment should rather be to ensure that the spirit of these standards is reflected in the EU proposal, for example by:

- **Relying on accepted concepts** rather than inventing new and untested vague ones.
- Clearly delineating between **business responsibility to *respect* and state responsibility to *protect*** human rights (UNGPs).
- Recognising the role of National Contact Points (NCPs) as a non-judicial, non-adversarial forum, which helps to avoid further escalation of disputes, as incorporated in the OECD Guidelines.

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[6] This is acknowledged in the original Commission version as well as the Council's general approach of the Corporate Sustainability Reporting Directive (CSRD) proposal which provides for an exemption for subsidiaries, if there is reporting at group level.

- Giving more emphasis to a learning-oriented approach based on engagement and support.
- Clarifying Article 7 and 8 as well as the definition of appropriate measures in Article 3(q) is required to allow for the prevention action plan and the thereby following **actions of due diligence taken by the company to be proportionate to the significance and scale of the adverse impact and to the contribution of the company's conduct to the potential adverse impact**. In other words, allowing companies to prioritise between adverse impacts, which is one of the features in the OECD guidelines.

In addition, the proposal mixes obligations of *prevention* and *mitigation* contrary to what is clearly distinguished in the OECD guidelines. Paragraphs 3 to 6 of Article 7 are not based on a logical preventive approach, instead they aim at negative impacts that have already occurred which **overlap** with Article 8 about mitigating and putting to an end impacts. It is therefore recommended that Article 7 is redrafted to be made consistent by adding the following wording (which would replace paragraphs 3-6): "*As regards potential adverse impacts that could not be prevented by the measures in paragraph 2, article 8 shall apply*".

The proposal requires that companies adopt a code of conduct with rules and principles to be followed by employees and subsidiaries (Article 5(1), point (b)) and extends the application of this code of conduct to the established business relationships (Article 5(1), point (c)) via contractual assurances (Article 7(2), point (b) and Article 7(3)). However, it is unclear if the requirements in Article 7(2), point (b) and Article 7(3) apply to business relationships (which seems to be the case if read independently) or only to established business relationships (if read in the context of Article 5(1), point (c)).

There is substantial unclarity around these requirements and definitions. Also, the internal "codes of conduct" that the proposal refers to cannot be exported or automatically transposed to all established business relationships in the same supply chain (e.g., because of different target groups or different laws that apply from one country to another). Companies should therefore be encouraged to promote the general principles of their "codes of conduct" (or ethics charter), particularly in the context of contractual clauses, rather than requiring the *stricto sensu* extension of their application to commercial relations.

The inclusion of financial sector could lead to spill-over of obligations

The **inclusion of regulated financial undertakings** could create adverse effects as this sector is already heavily regulated in relation to sustainability. The consequences of including this sector have not been analysed in the Commission's Impact Assessment. By

being included fully in the scope there is a risk of unintended, disproportionate spill-over effects far beyond the defined risk sectors and company sizes onto non-covered companies outside the financial sector when they are looking for loans, investment, etc. As it stands, Article 6(3) could severely hinder access to finance by European companies and should therefore be reconsidered or deleted.

In addition, it is also unclear – considering Articles 7(5) and 8(6) – whether for future contracts it would still be possible for EU banks or insurers to provide new financial services to companies that have violated the proposed directive. A consequence of this could be increasing reliance on foreign financing.

Suggested improvements on effectiveness, workability and proportionality	⇒ Replace all value chain references to supply chain. ⇒ Reconsider the concept of high impact sectors. If it remains, revision is necessary for example by narrowing it down through limiting the list of high-impact sectors to certain parts of sectors or use lists of products like the HS codes used in the Combined Nomenclature or NACE codes. ⇒ As regards companies referred to in Article 2(1), point (b), and Article 2(2), point (b), the Commission should develop simplified reporting obligations and, no later than one year after the entry into force of this proposal, provide interpretation guidelines to support them in fulfilling their obligations. ⇒ Clarify Article 7 and 8 as well as the definition of appropriate measures in Article 3(q) to allow for the prevention action plan and the thereby following actions of due diligence taken by the company to be proportionate to the significance and scale of the adverse impact and to the contribution of the company's conduct to the potential adverse impact. ⇒ Further clarity fulfillment of obligations at the level of the group. Groups of companies must have flexibility to organize due diligence and reporting in accordance with their business model and have the option to implement the due diligence plan at group level. Companies should be entitled to share resources (e.g., setting up joint-complaint procedures) and information within their respective groups of companies.

I.2. Ensuring a level playing field within the EU and vis-à-vis third country companies

Fragmentation of the EU single market must be avoided

The current proposal includes no provisions that limit the ability of a Member State to legislate beyond the provisions of the proposal, because it is a minimum (standards) harmonisation directive. This is **not delivering a level playing field** and contradicts the main justification of the proposal which underpins the used legal basis (Article 50(1) and (2), point (g) of the TFEU), namely, to fight legal fragmentation to ensure one of the EU fundamental freedoms (right of establishment), fair competition and ultimately to stimulate sustainable investment.

To limit this harmful fragmentation, **targeted full harmonisation** on essential elements must be ensured *ad minimum*. One technique could be to replicate what it is done in EU consumer law directives which include an "internal market clause"[7]. In accordance with this clause Member States *"shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more, or less, stringent provisions, unless otherwise provided for in the Directive".*

Furthermore, given that in the EU territory there is a very high standard regarding human rights and environment with dozens if not hundreds of legally binding frameworks, it seems disproportionate to impose the same obligations on companies in all their **intra-EU operations**. This leads to additional administrative burden for operations purely within Europe, where there is already a very high level of regulation and compliance.

The conditions for third-country companies need to be akin to conditions met by EU companies

The proposal does also not provide a level playing field in relation to third-country companies. Firstly, because the thresholds for non-EU companies are much higher than for EU companies (EUR 150 million turnover *inside the EU* for third-country companies, while for EU companies EUR 150 million *worldwide)*. This means that in practice EU companies under the scope of the proposal will likely be smaller than third-country companies, and the obligations on foreign companies will be limited compared to what is put upon EU

[7] See, as example Directive 2019/771 on sale of goods from 2019: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L0771

companies. The Explanatory Memorandum[8] even recognizes this regarding directors' duties which will not be applicable to foreign companies.

An idea could be to rework the turnover criteria, so that for both European and non-European companies the relevant turnover is calculated on what is generated in the EU.

As currently written, neither a subsidiary established in one or more Member States which does not fulfil the criteria in Article 2(1), nor a branch office of a large third-country company would fall under the scope of the proposal. The third-country parent company itself would only fall under the scope of the proposal if it fulfils the criterion of Article 2(2).

In addition, the different provisions of due diligence, and also Article 15 which goes beyond due diligence, will be very difficult to apply on foreign companies as it is uncertain how Member States can effectively enforce the rules and, if needed, sanction non-EU companies operating in the European market while still respecting the principle of *non-bis in idem*. Given the highly regulated environment European companies will have to operate in compared to their competitors worldwide, competitiveness of European companies will be hampered.

Suggested improvements on delivering a fairer level playing field	⇒ At least key provisions should be fully harmonised to avoid discrepancies to emerge between Member States' transposition laws. One technique could be to apply targeted full harmonisation on essential elements (using an "internal market clause") as it is done for example in several EU Consumer Law directives. ⇒ Consider adjusting turnover threshold so that it is calculated on turnover generated in the EU for both European and foreign companies.

