



OPINION

European Economic and Social Committee

Sustainable corporate governance

Proposal for a Directive of the European Parliament and of the Council on
Corporate Sustainability, Due Diligence and amending Directive (EU) 2019/1937
[COM(2022) 71 final]

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Rapporteur: **Antje GERSTEIN**

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Referral	European Parliament, 04/04/2022 Council of the European Union, 05/04/2022
Legal basis	Article 50(1) and (2)(g) and Article 114 of the Treaty on the Functioning of the European Union
Section responsible	Single Market, Production and Consumption
Adopted in section	27/06/2022
Adopted at plenary	14/07/2022
Plenary session No	571
Outcome of vote (for/against/abstentions)	179/6/14

1. **Conclusions and recommendations**

- 1.1 The EESC welcomes the proposal as an important step in setting up a coherent legislative EU framework on sustainable corporate governance and due diligence which promotes the respect of human rights as a duty for businesses and directors. The goal should be to achieve legal certainty for companies, employees and all of their other stakeholders.
- 1.2 Therefore, the EESC calls on co-legislators to keep the idea of a level playing field in mind and envisage at least key provisions being fully harmonised to avoid distortive discrepancies emerging between Member States' transposition laws.
- 1.3 The EESC underlines the great importance of the UN Guiding Principles on Business and Human Rights (UNGPs). It is the benchmark that clearly outlines the duties and responsibilities of all actors (states, business, civil society, trade unions and workers' representatives) with its three-pillar model of "protect, respect and remedy" to improve the human rights situation along the supply and value chains worldwide. States' international human rights law obligations require that they respect, protect and fulfil the human rights of individuals within their territory and/or jurisdiction.
- 1.4 Systemic and sustainable change on the ground can only be achieved through supporting countries in enabling them to better fulfil their duty to protect human rights. Companies have a clear responsibility to respect human rights, but they cannot replace the critical role and proper functioning of the State. In this context, the EESC welcomes the Commission's announced legislative initiative which will specifically address forced labour.
- 1.5 The EESC calls for the directive to clearly differentiate between adverse impacts that are either caused or influenced by an enterprise and impacts that are not caused or influenced by an enterprise, but directly linked to its operations, products or services through a business relationship. It needs to recognise that due diligence requires a risk-based approach and can involve prioritisation based on the risk-assessment.
- 1.6 The EESC would like to point out that, policymakers need to keep the challenging MSMEs' position in mind and ensure that support tools are ready at the European and national levels once the due diligence legislation enters into force.
- 1.7 Exercising corporate due diligence is an ongoing process, in which the involvement of trade unions and workers' representatives is a success factor. The EESC calls for considering the further development of the EU framework on sustainable CG. In this context, the existing involvement of organised and elected workers' representatives, for example based on the work of European Works Councils (EWCs) or IFAs (International Framework Agreements) and in company boardrooms, where applicable, offers guidance and support.
- 1.8 The EESC is concerned that the Commission proposal contains numerous unclear legal concepts that are open to interpretation, and thus considers it necessary to better define terms like "established business relationship", "downstream value chain" and "appropriate measures"

as they define/influence/determine not only the scope of the directive, but also the related due diligence requirements, sanctions and liabilities.

- 1.9 The EESC calls for the proposal to be more clear regarding groups and due diligence obligations. Instead of referring to "company" (Article 3(a)) the EESC considers a reference to a "company group" more appropriate and more coherent when it comes to disclosure mechanisms, reporting procedures, handling of reports/complaints and educational efforts within a company.

2. Context of the Commission proposal

- 2.1 Human rights are a key concern for the European Union, its Member States, European businesses, workers and civil society. The Union's transition to a climate-neutral and green economy and its ambitious plan to deliver on the UN Sustainable Development Goals¹ are drivers for the EU's deep engagement in the business and human rights agenda. Fully endorsing the existing international standards and their broad achievements, namely the United Nations Guiding Principles on Business and Human Rights (UNGPs)² and the OECD Guidelines for Multinational Enterprises³, the EESC puts great emphasis on policy coherence with these instruments. The ILO Tripartite Declaration of Principles concerning MNEs and Social Policy also contains a comprehensive set of rights relating to multinational enterprises and labour, referring in particular to the conventions and recommendations on health and safety at work, and should therefore be considered. The EESC also calls for coherence between national policies and European legislation that is currently being drafted and covers similar areas or also includes due diligence rules. Examples of such legislation are: the Corporate Sustainability Reporting Directive (CSRD)⁴, the proposal for a Regulation on Deforestation-Free Products⁵, the proposal for a new Batteries Regulation⁶, the Sustainable Products Initiative (SPI)⁷, EU Taxonomy for sustainable investments⁸ and the Commission's forthcoming legislative initiative to effectively prohibit the placing on the EU market of products made by forced labour (marketing prohibition)⁹.

