

# Corporate Sustainability Due Diligence: proposal for a new EU directive

A year ago, in its [resolution of 10 March 2021](#), the European Parliament called upon the Commission to propose Union rules for a comprehensive corporate due diligence obligation. Approximately two years ago, the Commission answered that call by its [proposal](#) for an EU directive on Corporate Sustainability Due Diligence.

According to the Commission, the behaviour of companies across all sectors of the economy is key to the success of the Union's transition to a climate-neutral and green economy in line with the European Green Deal, and in delivering on the UN Sustainable Development Goals, including on its human rights- and environment-related objectives. This requires implementing comprehensive mitigation processes for adverse human rights and environmental impacts in their value chains, integrating sustainability into corporate governance and management systems, and framing business decisions in terms of human rights, climate and environmental impact, as well as in terms of the company's resilience in the longer term.

Given the present and upcoming national legislation on human rights and environmental due diligence, (think, for example, of the French [Loi relative au devoir de vigilance](#) of 2017 and the German [Sorgfaltspflichtengesetz](#) of last year) the new proposal on Corporate Sustainability Due Diligence constitutes an important next step towards legislation on the EU level.

## Which companies are concerned?

Firstly, the proposed directive shall apply to large companies, namely companies with more than 500 employees on average and a net worldwide turnover of more than EUR 150 million in the last financial year for which annual financial statements have been prepared.

However, the directive also targets smaller companies that are active in certain sectors. More precisely, the directive shall also apply to companies with no more than 500 but still more than 250 employees on average and a net worldwide turnover of more than EUR 40 million in the last financial year for which annual financial statements have been prepared, provided that at least 50% of this net turnover was generated in one or more of the sectors listed in the directive. These sectors include the manufacture and wholesale trade of textiles, agriculture, forestry, fisheries, the manufacture of food products, and the extraction and wholesale trade of mineral resources.

Finally, this directive shall also apply to companies formed in accordance with the legislation of a third country, if they generated a net turnover of more than EUR 150 million in the Union in the penultimate financial year, or if they generated a net turnover of more than EUR 40 million but not more than EUR 150 million in the Union in the financial year preceding the last financial year, provided that at least 50% of its net worldwide turnover was generated in one or more of the listed sectors.

Although small and medium sized enterprises (SMEs) are thus excluded from the due diligence duty, they will, however, be exposed to some of the costs and burden through business relationships with companies within the scope of the duty, as large companies are expected to pass on demands to their suppliers. Therefore, supporting measures will be necessary and are envisioned by the directive in relation to the several due diligence duties.

## Which duties?

The imposed due diligence comes down to six different obligations for the companies concerned.

Firstly, they should integrate due diligence into all their corporate policies and put in place a due diligence policy to be updated annually. That due diligence policy will describe the company's approach (including in the long term) to due diligence, contain a code of conduct and describe implementation processes.

Secondly, the companies concerned shall have to identify actual or potential adverse human rights and environmental impacts arising from their own operations or those of their subsidiaries and, where related to their value chains, from their established business relationships, by taking appropriate measures.

Thirdly, the directive contains the obligation to prevent and mitigate potential adverse impacts, and to bring actual adverse impacts to an end and minimise their extent by appropriate measures. Where necessary, this requires companies to develop and implement a prevention action plan or a corrective action plan with reasonable and clearly defined timelines for action and qualitative and quantitative indicators for measuring improvement. Other required action, where relevant, include seeking contractual assurances from a business partner with whom it has a direct business relationship, making necessary investments, collaborating, and providing targeted and proportionate support for an SME with which the company has an established business relationship, where compliance with the code of conduct or the prevention or corrective action plan would jeopardise the viability of the SME. In case of potential or actual adverse impacts not being capable of being prevented, adequately mitigated, brought to an end or minimised by such actions, other measures are put forward, such as temporarily suspending commercial relations with the partner in question or even terminating the business relationship with respect to the activities concerned, if the potential adverse impact is severe.

Fourthly, the directive provides for establishing and maintaining a complaints procedure. Complaints may be submitted by persons who are affected or have reasonable grounds to believe that they might be affected by an adverse impact, but also by trade unions and other workers' representatives representing individuals working in the value chain concerned, as well as by civil society organisations active in the areas related to the value chain concerned.

Fifthly, the directive gives ample attention to the need for companies to monitor the effectiveness of their due diligence policy, by carrying out periodic assessments of their own operations and measures, those of their subsidiaries and, where related to the value chains of the company, those of their established business relationships.

Sixthly, it is important that companies publicly communicate on due diligence.

### **What about civil liability?**

A final key aspect of the proposed directive concerns the civil liability of companies and their directors.

*Companies* are liable for damages if they failed to comply with their obligations to prevent and mitigate potential adverse impacts, and to bring actual adverse impacts to an end and minimise their extent, and as a result of that failure, an adverse impact occurred and led to damage.

Yet, there are exceptions, for example in case of an adverse impact arising as a result of the activities of an indirect partner if the company did take the actions required by the directive.

*Directors* of companies, when fulfilling their duty to act in the best interests of the company, must take into account the consequences of their decisions for sustainability matters, including, where applicable, human rights, climate change and environmental consequences, in the short, medium and long term. The directive requires Member States to ensure that their laws, regulations and administrative provisions providing for a breach of directors' duties apply also to that directors' duty of care.

As for sanctions in general, Member States are free to decide on what sanctions to lay down in national law for infringements of the national provisions transposing the directive, provided, of course, that those sanctions are effective, proportionate and dissuasive. The directive nevertheless requires due account to be taken of 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 to SMEs, as well as collaboration with other entities to address adverse impacts in its value chains. In case of pecuniary sanctions, the directive imposes a requirement for them to be based on the company's turnover. Finally, each Member State shall designate at least one supervisory authority to supervise compliance with the different due diligence obligations.

## Timing?

The proposal by the European Commission has been forwarded to the Council and the European Parliament. It is now up to these institutions to amend the text and adopt the directive.

Member States will then have two years after the entry into force of the directive to transpose it. After those two years, the provisions will mandatorily apply to the largest companies, namely with a net worldwide turnover of more than EUR 150 million in the last financial year. The other, smaller companies concerned (with a net worldwide turnover of more than EUR 40 million in the last financial year and related to the listed sectors) have two additional years to prepare themselves.

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