Deutsches Aktieninstitut

EU Corporate Sustainability Due Diligence Directive

A balanced and proportionate EU law is needed

Position paper on the Proposal for a Directive on Corporate Sustainability Due Diligence, 23 May 2022

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Introduction

On 23 February 2022, the European Commission adopted a proposal for a Directive on corporate sustainability due diligence (Corporate Sustainability Due Diligence Directive, CSDDD). The aim of the Directive is to foster sustainable and responsible corporate behavior and to anchor human rights and environmental considerations in companies' operations and corporate governance. The European Commission aims to ensure that businesses address adverse impacts of their actions, including in their value chains inside and outside Europe.

The new proposal, together with the German due diligence act (*Lieferketten-sorgfaltspflichtengesetz*) will massively change the corporate due diligence landscape. The overall ambition of the CSDDD to better protect human rights, including labor rights is generally to be welcomed. 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.

However, the obligations for companies arising out of the CSDDD will pose massive new challenges on German and European companies as the draft covers the whole value chain, also indirect business relationship and includes many unclear legal terms. This means a high level of uncertainty linked with the risk for companies of civil liability.

Companies as catalysts for the sustainable transition need legal certainty and a clear view on legal responsibilities. The European legislator should focus on the feasibility of implementation of the new requirements.

The European regulation on sustainability due diligence should not be overestimated in its impact on effective human rights protection on the ground because the enforcement of human rights is a sovereign task and national governments are responsible for enforcing human rights in their own countries. However, European companies can make an important contribution to the enforcement of human rights through their engagement in developing and emerging countries.

A study dating from March 2022 "Economic evaluation of a Due Diligence Law" from Kiel Institute for the World Economy on behalf of Gesamtmetall concludes that the German Supply Chain Act could have significant developmental side effects that diminish the intended positive impacts on the human rights and environmental situation in the countries concerned. It can be assumed that German buyers will reduce the number of suppliers from which they purchase primary products and withdraw completely from countries where conditions are suspected to be particularly problematic. This effect can also be presumed for the proposal on the CSDDD.

Last but not least: Supply chain issues currently pose major challenges for companies. German companies are already operating in a challenging supply chain context, not least due to the Covid-19 pandemic but also the war in Ukraine which has aggravated the situation even further. Due diligence is a very complicated process for companies, also due to the fact that the vigorous and complex sanctions in Russia are being implemented. Supply chain shortages have been increasing for some time now. The CSDDD could - albeit unintentionally - further restrict trade especially with developing and emerging countries.

1 Key positions and claims

Clear and precise definitions are of paramount importance to allow for a consistent application of the CSDDD.

As the proposal contains many unclear definitions and legal terms, Deutsches Aktieninstitut urges the European Commission to clarify the definitions in order to allow for a consistent application of the CSDDD. For example, the definitions of the terms „value chain“, „business relationship” and “established business relationship” leave room for interpretation.

The legislator must focus on the most severe adverse impacts taking into account the fact that it is impossible to mitigate every single risk that may occur on supply chains.

It is questionable if due diligence obligations can be implemented as foreseen in the proposal. The proposal sets unrealistic expectations on companies. It is very challenging, if not even practically impossible, for a company to control its whole value chain, upstream as well as downstream.

We oppose the duty to adopt a plan to ensure that the business model and company strategy are compatible with the transition to a sustainable economy and with limiting global warming to 1.5° C.

The obligations laid down in Article 15 to establish a plan to ensure that the business model and strategy of the company are compatible with limiting of global warming to 1.5° C in line with the Paris agreement is exuberant. The duty to establish such a climate plan is not covered by the UN Guiding Principles on Business and Human Rights.

A risk-based approach should be the underlying principle as companies cannot monitor all of their operations and the ones of their subsidiaries every 12 months.

According to the proposal, companies have to monitor the effectiveness of the due diligence measures at least every 12 months. This frequency and scope are unrealistic and unfeasible. The Directive should leave it to companies to determine the frequency. A risk-based approach could be combined with a minimum period, e.g. at least every three years.