[8] See, page 16 of the proposal.

I.3. Providing legal certainty and clarity

Clarity of material norms that companies must adhere to is crucial

Companies shall conduct human rights and environmental due diligence by integrating due diligence into their policies as well identifying, preventing, mitigating, and bringing to an end adverse impact on human rights and environment. The lists contained in the Annex specify the adverse environmental impacts and adverse human rights impacts relevant for this Directive, to cover the violation of rights and prohibitions including the international human rights agreements (Part I Section 1), human rights and fundamental freedoms conventions (Part I Section 2), and the violation of internationally recognised objectives and prohibitions included in the environmental conventions (Part II).

The **material norms listed in the Annex** which make up a key element of the proposal, **pose serious problems: they are numerous, mostly government-to-government standards** and many of them are unclear and/or unfit for application by companies. Several of these rights are not even formulated in such a way that they can be invoked in a private-to-private relation posing additional problems regarding sufficient legal certainty.

The absence of a manageable set of applicable material norms is an existential concern, as legal certainty for companies, supervisory authorities and judges depends on it. Some of the described norms appear to include substantial interpretation of the directly referenced Declaration and Covenant references – without indication of the legal basis for these interpretations[9]. Moreover, the proposal states that **the list of the norms is not even exhaustive[10]**. This ‘catch all’ text defeats the purpose of listing the prohibitions and objectives that are in scope of the proposal. The annex needs to be clear and specific: rule of law requires that legislation is intelligible, clear, and predictable.

In France, the **Conseil constitutional declared the civil sanctions** in the French *devoir de vigilance* law [11] unconstitutional (a feature of the original bill) precisely because the sanctions could be based on violation of large and vague concepts.

Compared to laws such as the German *Lieferkettengesetz*, more environmental conventions (7 instead of 3) are listed in the Annex and likewise, the Human Rights due diligence

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[9] For example, point 18 in Annex Part I is in essential a human right to a clean environment, which has not yet been incorporated in any treaty. Thus, it is not part of and does not flow from the referenced documents: art. 3 of the Universal Declaration of Human Rights, Article 5 of the International Covenant on Civil and Political Rights and Article 12 of the International Covenant on Economic, Social and Cultural Rights.

[10] See, Recital 25 and point 21 of Part I of Annex of the proposal.

[11] Décision n° 2017-750 DC du 23 mars 2017.

obligations refer to further conventions on Human Rights and fundamental freedoms (22 instead of 11). This also increases the legal uncertainty of whether to apply international standards or local law when implementing due diligence in supply chains.

The enumeration of the many norms/principles/treaties in the Annex risks **mixing the role of states and companies**. European companies are obliged to *respect* human rights, but do not have the mandate nor the ability to solve the problems arising in states with weak judicial systems. Those states have, in accordance with the UNGPs, a duty to *uphold and protect* human rights and environment. By self-imposing this wider obligation on companies, the EU would de facto force companies to decouple from many operations in third states and at the same time jeopardise European competitiveness.

The definition of business relationship must be revised

*A **business relationship** (Article 3, point (e) is defined as a 'relation with a (sub)contractor or any other legal entity with whom the company has a commercial agreement, or which performs business operations related to the products or services of the company, for or on behalf of the company. An established business relationship (Article 3, point (f) is defined as a business relationship, whether direct or indirect, which is, or which is expected to be lasting, in view of its intensity or duration and which does not represent a negligible or merely ancillary part of the value chain.*

The **definition of established business relationships** is very broad and operationally difficult to apply. Which intensity or duration is to be considered as established, and can an indirect business relationship really be considered established? There is a substantial risk of different interpretations from Member State to Member State and from judge to judge.

Further, it is a new concept not formerly known nor used by the UNGPs and OECD guidelines which companies already know and work with. Therefore, this concept needs to be more clearly defined and should be limited to direct contractual suppliers only and not throughout the whole value chain (upstream and downstream).

'*For or on behalf of the company*' (Article 3, point (e)) seems to indicate that some form of explicit understanding between the parties should exist, and thus a direct relationship. This unclarity becomes more prominent when looking at concrete due diligence obligations: Articles 7(2) and 7(3) (prevention) and Articles 8(3) and (4) (bringing to an end) and Article 22(2) (civil liability). Direct or indirect is not defined there. It is unclear how these rules are supposed to be implemented by companies in practice.

Another unclarity is the meaning of **'*which is or is expected to be lasting*'** - what is 'lasting'? An important one-off supply is not lasting, but should it not be subject to due

diligence as well? Also, what is the meaning of ‘*not a negligible or ancillary part of the value chain*’? This leaves large room for interpretation and provides no clear criteria.

Concept of model contractual clauses and cascading - clarification needed

> *Article 12 states that to provide support to companies to facilitate their compliance with [Articles of the Directive] the Commission shall adopt guidance about voluntary model contract clauses.*

It is important that the proposal puts forward measures that facilitate compliance with its obligations. Model contractual clauses could have some added value provided that certain conditions are met around how they are drafted and which legal value they have. Questions arise how such clauses can be imposed, and its compliance monitored.

There needs to be a clarification regarding **their actual impact on the liability for breaches of law and for damages.** The connection between Article 7(2), point (b), Article 8(3), point (c), Article 12, Article 17 (supervisory authority) and Article 22 (civil liability) needs to be better clarified. Expressions like *seek contractual assurances*, *prevention action plan*, *contractual cascading from a direct business relationship* etc. seem to be formulated as obligations of means. However, it should be stated more clearly under what conditions the proposed directive considers that the obligation of means is reasonably fulfilled. Legal certainty on this point is essential, considering the key instrumental role the Commission assigns these clauses in determining compliance with the proposal’s obligations.

These model clauses should be developed in collaboration with businesses, which will be implementing the clauses in their day-to-day operations, and which have the contractual experience around supply chains. They should also be available as soon as possible and before the transposition deadline, so companies have scope and means to assimilate and implement them where relevant in the operations.

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The definition of a company's stakeholders must be company relevant

Article 3, point (n) defines 'stakeholders' as the company's employees, the employees of its subsidiaries, and other individuals, groups, communities, or entities whose rights or interests are or could be affected by the products, services and operations of that company, its subsidiaries, and its business relationships.

This **definition of stakeholder basically means anyone on earth** can be considered as a stakeholder, which can have far-reaching consequences for what companies will have to deal with e.g., in terms of complaints. Alternative definitions of stakeholder should be considered, for example drawing inspiration from existing European Court of Justice case law[12]. A stakeholder could be defined as a person who has specific attributes peculiar to them or by reason of circumstances that differentiate them from all other persons and who has a specific and actual (or soon to occur) injury that is causally connected to the conduct complained of that a favourable decision is likely to cure.

Stakeholder consultation must follow the **logic of prioritising exchanges**, especially if there are many of them, to avoid the multiplication of contacts with each individual likely to be affected. It is recommended to add wording to Articles 6(4), 7(2), point (a) and 8(3), point (b) that allow companies to prioritize the consultations. If the company can demonstrate sincere effort on the part of stakeholder consultation, this should be taken into account. The potential unwillingness of stakeholders to be involved should not be to the detriment of the company.