We generally reject the proposed (independent) civil liability in the CSDDD. The enforcement mechanism should rely on sanctions and administrative enforcement.

The proposal explicitly provides for civil liability if companies failed to comply with the due diligence obligations to prevent potential adverse impacts or to bring actual adverse impacts to an end. The proposed sanctions regime of Article 20 is already sufficient.

Directors' duty of care (Article 25) and the duty of setting up and overseeing due diligence (Article 26) should be deleted.

We suggest to focus on due diligence in this directive, not to formulate short cut directors' duties and to leave it to transparency obligations set out in the CSRD draft. Article 26 should be deleted as it is unclear and we see no possible amendment to give this article an added value in company law.

2 Comments on the Proposal for a Directive on Corporate Sustainability Due Diligence

2.1 Subject matter (Article 1)

Article 1 of the proposal stipulates that the *Directive lays down rules (a) on obligations for companies regarding actual and potential human rights adverse impacts and environmental adverse impacts, with respect to their own operations, the operations of their subsidiaries, and the value chain operations carried out by entities with whom the company has an established business relationship and (b) on liability for violations of the obligations mentioned above.*

The focus of the subject matter of the Directive should be on human rights risks. The inclusion of further environment-related agreements shifts the scope further in the direction of environmental issues, or at least strongly mixes the two. Even if there is a link between climate change and human rights issues the question arises if the CSDDD is the correct legal means for addressing climate issues? Climate change issues should not be introduced through the back door of the CSDDD. Rather, climate change issues should be regulated with a law to combat climate change.

2.2 Definitions (Article 3)

2.2.1 Business relationship

Article 3 (e) of the proposal defines 'business relationship' as *a relationship with a contractor, subcontractor or any other legal entities ('partner') (i) with whom the company has a commercial agreement or to whom the company provides financing, insurance or reinsurance, or (ii) that performs business operations related to the products or services of the company for or on behalf of the company.*

The definition of a business relationship is broad, unclear and gives rise to differing interpretation. The criteria in (i) and (ii) are alternative. Any "commercial agreement" creates a business relationship. This may include customers, consultants. If the purpose of a company is commercial this might allude that any agreement by that company has a commercial character. Since (ii) is given as alternative it implies that members of this group do not have an agreement with the company. On that basis the set of entities who "perform business operations related to the products (…) for or on behalf of the company" appears borderless. The wide degree of interpretability makes Article 3 (e) of the proposal quite the opposite of a definition.

Wide and vague definitions of the most basic terms will likely lead to great differences in the application, by the companies, and the control of the application, by the member states' authorities. This leads to a disparate practice in the European Union, achieving the opposite of the Directive's stated purpose, to "*avoid fragmentation of due diligence requirements in the single market*".

2.2.2 Value chain

The definition of the value chain in Article 3 (g) leaves open questions. The proposal *states that the value chain not only relates to the production of goods or the provision of services by a company, but also the development of the product or the service and the use and disposal of the product as well as the related activities of upstream and downstream established business relationships of the company*.

There are still many open questions regarding the obligations concerning the downstream value chain. It is unclear how far the supplier is responsible for the final product or parts of the final product when he sells pre-products B2B. The draft directive also does not clearly state if companies and their subsidiaries are expected to meet the due diligence obligations for their entire value chain, e.g. including the value chains of their subsidiaries all around the world.

2.2.3 Established business relationship

Article 3 (f) defines an established business relationship 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 an established business relationship needs further clarification with regards to e.g. "indirect established business relationship" and the terms "lasting", "intensity or duration". The benchmark of an indirect business relationship is too vague and it is not clear what is meant with "lasting" or "intensity". Does lasting also refer to re-occurring business relationships or is it linked to a certain threshold for volumes procured? Usually, a company does not have a business relationship with Tier 2. There is also a risk of conflicts of interest in relation to customers, as they are the basis of a company's regular business activities. It would be helpful if examples for indirect established business relationships would be provided.