Suggested improvements on how to provide legal clarity	⇒ Revise and shorten the list of norms/conventions in the Annex and deletion of point 21 in the Annex. ⇒ Revise definition of "business relationship", for example by deleting all references to "indirect" and make it coherent throughout the proposal. ⇒ Clarify the procedure of model clauses and how they are to be developed, including reference to industry involvement. The Commission should publish model contractual clauses as soon as possible to support companies in implementing the proposed Directive and

[12] Plaumann & Co v Commission, Case 25/62, 15 July 1963. It defines stakeholder as follows: i.e., "persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed"

	fulfilling their obligations (at the latest 6 months after its entry into vigour). ⇒ Clarify some of the key definitions in Article 3. Redefine "stakeholders" drawing inspiration, for example, from existing ECJ case law.

I.4. Establishing balanced enforcement and sanctions mechanisms

Adequate and proportionate sanctions

Using guiding criteria for Member States to assess whether to impose a penalty and at what level is preferable to proposing turnover-based fines. It is important that Member States have a similar view on the relationship between the severity of an offence and the sanctions applied by the competent authorities. In fact, harmonisation in key aspects of enforcement is essential to guarantee a level playing field.

The Commission's own reports[13] confirmed that it is difficult to draw a conclusion about whether specific penalties like turnover-based fines have a better performance in terms of trust or on enforcement. Other factors than turnover tend to be more appropriate to determine the level of fines, for example: severity of the infringement; the distinction between procedural shortcomings and material adverse impacts, intentionality; risk for the property, physical integrity, and interests of the citizens; damages; type and size of the breach; repetitive nature of the breach, etc.[14]

In addition, the proposal refers[15] to a certain number of rights which are not ratified nor legally authorized in many parts of the world (e.g., ILO Conventions on Right to Organise and Collective Bargaining Convention). Even if European companies would like to foster those rights, the legislative frameworks of some third countries do not allow or do not always authorize them to do so. Therefore, companies subject to the proposed directive should not be sanctioned in this type of situation (e.g., when the third country prohibits unionization).[16] A suggestion could be to modify Article 20 (2) as follows:

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[13] For example, Consumer conditions scoreboard: consumers at home in the single market - 2017 edition.
[14] See for example Directive 2019/2161 (Omnibus directive, New Deal for Consumers).
[15] See, Annex to the proposal.
[16] See OECD MNE Guidelines, Chapter 1 Concepts and principles, point 2: 'Obeying domestic laws is the first obligation of enterprises. The Guidelines are not a substitute for nor should they be considered to override domestic law and regulation. While the Guidelines extend beyond the law in many cases, they should not and are not intended to place an enterprise in situations where it faces conflicting requirements. However, in countries where domestic laws and regulations conflict with the principles and standards of the Guidelines,

"In deciding whether to impose sanctions and, if so, in determining their nature and appropriate level, due account shall be taken of ***the legal framework applicable in the country where the adverse impact occurred,*** *the company's efforts to comply with any remedial action required of them by a supervisory authority, any investments made and any targeted support provided pursuant to Articles 7 and 8,* ***cumulative effects of the different measures and sanctions already imposed on the company*** *as well as the collaboration with other entities to address adverse impacts in its ~~value~~* ***supply*** *chains, as the case may be".*

The proposal also provides for various measures and sanctions which, taken together, can have major consequences on companies:

- Financial compensation to be paid to affected persons (article 8(3), point (a)).
- Obligation to comply with measures imposed by the supervisory authority (article 18).
- Obligation to make investments (Article 7.2, point (c) and Article 8.3, point (d)).
- Financial penalties (Article 20(3)).
- Suspension or termination of the commercial relationship which may lead to loss of incomes (Article 7(5) and 8(6)) and/or possibly having to pay more to replace a partner (e.g., supplier).
- Deprivation of public support (Article 24) if one is in violation of one of the obligations of the proposed directive.

In this regard, when exercising their powers and deciding to impose sanctions, supervisory authorities should take due account of the cumulative effects of the above measures and sanctions imposed on companies. Any decision should be reasonable, non-discriminatory, and proportionate. Furthermore, supervisory authorities should ensure a strong and deep coordination to avoid a multiplication of request and information from a same company. Achieving harmonisation on these elements is very important.

In Article 24 the proposal establishes that companies breaching the duties of the proposed directive will be deprived from public support. Not only is the concept of public support vague but the way this consequence is laid out is not in line with the principle of proportionality as:

- it might lead to double punishment for the same facts (*ne bis in idem*).
- it does not contain any time limitation (a company can be punished for ever).
- it does not make any distinction on severity nor nature of the infringement.

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enterprises should seek ways to honour such principles and standards to the fullest extent which does not place them in violation of domestic law'.

- it gives rise to fragmented implementations by Member States who define public support differently and thus distorts the level playing field.
- by not being subject of appeal it violates basic standards of rule of law.

Article 24 should therefore be deleted.

Civil liability regime proposed is complex, disproportionate and will invite frivolous litigation

Articles 22(1) and 22(2) states that Member States shall ensure that companies are liable for damages if they failed to comply with the obligations laid down in Articles 7 and 8 and as a result of this failure an adverse impact that should have been identified, prevented, mitigated, brought to an end or its extent minimised through the appropriate measures laid down in Articles 7 and 8 occurred and led to damage. According to Article 22(3), the civil liability of a company for damages arising under this provision shall be without prejudice to the civil liability of its subsidiaries or of any direct and indirect business partners in the value chain. Article 22(5) says that Member States shall ensure that the liability provided for in provisions of national law transposing this Article is of overriding mandatory application in cases where the law applicable to claims to that effect is not the law of a Member State.

Article 22 raises three fundamental concerns:

1) It mixes up liability of companies for own acts and responsibility for the acts of others.

2) It regulates liability without providing neither legal certainty nor real harmonisation

3) It unjustifiably interferes with international private law.

This provision as its stands is therefore highly problematic and creates risk of excessive litigation and should be removed.

Below a more detailed description of the most problematic elements in Article 22:

- It would **effectively make companies liable for damage not caused by their own actions**, but rather by the actions of others. This is bound to lead to significant difficulties in practice and uncertainty for businesses. It could also have the effect of shifting liability away from the actual perpetrators of the damages (if those who have suffered damage simply elect to sue the companies that are subject to the proposed directive in Europe), diminishing the deterrent effect of damages actions.

- It does not indicate whether **intentionality or gross negligence needs to be part of the legal assessment** (is objective liability possible in these cases?) which is essential in EU civil law traditions.
- It does not clearly stipulate that **civil liability should only apply if (i) due diligence has not been appropriately carried out and (ii) usual rules of civil liability are satisfied** (damages occurred because of an attributable conduct and a sufficient causal link between the two is established). On the contrary, Article 22 introduces civil liability for companies even if a company could only have identified the potential for an adverse impact but could not have prevented the adverse impact or the damages resulting from it. This would go against what is widely acknowledged in EU civil law traditions.
- Article 22(2) largely but not entirely excludes liability for damages caused by **indirect business relationships** but using quite complex legal drafting. But because of the wording of Article 22(2), it also introduces civil liability in specific case of damages caused by indirect business partners while the company did have due diligence measures which in general are considered appropriate. Article 22(2) makes companies with generally appropriate due diligence measures liable for damages caused by indirect business partner where it was "unreasonable … to expect" that the generally appropriate due diligence measure would be adequate. This means lawful behaviour of companies (generally appropriate due diligence measures) can still lead to civil liability unless the company sets up individual due diligence measures regarding each and every indirect business partner. This cannot be done considering supply and value chains of companies can contain 10s to 100s thousands of business partners in tier-1 only. Furthermore, the prerequisite "unreasonable … to expect" is too vague, giving to much room for interpretation and therefore providing the company with no foreseeability, which is a key necessity for civil liability rules. It should be noted that **a company does not control its indirect, but neither its contractual, business partners and the company's degree of leverage along the chain of suppliers may vary widely**. At most companies can try to introduce general provisions for behaviour and actions of another person in a contract – but they can neither one-sidedly force a business partner to sign a contract nor can companies ensure business partners in reality actually adhere to their contractual obligations.
- In the second subparagraph of paragraph Article 22(2) criteria are introduced (e.g., company's efforts, etc.), which shall be taken into account when assessing existence and extent of liability. It is unclear whether such type of consideration would lead to a **mitigation of civil liability**, e.g., reduction of the amount to be paid, or as a "punitive damages" way. It should be clarified that it would only be the former.

- Article 22(3) article points to a **joint and several liability**, but without clarifying what the company can ask from the entities that actually caused the damage (right to redress). A company should **not be made responsible for acts of non-controlled subsidiaries (vicarious liability)** as this would amount to a violation of the principle of autonomy of legal entities embedded in national company laws.
- For the purposes of assessing liability, Article 22(5) seems to indicate that EU law would be extended to impacts occurred in third-country operations even if the specific case would not be covered by a Member State's tort law. This amounts to a simplified extension of applicable law **raising important questions from an international private law perspective**. It interferes with existing and well-established international private law rules without a convincing justification, leading to problems such as parallel litigation processes and *lis pendens*.[17] There is no need for new rules to ensure cases concerning events in other countries can be adequately brought before and decided by courts in the Member States. The current rules of international private law, in particular the Rome II Regulation, already provide for a sufficient and comprehensive framework on which law is applicable to which case and allow events which happened in third countries to be brought before (competent) civil courts in the Member States. Therefore, this provision should be deleted.
- The proposal's **definition of stakeholder** mentioned above, is also very problematic in the context of civil liability. If not redefined and delimited, the definition of stakeholders could expose companies to future potential third-party illegitimate complaints which would risk creating an immense wave of litigation processes and accusations at companies holding them responsible for damages that they could not control.

In conclusion, the introduction of extensive, unclear, and disproportionate civil liability rules would create enormous legal uncertainty and the risk of excessive litigation for companies with complex supply chains. Therefore, Article 22 as it stands should be removed.

[17] Proceedings involving the same cause of action and between the same parties brought up in the courts of different countries.

The power of supervisory authorities must be delimited and streamlined

> *Article 17 prescribes Member States to designate one or more national supervisory authorities which would have a minimum set of enforcement and investigation powers. Article 18 outlines these powers. Article 19 states that Member States shall ensure that natural and legal persons are entitled to submit substantiated concerns to any supervisory authority when they have reasons to believe, based on objective circumstances, that a company is failing to comply with the national provisions adopted pursuant to this Directive ('substantiated concerns').*

The proposal foresees far-reaching powers for authorities. Investigative powers (e.g., on-site *unannounced* inspections) go even beyond what classical national authorities are entitled to do today in areas which are far more specific in terms of regulation (e.g., consumer protection). The proposed powers are not appropriately counter-balanced with due process and they lack appeal rights for companies targeted. There is not even an indication that the competences of the new appointed authorities are limited to activities that have some link with the European Union.

According to Article 17(1) the competence of the supervisory authority is limited to the due diligence obligations in Articles 6 to 11, as well as the obligations in Articles 15(1) and 15(2) regarding climate plan and carbon reduction targets. In contrast, the wording of Article 19 concerning "substantiated concerns" that can be brought before a supervisory authority is unlimited and refers instead to all breaches of the proposed directive. This would mean that any external stakeholder could bring a case before a supervisory authority also regarding the rules on directors' duties in Articles 25 and 26, and executive remuneration in Article 15(3), if these articles remain in final Directive.

The current combination between the lack of legitimacy requirements of submitted complaints, lack of mechanisms for filtering out frivolous complaints at an early stage and the seemingly unlimited powers of the supervisory authorities create huge risks and are on the verge of being contrary to rule of law.

There must be some criteria (e.g., legitimate interest) to be fulfilled at least by legal persons submitting concerns, as well as safeguards around public disclosure of commercially sensitive information. It is also unclear which parts of the proposed directive the supervisory authority is intended to have the competence to enforce. For the sake of coherence, these requirements should justifiably be mirrored in Article 9 with regard to the company own complaint procedure.

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The **competence of the supervisory authority** should be limited to the diligence obligations in the proposal, i.e., Articles 6-11, which is the focus of the proposal. It would be very problematic if the right to submit substantiated concerns (Article 19) and the competence and powers of the supervisory authority (Articles 17-18) also were applicable to corporate governance provisions since these are of completely different nature and thus should be handled accordingly.

Suggested improvements on establishing balanced enforcement and sanctions mechanisms	⇒ Sanctions should only apply to breaches of concrete obligations (e.g., failure to follow formal instruction from an authority), not breaches of open norms or principles that are not addressing companies in the first place. ⇒ Modify Article 20(2) as follows (additions in red): "*In deciding whether to impose sanctions and, if so, in determining their nature and appropriate level, due account shall be taken of the legal framework applicable in the country where the adverse impact occurred, the company's efforts to comply with any remedial action required of them by a supervisory authority, any investments made and any targeted support provided pursuant to Articles 7 and 8, cumulative effects of the different measures and sanctions already imposed on the company as well as the collaboration with other entities to address adverse impacts in its ~~value~~ supply chains, as the case may be*". ⇒ Delete of Article 20(3) (turnover-based sanctions). ⇒ Delete of Article 24 (conditionality for public support). ⇒ The civil liability provision as it stands (Article 22) is not fit for purpose and should be removed. Civil liability in general should revolve around whether a party has directly caused or contributed to the damage or is otherwise directly associated with it, following the basic principle that all civil liability must end where the involvement of a legally distinct third party begins. ⇒ Revise and ensure the adequacy and proportionality of powers of authorities; clarify the means at their disposal e.g., to mediate. ⇒ Insert due process safeguards in relation to decisions from supervisory authorities, including appeal rights to the courts. ⇒ Only directly affected parties or entities with at least a legitimate interest should have the right to file substantiated complaints.

	This should also be mirrored in Article 9 on the company own complaint channel. Clarify that substantiated complaints in Article 19 only refer to potential breaches of companies' due diligence obligations in Articles 6 to 11.

I.5. Recognizing the real and substantial economic impact of the proposal, including on SMEs

Even if out of the scope of some provisions, SMEs will be substantially affected

The nominal exclusion of SMEs from the direct scope does not mean that they will not be very substantially impacted by key provisions, which several sections of the proposal also acknowledge. The limited threshold does not determine which companies have to execute due diligence and which not, as all companies in the supply chain are expected to do due diligence, but only which companies can be subject to administrative supervision and fines. Therefore, SMEs clearly will be affected and hence will face massive challenges, both as they are suppliers in the supply chain but also since they can be subject to contractual fines with their larger business partners. It must be considered that SMEs have less influence on supply chains due to limited resources and less market power. It is important to avoid unnecessary bureaucracy and burdens for SMEs in the concrete implementation.

1% of EU firms does not mean 1% of total turnover

The Commission has stated that the proposal covers only 1% of EU companies, which gives a misleading picture of its scope. In fact, the proposal will cover more or less all companies in the European economy and have far-reaching consequences for their ability to compete in an international market. For example, it is projected that the companies in some of the sectors in the scope make up as much as 70% of that sector's total turnover in certain Member States.