2.2.4 Adverse environmental impact

Article 3 b) and c) define an *'adverse environmental impact' as an adverse impact resulting from the violation of one of the prohibitions and obligations pursuant to the international environmental conventions listed in the Annex, Part II; and an 'adverse human rights impact' as adverse impact on protected persons resulting* *from the violation of one of the international conventions listed in the Annex, Part I Section 2.*

International conventions are agreements between different countries which are legally binding only to the contracting States, and only when that State ratifies it. By contrast, the directive proposal will make the relevant conventions directly applicable to companies within its scope without addressing the numerous question this raises in practical and legal terms.

Also, from the legal point of view of legal certainty it seems unduly to refer to a six pages long list of conventions and agreements in order to “define” what can be an adverse environmental impact. Sanctions and civil liability cannot be imposed on companies if it is legally not clear what their obligations are.

2.2.5 Directors

It is necessary to distinguish in the proposal between executive and non-executive directors. Otherwise, it is not clear in Article 26 who is responsible for what. We consider that executive directors are responsible for putting in place due diligence whereas overseeing the due diligence actions is of the remits of the board of directors. The same clarification is needed for the obligations derived from Article 25.

2.2.6 Regulated financial undertaking

For regulated financial undertakings and insurance companies, the definition of value chain needs to be specified.

Banks seek guidance and legal clarity what is meant practically with regard to the due diligence obligations in the value chain, especially regarding the clients and products in scope. Given that the financial industry has millions of client relationships and carries out thousands of transactions each day, we recommend to find a proportionate approach – also vis-à-vis the clients, as the corporates will of course be affected by the due diligence. We seek confirmation whether it is the intent to reduce the scope of applications to loans, credits and other financing services and which kind of financial services are excluded. Trading, retail and custody business for example are services, where given the short-term nature, as in the case of trading, it would be hardly feasible to carry out due diligence ahead of such a service, or as in the case of custody, banks do not own the assets, but act as custodian only.

With regard to the timing of the due diligence, we appreciate the Commissions’ proposal that the due diligence should take place only before providing financing. We would like to understand how this would be operationable and would recommend to integrate this in onboarding processes.

At the same time, we would expect that once a client has gone through the due diligence, the due diligence would not need to take place ahead of each and every service provided to this client, but rather a regular check on the client would be needed to be established, e.g. once a year, in order to reduce the burdens on the clients.

Clear and precise definitions are of paramount importance to allow for a consistent application of the CSDDD.

2.3 Scope (Article 2)

2.3.1 Personal scope SMEs

While we generally understand the arguments, e.g. as regards proportionality, brought forward by the European Commission for excluding SMEs from the personal scope of the CSDDD, this raises concerns for CSRD companies. In case the European Commission decides to retain this difference in scope, it is absolutely essential that the implications thereof are taken due account of and are adequately reflected in the CSRD and/or CSDDD, as relevant. For example, the CSRD requirements must be designed in a way that any disclosure requirements on the undertaken and mandated due diligence process as per the CSDDD cannot cover partners that do not have respective duties (e.g. EU SMEs in that case) or for which due diligence information is not available (e.g. US partners). Companies must not be held accountable where information is not available that could flow into their decision-making or their reporting.

In general, the question remains if the objectives of the directive (to improve corporate governance practices and to avoid fragmentation of due diligence requirements) can be achieved if around 99 percent of all companies in the Union are excluded from the due diligence duty, as stated by the European Commission in the proposal (page 14).

SMEs will be affected gravely by the extension of the Directives formalities through the supply chain and the delegation of obligations along this chain. The limitation of the direct application is an apparent indication that the Directive’s systematic causes great burdens to its subject not in reasonable relation to the results to be expected by the application of the Directive.

2.3.2 High impact sectors

Article 2 (1(b)) stipulates the high impact sectors to which the directive shall apply. The list of high impact sectors is very broad and covers everything produced within a sector regardless of whether the actual product or service in itself can be deemed to have a high impact on human rights and environment. This embodies a punitive approach of sectors. Therefore, it is necessary to find criteria which can reduce the scope of high impact sectors of the directive. For example, establishing a regional reference or listing certain products which are produced under bad working conditions.