The economic risk of limiting number of suppliers

The above-mentioned study[18] on impacts of the German supply chain due diligence law foresees that companies "*will reduce the number of their suppliers, if possible, which would initially lead to an increase in imports from the remaining suppliers*". This would result in a concentration of suppliers which not only raises (the currently very relevant) question of supply bottlenecks and supply shortages, but also risks creating a monopolization of

[18] Expert Report: *Economic Evaluation of a Due Diligence Law*, Kiel Institute for the World Economy.

suppliers with increased market power, leading to higher prices for consumers and unfair competition between companies – which also goes against other important EU aims of diversification and resilience.

I.6. Real change requires an engagement- and learning-oriented – not punitive – approach

It is essential to respect the specific nature of companies**– as creators of growth and employment** – to not jeopardize another perspective of sustainability, namely the economic prosperity. Without competitive companies there is no wealth, investment, employment nor tax revenue to finance and support sustainability policies.

Decoupling must be last resort following OECD and UN standards

Recital 32 states that in line with international standards, prevention and mitigation as well as ending and minimisation of adverse impacts should take into account the interests of those adversely impacted. To enable continuous engagement with the value chain business partner instead of termination of business relations (disengagement) and possibly exacerbating adverse impacts, this Directive should ensure that disengagement is a last-resort action, in line with the Union`s policy of zero-tolerance on child labour. Terminating a business relationship in which child labour was found could expose the child to even more severe adverse human rights impacts. This should therefore be considered when deciding on the appropriate action to take.

Despite this clear objective of the proposal to promote disengagement only as a last-resort action, several requirements listed could easily lead to the opposite effect because it would become too risky for European companies to do business with companies – especially SMEs – in some third countries. Companies seek to minimize all avoidable (legal) risks. Consequently, faced with burdensome and, at times, impracticable obligations, companies may be incentivised to terminate certain relationships, with the unintended consequences being worsening of human rights or environmental risks. The provisions in this proposal thus tilt the balance away from constructive engagement to supervision and enforcement and will likely push business to disengage in order to avoid uncertainty and risk. This is the opposite of what should be the intention.

A recent study[19] evaluating the economic implementation of the German supply chain due diligence law shows that these types of rules "*could have significant developmental side effects that diminish the intended positive impacts on the human rights and environmental situation in the countries concerned*". The study points to that direct accounting efforts, costs of reporting to supervisory authorities as well as the extensive legal risk arising from the law itself might lead to companies withdrawing "*from countries where conditions are suspected to be particularly problematic*".

In the description of the due diligence obligations Member States should create ***possibilities for termination of the contract*** *with a view to corporate preventive and remedial measures (Article 7(5), Article 8(6)).*

This provision seems to be incompatible with the UNGPs and the OECD MNE Guidelines[20] (principle 22). It is too prescriptive concerning the approach companies should take. On this very point the Ruggie Principles[21] provide guidance on a wide array of non-exhaustive approaches that a company could choose from. Prohibiting *ab initio* to extend the existing relationship when adverse impacts cannot be prevented or mitigated can be counterproductive in solving the problem and even lead to unintended adverse impacts (e.g., on employment in case of disengagement).

To apply this provision of termination of contract[22], additional provisions would probably have to be created in national civil law that allow a company to terminate a contract "for cause" in the event of violations. It is doubtful that all companies have the leverage to impose their national contract law when contracting with business partners in third countries. Also, these type of civil law measures must be taken only if the applicable law allows it, to avoid the situation in which the responsibility of the company would be engaged whatever it does (i.e., for having terminated the relationship in country X versus for not having terminated the relationship according to the proposed directive).

Because of the level of prescription, these mandatory measures set out in Articles 7(5) and 8(6) may be found in breach of Articles 16 (Freedom to conduct a business) and 52 (Scope of guaranteed rights) of the EU Charter of Fundamental Rights.

[19] Expert Report: *Economic Evaluation of a Due Diligence Law*, Kiel Institute for the World Economy.
[20] https://www.oecd.org/corporate/mne/48004323.pdf
[21] https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf
[22] See, Art. 7(5) and 8(6).

Flanking measures are welcomed – but need to be clarified

Article 13 states that to provide support to companies or to Member State authorities on how companies should fulfil their due diligence obligations, the Commission, in consultation with Member States and stakeholders, the European Union Agency for Fundamental Rights, the European Environment Agency, and where appropriate with international bodies having expertise in due diligence, may issue guidelines, including for specific sectors or specific adverse impacts. According to Article 14(1), Member States shall, to provide information and support to companies and the partners with whom they have established business relationships in their value chains in their efforts to fulfil the obligations resulting from this Directive, set up and operate individually or jointly dedicated websites, platforms, or portals. Specific consideration shall be given, in that respect, to the SMEs that are present in the value chains of companies.

We welcome the fact that different types of flanking/supporting measures are put forward ranging from guidance, support and (supply chain) information access points. However, more prominence is necessary to these measures as well as clarification on the scope and nature of some of them.

I**t is important that guidelines are developed in consultation** with companies.

The planned **support programmes for SMEs**, backed by public funds, must be designed in a practical way so that they are also a real relief. In addition, these must be established in due time so that SMEs are not confronted by parallel demands from their customers.

The **task of gathering information on the global human rights** situation must not be placed primarily on companies, as this is a governmental task. As a supplementing measure we propose the idea of a “European contact point/observatory” (name to be defined), where European companies could obtain reliable information (informed and authoritative opinion) on regional human rights situations that would enable them to take/justify decisions in relation to their supply chains, get guidance and support. This work should start the year after entry into force of this proposed directive with the purpose of identifying country-specific risks of adverse impact including for specific sectors or specific adverse impacts. The European External Action Service and the European Commission delegations in third countries could be used to collect and pass key information. The Commission should also have some role in granting companies **information on supply chains (see, Article 14(1) and 14(3))**. At least a coordination role should be foreseen to pool the information coming from national sources to ensure accessibility and coherence.

Recognition of industry schemes and multistakeholder initiatives by the Commission

> *Article 14(4) states that companies may rely on industry schemes and multi-stakeholder initiatives to support the implementation of their obligations referred to in Articles 5 to 11 of this Directive to the extent that such schemes and initiatives are appropriate to support the fulfilment of those obligations. The Commission and the Member States may facilitate the dissemination of information on such schemes or initiatives and their outcome. The Commission, in collaboration with Member States, may issue guidance for assessing the fitness of industry schemes and multi-stakeholder initiatives.*

As part of the accompanying measures, there should be a system of formal recognition by the Commission of industrial schemes and multistakeholder initiatives. The current text on industry regulations and multi-stakeholder initiatives (Articles 7 and 8 as well as 22) does not standardise a safe harbour regulation; reference is only made to the industry initiatives and industry standards within the framework of the business partner review/screening. Furthermore, the proposal defines the possibility that the Commission, in cooperation with the Member States, will first issue guidelines for assessing the suitability of industry regulations and multi-stakeholder initiatives. This is not a recognition. For this reason, we ask the Commission to publish no later than one year after the entry into force of this proposed directive, a list of industry schemes and multi-stakeholder initiatives on which companies can rely on to support the implementation of due diligence obligations under this proposal. The Commission, in collaboration with Member States, should assess on an annual basis the fitness of industry schemes and multi-stakeholder initiatives and where appropriate, update the list. Where commitments are equivalent to or stricter than the main obligations under this proposal, companies should be given a presumption of conformity with the proposal. In this case, companies should be in position to provide all relevant information and documents to the supervisory authorities to explain how they comply with those industry schemes or multi-stakeholder initiatives.

Regarding accompanying measures, it is essential that not only the instruments of development cooperation mentioned come into play here, but more importantly that the Member States fulfil their very **own state duty to protect** human rights within the framework of their foreign policy and advocate through the EU for international agreements on improved human rights standards.

Suggested improvements for an engagement- and learning-oriented – not punitive – approach	⇒ Ensure decoupling remains action of very last resort. Reconsider the use of legally imposed clauses for “termination of contract”. ⇒ Better clarification of flanking measures. ⇒ Recognition of sectoral schemes is essential. The concepts and roles of collective action and joint stakeholder initiatives should be elaborated further. Consider the possibility to create a presumption of conformity with the main obligations laid down in this proposal when companies implement industrial schemes or other initiatives equivalent to or stricter to the ones of the proposed directive. ⇒ Commission to have a more prominent role in granting companies’ information on supply chains (acting as authoritative information point).

II. Corporate governance not suited for due diligence legislation

Corporate obligation on climate change planning misplaced in this proposal

Articles 15(1) and 15(2) include an obligation for EU companies above 500 employees as well as third-country companies with turnover of EUR 150 million to adopt a plan to ensure that the business model and strategy of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C in line with the Paris Agreement. This plan shall identify, based on information reasonably available to the company, the extent to which climate change is a risk for, or an impact of, the company's operations. Member States shall ensure that in case climate change is or should have been identified as a principal risk for, or a principal impact of, the company's operations, the company includes emission reduction objectives in its plan. Article 15(3) says that if the variable remuneration in companies is linked to the contribution of a director to the company's business strategy and long-term interests and sustainability, those companies should duly take into account the fulfilment of the climate change strategies obligations referred to in 15(1) and (2) when setting such variable remuneration.

European business fully supports the Paris Agreement and the objective of climate-neutrality by 2050. European companies and industrial sectors are developing long-term strategies to decarbonise, which are reflected in the ongoing legislative work under the 'Fit-for-55' package, the Corporate Sustainability Reporting Directive (CSRD) and the Taxonomy.

However, contrary to the objective stated in the proposal to avoid overlapping[23], we believe that Article 15 will interfere with already existing and in-the-making climate and sustainability policies and lead to an incoherent framework that is not helping but rather hindering the green transition. The EU already has a strong regulatory framework to regulate CO2 emissions and it is currently strengthening this framework to reach its objectives.

Furthermore, the proposal speaks of emission reduction objectives but not to be forgotten is that this proposal is about due diligence, not climate change measures. It should be noted that this type of provision as in Article 15 goes far beyond conventional due diligence. It is rather an environmental impact measure which is not suitable in a due diligence framework nor necessary to reach stated objectives of the current proposal. The two negative opinions issued by Regulatory Scrutiny Board strongly underlined this also regarding director's duties.

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[23] See, Explanatory Memorandum of the proposal.

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This proposal is not the appropriate place, nor is the legal basis, to set this obligation for companies. EU requirements to have such a plan are already foreseen under the CSRD proposal.

This provision also raises questions on the level of interference with the corporate governance models of Member States and potentially property rights of shareholders. It seems to overrule the director's competence to judge what type of business model and strategy is appropriate for continued business with that of supervisory authorities who may have neither background nor expertise in the particular business at hand and who have not been elected to lead the company[24]. This would go against the fundamental freedom of enterprise (around objectives, specific business plans, internal management).

Lastly, Article 15(3) which attempts to further regulate directors' pay in companies within the scope is misplaced. Besides leaving many questions open regarding the *rationale* for this level of interference particularly in non-listed companies, as well on the modalities of how to implement it (e.g., non-executive directors normally are not awarded variable remuneration), it overlooks that the Shareholders Rights Directive already contains rules on pay in listed companies. The latter directive clearly establishes that remuneration policy must contribute to the company's business strategy and long-term interests and sustainability and must explain how it does so.[25] This is a good balance which is even being strengthened by national corporate governance codes around the substance of executive remuneration. Determining in detail which components (including ESG related ones) should go into variable remuneration is very far-reaching and intrusive on the fundamental rights of privately owned companies. The impact assessment does not provide enough justification for this which the Regulatory Scrutiny Board pointed to in its negative opinions. Since the design of executive remuneration is a strong tool to steer the direction of companies, the proposal means that the regulator (i.e., the state) indirectly assumes some control over this aspect. This is in clear breach of fundamental principles on property rights and corporate

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[24] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4075097

[25] Art. 9 a) 6 SRD I (introduced by SRD II): "The remuneration policy […] shall be clear and understandable and describe the different components of fixed and variable remuneration, including all bonuses and other benefits in whatever form, which can be awarded to directors and indicate their relative proportion. […] Where a company awards variable remuneration, the remuneration policy shall set clear, comprehensive, and varied criteria for the award of the variable remuneration. It shall indicate the financial and non-financial performance criteria, including, where appropriate, criteria relating to corporate social responsibility, and explain how they contribute to the objectives set out in the first subparagraph, and the methods to be applied to determine to which extent the performance criteria have been fulfilled. It shall specify information on any deferral periods and on the possibility for the company to reclaim variable remuneration. […]". In addition, recital 29 in SRD II states that "[…] Directors' performance should be assessed using both financial and non-financial performance criteria, including, where appropriate, environmental, social and governance factors."

governance principles[26] in privately owned companies. Therefore **Article 15(3) should be deleted**.

General directors' duties do not belong in a due diligence framework

Article 25 prescribes that Member States shall ensure that, when fulfilling their duty to act in the best interest of the company, directors of companies referred to in Article 2(1) take into account the consequences of their decisions for sustainability matters, including, where applicable, human rights, climate change and environmental consequences, including in the short, medium and long term. Member States shall ensure that their laws, regulations and administrative provisions providing for a breach of directors' duties apply also to the provisions of this Article. According to Article 26, Member States shall ensure that directors of companies referred to in Article 2(1) are responsible for putting in place and overseeing the due diligence actions referred to in Article 4 and in particular the due diligence policy referred to in Article 5, with due consideration for relevant input from stakeholders and civil society organisations. The directors shall report to the board of directors in that respect. Member States shall ensure that directors take steps to adapt the corporate strategy to take into account the actual and potential adverse impacts identified pursuant to Article 6 and any measures taken pursuant to Articles 7 to 9.

The proposal **mixes corporate governance and due diligence especially in Article 25**. The important and prerogative role of the board to do the balancing on different element and interests to consider when acting in the corporate interest cannot be jeopardised. Overloading directors' duties with unspecified and very far-reaching general policy goals of all kinds will be disruptive to companies' decision-making and is disproportionate. Article 25 does not apply specifically to due diligence but to the general duty of care of directors. The Impact Assessment does not provide enough justification for this provision, also bearing in mind that **this duty of care might replace – not complement – what national laws say** about directors' duty of care. There is no convincing evidence that the corporate governance models of the Member States, which includes directors' general duty of care, stand in the way of the sustainable transition. Article 25 will therefore **not result in clarification as argued by the Commission** but will do the opposite – it will create legal uncertainty. **John G. Ruggie**, one of the leading international voices on Business and Human rights, also warned against this approach of mixing corporate governance and due diligence stating

[26] Recital 28 states that "[…] It is therefore important to respect the diversity of corporate governance systems within the Union, which reflect different Member States' views about the roles of companies and of bodies responsible for the determination of the remuneration policy and of the remuneration of individual directors."

affirmingly that "*company directors are not the main drivers of short-termism.*"[27] Moreover, it does not make sense to regulate directors' general duty of care differently depending on **size or sector of activity** of the company.