It is also not always clear if a company belongs to one of the sectors mentioned (e.g. manufacture of textiles, leather and related products, agriculture, forestry, etc.). It is for example unclear which products fall under the term “related products”.

2.4 Due diligence obligations (Articles 4 – 8)

The due diligence obligations foreseen in the proposal relate to the *company's own business activities, or those of their subsidiaries and direct and indirect contractors active in the value chain with whom the company has an established business relationship. The extent to which the business relationship can be classified as established must be assessed periodically, at least annually (Article 1).*

It is questionable if due diligence obligations can be implemented as foreseen in the proposal. The proposal sets unrealistic expectations on companies. It is very challenging, if not even practically impossible, for a company to control its whole value chain, upstream as well as downstream. Some companies have hundreds, thousands or ten thousand of suppliers. This makes monitoring the entire supply chain an unachievable task. This is further complicated by the fact that there are often only a few suppliers abroad for highly specialized products. Placing an order with an alternative supplier is therefore not always possible.

With a view to make the legislation efficient, including through effective allocation of companies’ resources, the legislator must focus on the most severe adverse impacts taking into account the fact that it is impossible to mitigate every single risk that may occur on supply chains. The requirements should be focused on the most severe adverse impacts identified across undertakings’ activities, which would allow interested parties and stakeholders to better understand the due diligence strategy of the undertaking.

The duties of care apparently apply without restriction to indirect suppliers. This is impracticable and leads (either due to a lack of knowledge, but in any case, due to lack of possibilities to exert influence) to excessive demands on responsibility at the indirect levels in the supply chain. There has to be a difference regarding the due diligence requirements in a company's own operations and its direct suppliers on the one hand and indirect suppliers on the other hand. To ensure feasibility and the realistic possibility of achieving the objectives of the Directive, the due diligence requirements should differentiate between comprehensive requirements for direct suppliers and reasonable requirements for indirect suppliers. The broad approach to the inclusion of subsidiaries can lead to significant practical problems in the implementation of group standards in critical countries.

The far-reaching mandatory scope would also directly affect the competitiveness of European and German companies if they were bound by law to carry out due diligence obligations on customers in their third-country operations while companies from other jurisdictions do not do the same.

2.4.1 Preventing potential adverse impacts (Article 7)

Article 7 (1) states that companies *should take appropriate measures to prevent, or where prevention is not possible or not immediately possible, adequately mitigate potential adverse human rights impacts or adverse environmental impacts that have been, or should have been, identified*.

It is not clear what is meant by "should have been identified" and what the benchmark is for this.

It is said in Article 7 paragraph 3 that "as regards potential adverse impacts that could not be prevented or adequately mitigated, the company may seek to conclude a contract with a partner with whom it has indirect relationship, with a view to achieving compliance with the company's code of conduct or a prevention action plan". A similar wording is included in Article 8 paragraph 4 as regards actual adverse impacts that could not be brought to an end or adequately mitigated.

Often it might be very difficult for companies to assess whether there is an indirect business relationship. The conclusion of contracts with indirect relationships is not part of the usual due diligence measures recommended by UNGP or OECD Guidelines. Numerous legal and practical questions arise such as: What would be the terms of the contract? How can a company which has concluded a contract with its direct relationship may conclude at the same time a contract with its indirect relationship? What would be the financial or other compensation of such an agreement? What if the indirect business relation does not want to sign such a contract?

In addition, as the relationship would transform into a direct business relationship, liability rules would be even stricter which means that there would be a legal risk to follow this provision.

Article 7 paragraph 3 should be deleted.

2.4.2 Bringing actual adverse impacts to an end (Article 8)

Article 8 of the proposal states the *measures companies have to take to bring an actual adverse impact to an end.*

As not all wrongdoings of a company are known by the company itself, it is not clear what a company has to do if it does not have knowledge about the wrongdoings within its supply chain. What if it has to assume human rights violations?