There could be serious negative consequences attached to this **unnecessary EU regulation** of directors' duties because it would **create legal uncertainty about when management decisions are lawful/unlawful**. This would create risk-aversion, hamper efficient decision-making, and increase time and costs spent on litigation and consultation with lawyers rather than developing the business. There is also a risk that all management decisions will have to await comprehensive life-cycle assessments of environmental, climate and social impacts, and, even then, there will be uncertainty as to whether management could become liable several years after when the direct and indirect (unforeseen) consequences show themselves more clearly. There could even be disputes about whether a negative impact was directly or indirectly related to a particular management decision at all.

Also, it is **not clear how authorities are supposed to enforce and verify directors' duties**. By having the law determining that directors must take on board all stakeholders expectations, there is also a risk of making directors (paradoxically) less accountable to anyone because these expectations would be vague, contradictory, and difficult to measure against any KPIs. Evaluation of boards, which is an important practice in listed companies, would also become very difficult, alongside holding board members accountable for poor results, financial or others. Where a company is not maximizing value for shareholders, directors have more grounds to defend that their actions were justified on ESG interest which are complex and currently difficult to measure.

Turning to corporations to find solutions to problems traditionally in the domain of governments is not the best approach. In practice, this means that directors are being required to address "public issues" that are not always being scrutinized by public entities. On the contrary, there is a growing private industry providing certifications to show "independent verification" of the companies' commitment to sustainability.

Lastly, overly onerous, and unprecise requirements on individuals, such as directors of European companies, would have the potentially damaging effect of discouraging progressive and highly qualified individuals from taking up directorships of companies. It would be difficult for insurers to offer board insurance products due to diffuse liability and executive remuneration would increase. Particularly, in corporate governance, it is essential

[27] https://media.business-humanrights.org/media/documents/EU_mHRDD_paper_John_Ruggie.pdf

that companies can attract open-minded, progressive individuals to drive companies' strategy forward in this area.

Article 25 thus creates unnecessary legal uncertainty, violates the subsidiarity principle[28] and – on top – has no direct connection with due diligence. It should therefore **be deleted**.

There are also several important **considerations to be made regarding the provision in Article 26** where directors' specific duties in relation to the company's due diligence obligations are proposed:

- The need to regulate directors' duties in relation to due diligence on top of the due diligence duties of the company is unconvincing as also pointed out by the Regulatory Scrutiny Board. Both Articles 26(1) and 26(2) are basically unnecessary because when a responsibility for a company becomes hard law (due diligence in this case), it automatically becomes part of directors' general duties according to existing company law in the Member States.
- Article 26(1) has the additional problem that it seems to add something to directors' duties that go beyond the due diligence obligations in Articles 4-5 when it adds "with due consideration for relevant input from stakeholders and civil society organisations". Adding this – instead of just referring to the obligations already regulated in Articles 4-5 – creates legal uncertainty.
- The above-mentioned addition, if it is meant to go beyond what already follows from Articles 4-5, would constitute an **inappropriate and unnecessary interference** in the internal management of companies. It is crucial that it remains the legally appointed management of companies who ultimately make the decisions on the company's strategy, policies, and other important decisions. Any dilution of this principle is a dilution of companies' right to self-determination and the property rights of shareholders. It is also wrong and inappropriate to give external parties a legal right to influence management decisions in companies when they bear no legal co-responsibility for the consequences. The proposed addition is unnecessary as the involvement of external stakeholders in due diligence processes is already regulated in Articles 6-8 where consultations are required in various contexts. There is also **no clear reference to which actual input** is required or the level of formality.
- The problem is exacerbated by the extremely broad **definition of stakeholders** which means that anyone could have a say which is certainly not the intention of the

[28] To note that the Parliament of Sweden has sent a reasoned opinion to the Commission that it considers that the corporate governance parts of the proposal (i.e. Articles 15(3), 25 and 26) do not comply with the subsidiarity principle.

legislator. Companies are private entities, not democratically elected bodies or public services.

- Article 26(2) has a similar problem. The company's due diligence obligations, for which the management is of course ultimately responsible, are already (and more extensively) regulated in Articles 6-9. When trying to define an independent responsibility for directors in addition to the company's responsibility, there will always be a risk of unintended inconsistencies.

Suggested improvements to make the framework more of a proper due diligence framework and less interfering with corporate governance models	⇒ The purpose of the provisions of climate change planning in Articles 15(1) and 15(2) should be dealt with in other legal acts with a different legal basis. ⇒ Delete Article 15(3) on remuneration of directors. ⇒ Delete Article 25 on directors' duty of care. ⇒ Revise Article 26 on directors' duty to set up and oversee due diligence.

III. The proposal should be in line with better regulation principles

Imperative that the two negative opinions by the Commission's Regulatory Scrutiny Board are taken seriously

EU law making needs to live up to its better regulation principles. Given that the **Regulatory Scrutiny Board** has issued two negative opinions largely based on the corporate governance part of this proposal, there is reason for concern regarding the respect for better regulation principles. Compliance with these principles is a crucial safeguard in ensuring that EU proposals are evidence-based and sufficiently substantiated in relation to the need for the proposed EU intervention, its consequences, its proportionality and not least its respect for the principle of subsidiarity.

It has been expressed multiple times by leading academics[29], several Member States and not least by industry that intervention in national corporate governance models is neither necessary, proportionate nor appropriate to attain the goal of promoting corporate sustainability.

The second negative opinion[30] by the Regulatory Scrutiny Board from November 2021 states the following problems regarding the corporate governance parts of the proposal.

- "It is **not clear […] why it is necessary to regulate directors' duties** on top of due diligence requirements."
- There is a need to "[…] **better explain and assess the value-added of regulating directors' duties**, considering that the due diligence option already requires risk management and engagement with stakeholders' interests.
- **Justification is needed** "[…] why stand-alone options covering directors' duties or due diligence requirements only were not identified and subsequently compared with the combination options."
- The legal uncertainty and conflicting interests that would result from the proposals are addressed especially with this comment: "The description of the directors' duties should clarify how directors need to incorporate conflicting interests of stakeholders and sustainability aspects. It should clarify whether there is a long-term interest of the company that could supersede particular interests of stakeholders or beneficiaries or particular sustainability considerations."