Article 8 (3(b)) states that *where necessary due to the fact that the adverse impact cannot be immediately brought to an end, develop and implement a corrective action plan. Where relevant, the corrective action plan shall be developed in consultation with stakeholders.*

It is not clear what is meant with the term “where relevant” and who decides which situation is relevant. Is it the company or another organization? Are there negative consequences that might arise if the company decides it is not relevant to consult stakeholders?

Article 8 (3(d)) states that *companies have to make necessary investments, such as into management or production processes and infrastructures, to comply with Article 8 paragraphs 1, 2 and 3.*

It is unclear to which organization this requirement relates to. Is it only the company falling under the direct scope of the proposal? This requirement must not also relate to the suppliers of the companies as this would intervene too much with the corporate freedom and the property rights of the companies.

→ The legislator must focus on the most severe adverse impacts taking into account the fact that it is impossible to mitigate every single risk that may occur on supply chains.

2.5 Combating climate change (Article 15)

2.5.1 Duty to establish a plan

Article 15 introduces under the headline “combating climate change” *the duty to establish 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.*

It is of great importance that the EU is moving forward ambitiously on climate policy. But the present CSDDD proposal should focus on human rights and environmental due diligence, as already mentioned under 1.1. To avoid fragmented and incoherent regulation, the climate aspects should be dealt with in a separate legislative proposal to allow create a more coherent framework.

The obligations laid down in Article 15 to establish a plan to ensure that the business model and strategy of the company are compatible with limiting of global warming to 1.5° C in line with the Paris agreement is exuberant. The Paris Agreement is an international treaty directed to States. It is not possible to derive any concrete contribution that an individual company could make in order to achieve the global goal. The obligations should instead be based on the UN Guiding Principles on Business and Human Rights which always have been the benchmark in the past. The UN Guiding Principles do not contain a duty for companies to establish a climate plan.

Furthermore, it is not possible to attribute responsibility for climate change to one single operator nor to create an obligation of result for companies. The term "ensure" is too strong as the transition depends on multiple factors that are not all within the companies' control (energy and carbon prices, growth, availability of technologies, global emissions…). Companies would risk court action for failing to "ensure" if the transition turns out differently than initially planned. The objective should be to show the company's efforts to achieve transition and not to guarantee future results.

In contrast to the distinct title of the article, such plans also include the transition to a sustainable economy in general and so loses the focus on the objective of climate change. It is unclear if the transition plan only has to be established with regard to combating climate change or if it necessarily also has to include transitional measures that do not contribute to climate change.

The relation of plans to ensure the compatibility with a sustainable economy and adaption of the strategy taking into account the due diligence that is also aimed at contributing to a more sustainable economy is unclear as both have more or less the same intention. This could have repercussions on the possibility of liability of directors as the corporate strategy is also addressed in Article 26 paragraph 2.

We also wonder how such plan is going to be assessed by the public authority according to Article 17. Just as little as such agreement is litigable for the signatory states, it is and should be for companies due to the high level of the agreement. On the other hand, companies do try to adapt their business plans to the common goal and reduce emissions already in practice.

It is still unclear if there will be guidance on the specific requirements for the climate plan. Compatibility with the 1.5 °C objective can somehow, but very individually, be assessed by companies. But it is even more unclear, how compatibility with a more sustainable economy is measured. What will the supervisory authorities assess because the transition to a "sustainable economy" as such is too broad and has no contour.

For these reasons, we suggest to delete this obligation and leave it at transparency level with the respective Corporate Sustainability Reporting Directive obligation.

2.5.2 Reduction objectives

Article 15 paragraph 2 stipulates that *"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".*

While climate change may be identified by a company as a "principal" risk for its operations, we wonder if "climate change" as such can be a principal impact by an individual company's operations. It seems that the wording has to be changed also against the background of the authority's monitoring function. How can an authority come to the conclusion that an individual company's operations have a "principal" impact on the global phenomenon of climate change?

We understand that "or should have been identified as a principal risk" means that the authority can replace the company's analysis according to Article 17. This implies that such identification is simple and a company's analysis can be declared as wrong ascertained with precision. While there may be obvious cases, the analyses are characterized by high uncertainty and assumptions. The directive should therefore clarify that a company's analysis can only be declared as wrong if it is under no circumstances appropriate.

Also, assigning supervisory powers to the authorities with regard to Article 15 paragraph 1 and 2 touch upon strategic decisions of companies. The decision how to contribute to combating climate change, and more, to become more sustainable and how, are strategic decisions. This is not the field of compliance. We reject interference of public authorities with strategic decisions of companies as this contradicts free establishment of business in Europe.

2.5.3 Group dimension

CSDDD introduces due diligence obligations at legal entity level and does not specifically address the case of groups on a consolidated basis (Article 5 and 15). As it stands, a parent company which does not meet the thresholds would not be required to establish a due diligence plan while its subsidiaries meeting the threshold would be obliged. Depending on the way the group is organized, legal entities which are not in the same chain of control (e.g. sister companies) would be required to establish potentially different due diligence plans. If these legal entities are registered in different member states, the plan would be set up according to the national legislation of their head offices which may vary to some extent.

This approach might contradict the organization of groups which in turn might lead to a lack of efficiency and coherence. CSR and due diligence policies are usually adopted at the parent company level, which ensures their deployment throughout the group. The parent company often plays an essential role in the identification of risks and their management or mitigation.. To meet the requirements of the CSDDD (only) on a single entity level subsidiaries would have to individually hire, and train dedicated teams which would disproportionately increase the administrative burden, cost and risk of litigation for each subsidiary. Groups should be free to implement the requirements of the CSDDD in a most efficient way as long as the requirements are met and not being diluted. Therefore, we urge the European Commission to include the possibility of a waiver or dedicated exemption for subsidiaries in case their parent undertaking is either obliged or commits to ensure compliance on a group level. In such cases the requirements as transposed into the applicable law of the parent company should prevail.

2.5.4 Remuneration

Article 15 paragraph 3 obliges *companies to duly take into account the fulfilment of the obligations referred to in paragraphs 1 and 2 when setting variable remuneration, if variable remuneration is linked to the contribution of a director to the company's business strategy and long-term interests and sustainability.*

Does "the fulfilment" mean that a plan as such is established? It would be strange, though, to link a reward to the (formal) fulfilment of a legal obligation. Therefore, this sentence probably has another meaning and should be clarified.

→ *We oppose the duty to adopt a plan to ensure that the business model and company strategy are compatible with the transition to a sustainable economy and with limiting global warming to 1.5° C.*

2.6 Complaints procedure (Article 9)

Article 9 (4b) states that *complainants are entitled to meet with the company's representatives at an appropriate level to discuss potential or actual severe adverse impacts that are the subject matter of the complaint.*

It is not clear how "appropriate level" is defined.

2.7 Monitoring (Article 10)

Article 10 states that *companies have to carry 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, to monitor the effectiveness of the identification, prevention, mitigation, bringing to an end and minimization of the extent of human rights and environmental adverse* *impacts. Such assessments shall be based, where appropriate, on qualitative and quantitative indicators and be carried out at least every 12 months (…).*

This frequency and scope are unrealistic and unfeasible. The due diligence exercise is a highly complex process, involving the assessment of up to thousands direct suppliers. It is not possible to monitor every operation and measure every year. In order to ensure feasibility, the monitoring has to be limited by a risk-based approach. The legislator should leave it up to the companies to decide on the frequency of the risk-based monitoring. The operations and measures have to be monitored at least every three years.

It is not clear which indicators are meant in the article and who defines these indicators. Is it for example the company or does the European Commission define the indicators in the guidelines according to Article 13?

→ *A risk-based approach should be the underlying principle as companies cannot monitor all of their operations and the ones of their subsidiaries every 12 months.*

2.8 Supervisory Authorities (Article 17)

The proposal shall also apply to companies which are formed in accordance with the legislation of a third country. The conditions for companies for which the Directive would apply are listed in Article 2 (2). Article 17 (3) stipulates that if the company does not have a branch in any Member State, or has branches located in different Member States, the competent supervisory authority shall be the supervisory authority of the Member State in which the company generated most of its net turnover (…). Therefore, the proposal does not regulate which national law and jurisdiction third country companies should be subject to. This still needs to be clarified.