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[29] Some examples of academics' reactions in particular regarding the corporate governance part of the Commission initiative:
Response from ECLE (European Company Law Experts): it "*proceeds by **unsupported assertions** – managers and investors are short-termist and corporate law is responsible for it – rather than rigorous demonstration.*"
Response from 21 Nordic law professors to the 2020 Commission study on directors' duties: *"the [..] Study is so biased in its approach and so **openly and excessively political in furthering a specific regulatory outcome**, that we find ourselves compelled to address these shortcomings".*
Also **John G. Ruggie**, one of the leading international voices on Business and Human rights has criticised the Commission study and approach by affirming that "*company directors are not the main drivers of short-termism"*: https://media.business-humanrights.org/media/documents/EU_mHRDD_paper_John_Ruggie.pdf
Nordic and Baltic Company Law Scholars: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance/F3263122_en
Docent jur. Erik Lidman, Stockholm: https://www.law.ox.ac.uk/business-law-blog/blog/2022/04/role-corporate-governance-sustainability-and-why-commissions-csddd
Prof Guido Ferrarini, Italy: https://www.law.ox.ac.uk/business-law-blog/blog/2022/04/corporate-sustainability-due-diligence-and-shifting-balance-between
Prof QC Paul Davies, Oxford: https://www.law.ox.ac.uk/business-law-blog/blog/2022/04/ending-human-rights-abuses-which-companies-and-states-are-complicit
Prof Jesper Lau Hansen, Copenhagen University: https://www.law.ox.ac.uk/business-law-blog/blog/2022/03/unstainable-sustainability

[30] https://ec.europa.eu/transparency/documents-register/detail?ref=SEC(2022)95&lang=en

- Assessment is needed regarding "[…] how the proposed EU corporate sustainability governance rules would fit with the different national corporate governance models existing in the EU, given the national focus of company law."

In its follow-up[31] to the second negative opinion of the Regulatory Scrutiny Board, the European Commission argues that in the presented proposal "directors' duties were changed. While most of the duties are closely linked with the due diligence obligations and necessary for the due diligence to be effective, they also include the clarification of how directors are expected to comply with the duty of care to act in the best interest of the company." This gives a misleading picture of the proposal as it does not answer to the main issue: the lack of sufficient justification for including directors' duties in the first place.

The Commission further states that "Directors' duties […] allows due diligence to become strategic and to infiltrate into relevant corporate functions. A due diligence obligation without a proper corporate governance backing and without directors' responsibilities could become a mere compliance issue of secondary relevance. Regulating directors' duty of care was retained." This statement shows a disregard towards the comments from the Regulatory Scrutiny Board as well as from leading academics[32] and business. The Commission overlooks the already existing and extensive body of EU corporate rules and national corporate governance codes which already provide sufficient incentives for directors to apply a duty of care. Such a duty already factors in the numerous laws and regulations that companies need to fulfil. According to company law, directors must take all necessary decisions to guarantee that the company complies with all applicable laws (labour law, administrative law, environmental law, etc).

Suggested improvements on how to uphold better regulation principles	⇒ Take the two negative opinions of the Regulatory Scrutiny Board into account.

[31] https://ec.europa.eu/transparency/documents-register/detail?ref=SWD(2022)39&lang=en
[32] See references in footnote 27.

SUMMARY OF SUGGESTED IMPROVEMENTS

Suggested improvements on effectiveness, workability and proportionality	⇒ Replace all value chain references to supply chain. ⇒ Reconsider the concept of high impact sectors. If it remains, revision is necessary for example by narrowing it down through limiting the list of high-impact sectors to certain parts of sectors or use lists of products like the HS codes used in the Combined Nomenclature or NACE codes. ⇒ As regards companies referred to in Article 2(1), point (b), and Article 2(2), point (b), the Commission should develop simplified reporting obligations and, no later than one year after the entry into force of this proposal, provide interpretation guidelines to support them in fulfilling their obligations. ⇒ Clarify Article 7 and 8 as well as the definition of appropriate measures in Article 3(q) to allow for the prevention action plan and the thereby following actions of due diligence taken by the company to be proportionate to the significance and scale of the adverse impact and to the contribution of the company's conduct to the potential adverse impact. ⇒ Further clarity fulfillment of obligations at the level of the group. Groups of companies must have flexibility to organize due diligence and reporting in accordance with their business model and have the option to implement the due diligence plan at group level. Companies should be entitled to share resources (e.g., setting up joint-complaint procedures) and information within their respective groups of companies.

Suggested improvements on delivering a fairer level playing field	⇒ At least key provisions should be fully harmonised to avoid discrepancies to emerge between Member States' transposition laws. One technique could be to apply targeted full harmonisation on essential elements (using an "internal market clause") as it is done for example in several EU Consumer law directives. ⇒ Consider adjusting turnover threshold so that it is calculated on turnover generated in the EU for both European and foreign companies.

Suggested improvements on how to provide legal clarity	⇒ Revise and shorten the list of norms/conventions in the Annex and deletion of point 21 in the Annex. ⇒ Revise definition of "business relationship", for example by deleting all references to "indirect" and make it coherent throughout the proposal. ⇒ Clarify the procedure of model clauses and how they are to be developed, including reference to industry involvement. The Commission should publish model contractual clauses as soon as possible to support companies in implementing the proposed Directive and fulfilling their obligations (at the latest 6 months after its entry into vigour). ⇒ Clarify some of the key definitions in Article 3. Redefine "stakeholders" drawing inspiration, for example, from existing ECJ case law.

Suggested improvements on establishing balanced enforcement and sanctions mechanisms	⇒ Sanctions should only apply to breaches of concrete obligations (e.g., failure to follow formal instruction from an authority), not breaches of open norms or principles that are not addressing companies in the first place. ⇒ Modify Article 20(2) as follows (additions in red): "*In deciding whether to impose sanctions and, if so, in determining their nature and appropriate level, due account shall be taken of the legal framework applicable in the country where the adverse impact occurred, the company's efforts to comply with any remedial action required of them by a supervisory authority, any investments made and any targeted support provided pursuant to Articles 7 and 8, cumulative effects of the different measures and sanctions already imposed on the company as well as the collaboration with other entities to address adverse impacts in its ~~value~~ supply chains, as the case may be*". ⇒ Delete of Article 20(3) (turnover-based sanctions). ⇒ Delete of Article 24 (conditionality for public support). ⇒ The civil liability provision as it stands (Article 22) is not fit for purpose and should be removed. Civil liability in general

	should revolve around whether a party has directly caused or contributed to the damage or is otherwise directly associated with it, following the basic principle that all civil liability must end where the involvement of a legally distinct third party begins. ⇒ Revise and ensure the adequacy and proportionality of powers of authorities; clarify the means at their disposal e.g., to mediate. ⇒ Insert due process safeguards in relation to decisions from supervisory authorities, including appeal rights to the courts. ⇒ Only directly affected parties or entities with at least a legitimate interest should have the right to file substantiated complaints. This should also be mirrored in Article 9 on the company own complaint channel. Clarify that substantiated complaints in Article 19 only refer to potential breaches of companies' due diligence obligations in Articles 6 to 11.

Suggested improvements for an engagement- and learning-oriented – not punitive – approach	⇒ Ensure decoupling remains action of very last resort. Reconsider the use of legally imposed clauses for "termination of contract". ⇒ Better clarification of flanking measures. ⇒ Recognition of sectoral schemes is essential. The concepts and roles of collective action and joint stakeholder initiatives should be elaborated further. Consider the possibility to create a presumption of conformity with the main obligations laid down in this proposal when companies implement industrial schemes or other initiatives equivalent to or stricter to the ones of the proposed directive. ⇒ Commission to have a more prominent role in granting companies' information on supply chains (acting as authoritative information point).

Suggested improvements to make the framework more of a proper due diligence framework and less interfering with corporate governance models	⇒ The purpose of the provisions of climate change planning in Articles 15(1) and 15(2) should be dealt with in other legal acts with a different legal basis. ⇒ Delete Article 15(3) on remuneration of directors. ⇒ Delete Article 25 on directors' duty of care. ⇒ Revise Article 26 on directors' duty to set up and oversee due diligence.

Suggested improvements on how to uphold better regulation principles	⇒ Take the two negative opinions of the Regulatory Scrutiny Board into account.