2.9 Directors' duty of care (Article 25)

Article 25 stipulates, 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.*"

This is the first time the duty to act in the best interest of the company is addressed by EU law. The problem is, that it only relates to sustainability and does not mention other matters that belong to acting in the best interest of the company. It should therefore be added "also take into account". At least in the German jurisdiction the concept is derived from the purpose of the company laid down in the statutes and would include for a business enterprise to secure the viability of the company, i.e. the long-term profitability. We assume, that interest of the company always implies securing its existence in all Member States concepts. There is no hint to the full concept which is a pity because it would increase legal clarity and also acceptance by companies by showing that they still can be business-oriented organizations, today.

Also, this duty only reflects the inside out perspective of companies. Directors also have to take into account, the outside in effects e.g. of climate change, when expanding to markets in geographic areas which are under extreme threat from climate change. So, even in the area of sustainability the duty is shortcut. The inside out perspective also is questionable from a legal perspective as it introduces a duty to take into account public interests by private companies without limits set in the article. Practically, companies are currently in the transformation process to a more sustainable economy for various reasons, including conviction, market pressure and expected business advantages. The contribution of a legal obligation for sustainability in addition to the due diligence obligations set out in the draft will probably be limited while being constitutionally questionable.

The newly formulated duty of care is overall characterized by vague legal terms. "Sustainability matters", for example, "include" human rights, climate change and environmental consequences. With the use of the word "include" it seems that the list of sustainability matters is not final, but also other sustainability matters have to be taken into account. It should be clarified what such matters could be.

We understand that paragraph 1 obliges directors to analyze the consequences for sustainability matters in every decision including in the short, medium and long term. Only material decisions should be included in the assessment. For the director to be able to show that he has fulfilled the requirement, it would be necessary to document each decision he/she has taken. Therefore, not every decision of the director can be assessed in terms of sustainability matters. Otherwise, this would lead to a huge bureaucratic burden for the company.

We suggest to focus on due diligence in this directive, not to formulate short cut directors' duties and to leave it to transparency obligations set out in the CSRD draft.

→ *Article 25 should be deleted.*

2.10 Setting up and overseeing due diligence (Article 26)

Article 26 stipulates that "*Member States shall ensure that directors of companies referred to in Article 2 paragraph 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 organizations. The directors shall report to the board of directors in that respect."*

We understand that Article 26 intends to assert a high-level responsibility for due diligence within companies. Due to the definition of directors that includes at least members of the management board and supervisory board of stock corporations established under German law, the responsibility is assigned to them altogether by the draft directive. We suggest to give the responsibility to the board who is managing, not overseeing the company. This is probably meant to be possible for Member States and should be made clear. Also, we do not understand the duty of "directors" to report to the "board of directors" against this background.

It is unclear if stakeholders and NGOs should be heard when designing the due diligence processes. It is unclear, if the input from stakeholders is deliberate or an obligation. It should not be a legal obligation because "relevant" input cannot be expected at all times from stakeholders or NGOs.

Paragraph 2 obliges *directors to 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.*

Constant and far reaching negative impacts e.g. on human rights should clearly lead to a rethinking of the corporate strategy. For identified "potential" adverse impacts an obligation to adapt the corporate strategy in addition to the measures which have to be taken and the consideration for single decisions according to Article 25 seems to be inappropriate. However, there are so many cases where e.g. singular measures taken do not touch upon the overall corporate strategy. In these less severe cases, instead of the corporate strategy the human rights strategy of the company can be revised.

→ *Article 26 should be deleted as it is unclear and we see no possible amendment to give this article an added value in company law.*

2.11 Substantiated concerns (Article 19)

Article 19 stipulates that *natural and legal persons are entitled to submit substantiated concerns to any supervisory authority when they have reasons to believe, on the basis of objective circumstances, that a company is failing to comply with the national provisions adopted pursuant to this Directive.*

In Article 19 paragraph 1, it is not clear why natural and legal persons can submit substantiated concerns to the supervisory authorities while, when it comes to companies, persons and organizations can submit legitimate concerns. Indeed, the concerns addressed in Article 9 should not only be legitimate but also substantiated in order to avoid a flow of insignificant or anecdotal complaints.

2.12 Civil liability (Article 22)

The proposal explicitly provides for *civil liability if companies failed to comply with the due diligence obligations to prevent potential adverse impacts or to bring actual adverse impacts to an end. Liability is not limited to own breaches, but is also conceivable for breaches by subsidiaries as well as suppliers*. This can lead to disproportionate litigation risks for companies. In addition, companies would be faced with high legal uncertainties.

We generally reject (independent) civil liability. The proposed sanctions regime (Article 20) is already sufficient. The pecuniary sanctions listed in Article 20 (3) are already in antitrust dimensions. If no success of effort is owed, there should not be any additional threat scenarios with lawsuits, even in the case of a possible breach of the duties of care. The protected legal asset is not competition, but the individual legal interests. For employees, the possibilities to take legal action, for example from the employment relationship, are sufficient.

Only in the case of direct liability of the company should general legal actions be considered for others as well. Otherwise, liability for the behavior of third parties would also be included, possibly also the failure to avoid infringement? This would be far too far-reaching in terms of general civil liability standards, i.e. it would be an unreasonable extension of the general civil liability standards. Liability for indirect business relations is completely contrary to the current legal system despite the limitation to obvious/expected infringements. Expected infringements are very vague.

Civil liability cannot refer to indirect business relationships. The sentence "unless it was unreasonable…" (paragraph 2) lacks clarity and is too vague and subjective to be the basis of a responsibility regime. Which criteria would allow to judge that the measures taken are inadequate to prevent or mitigate the risk? Therefore, the burden of proof should be reversed, and it should be up to the plaintiff to prove bad faith in the implementation of the due diligence policy vis-à-vis indirect partners.

In addition, direct liability of the management for extended duties of care seems too far-reaching. A general standard of organizational culpability (e.g. the German Gesetz über Ordnungswidrigkeiten) is sufficient.

The proposed civil liability provisions will make the scenario of companies withdrawing from poorer countries very real. The global competitiveness of European companies would be weakened against competitors coming from countries without comparable due diligence regulation. The civil liability regime could also lead to business partners being put under undue pressure.

It is of paramount importance that no collective regress is allowed under the CSDDD proposal.

→ *We generally reject the proposed (independent) civil liability in the CSDDD. The enforcement mechanism should rely on sanctions and administrative enforcement.*

3 Annex of the proposal

The Annex to the proposal specifies the adverse environmental impacts and adverse human rights impacts relevant for the directive and lists the relevant international conventions. It is not clear how companies should deal with countries that have not signed all conventions. Therefore, it would be very helpful if for every human right there were a list of positive/negative factors which describe the human risks respectively environmental risks in an objective manner.

Point 17 of Part I of the Annex stipulates the violation of the prohibition of withholding an adequate living wage in accordance with Article 7 of the International Covenant on Economic, Social and Cultural Rights. Article 7 of the Covenant lists remuneration which provides all workers, as a minimum, with fair wages and equal remuneration for work of equal value (…). It is not clear how a fair remuneration to be calculated and what standards will be employed. How are companies expected to ensure that a living wage is paid? The question arises if there will be tools that can be used to calculate and enforce the payment of living wages?

4 Full alignment with all EU sustainability reporting duties

It is of the utmost importance that the CSDDD is fully aligned and compatible with all relevant EU legislations, e.g. the CSRD. This applies for all relevant dimensions, including, but not limited to the respective sustainability-related reporting requirements. Inconsistencies and duplications need to be avoided to avoid complexity, confusion and legal liability risks. Also, to avoid fragmentation of reporting and due diligence requirements, it is important to have a clearly structured framework in which the CSRD contains sustainability-related disclosure requirements (incl. on due diligence) while the CSDDD lays out the underlying due diligence duties.

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