- 2.2 After some Member States¹⁰ issued national corporate due diligence legislation, a growing desire emerged to create a European level playing field for companies within the Union and

1 [A/RES/70/1](#).

2 The UNGPs were endorsed by the UN Human Rights Council in its resolution 17/4 of 16 June 2011 ([A/HRC/RES/17/4](#)).

3 OECD (2011), OECD Guidelines for Multinational Enterprises, OECD Publishing. <http://dx.doi.org/10.1787/9789264115415-en>.

4 [COM\(2021\) 189 final](#); [OJ C 517, 22.12.2021, p. 51](#).

5 [COM\(2021\) 706 final](#).

6 [COM\(2020\) 798 final](#).

7 [COM\(2022\) 142 final](#).

8 [OJ L 198, 22.6.2020, p. 13](#).

9 https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13480-Effectively-banning-products-produced-extracted-or-harvested-with-forced-labour_en.

10 France (*Loi relative au devoir de vigilance, 2017*), Germany (*Sorgfaltspflichtengesetz, 2021*), Netherlands (*Wet zorgplicht kinderarbeid 2019*).

avoid fragmentation. Against this background, the European Commission set out this proposal for a horizontal framework to encourage businesses to do their bit to respect human rights and the environment.

3. **General comments**

- 3.1 Russia's unprecedented attack on Ukraine is changing geopolitics profoundly and has triggered a fundamental reassessment of economic relations and dependencies in our globalised economy, accelerating Europe's pursuit of more independence in key strategic areas. The consequent wide-ranging readjustment of our supply chains will require a reflection on the relationship between due diligence and the duty to follow politically decided sanctions which limit the scope of business. Therefore, the EESC calls for an approach that is practical, takes new business realities into account and is supportive in providing the urgently needed advice.
- 3.2 In view of the high complexity of today's supply chains, thoroughness must take precedence over speed - the detailed design of this directive requires a sense of proportion. In addition to the full respect of international human rights standards and instruments, the starting point should always be how the well-established elements of the UNGPs and the OECD Guidelines for Multinational Enterprises can be integrated in a practical and effective manner alongside a careful evaluation of the consequences/impact of this directive on different types of European companies (e.g. MSMEs, internationally operating holding structures).
- 3.3 The EESC stresses that the proposed directive is just one element of a much more comprehensive EU agenda to promote environmental sustainability, decent work and human rights worldwide. Systemic and sustainable change on the ground can only be achieved through supporting countries in enabling them to better fulfil their duty to protect human rights. Companies have a clear responsibility to respect human rights, but they cannot replace the critical role and proper functioning of the State, particularly the State duty to protect against human rights abuse within their territory and jurisdiction by taking appropriate steps to prevent, investigate, punish and redress human rights abuses through effective policies, legislation, regulations and adjudication.
- 3.4 Companies are obliged to comply with applicable laws and have a responsibility to respect human rights in line with the UNGPs. They need to implement a functioning due diligence process to ensure respect for human rights along the value chains. States and their governments have a duty to prosecute human rights violations. They are the addressees of human rights and the corresponding international conventions. States rightly have many enforcement powers that companies do not have and should never have. These include inspecting workplaces, issuing fines, seizing assets, revoking business licences, arresting suspects, charging alleged abusers and imprisoning those convicted.
- 3.5 The EESC underlines the continued need to prioritise the green transformation alongside social protection and safeguarding of human, including trade union and workers' rights. Civil society organisations must also play a key role in creating reliable transparency regarding the violation of human and environmental rights, as well as in supervising the requirement under the EU

taxonomy for investments to meet the do-no-significant-harm (DNSH) requirement and minimum safeguards¹¹.

- 3.6 Trade unions and workers' representatives are well aware of where possible misconduct may occur. Hence, the EESC points out the importance of involving workers' representatives and trade unions in the process of setting up (risk mapping) due diligence processes, as well as in monitoring it (implementation) and reporting breaches (alert mechanisms). Only with a fruitful social partnership can the transformation towards a more social and ecological sustainable economy be managed.
- 3.7 The EESC notes that the list of international human rights on which the directive should be based must be clearly defined to give the enterprises the legal certainty they need in international business life. The EESC believes that corporate due diligence should extend to the examination of human rights standards recognised in the UNGPs¹², consisting of the principles relating to the ILO core labour standards (no forced labour, child labour and discrimination, and freedom of association), the Universal Declaration of Human Rights (UDHR)¹³ and the International Covenants on Civil and Political Rights¹⁴ and on Economic, Social and Cultural Rights¹⁵. In addition, the EU-Charter of Fundamental Rights of the European Union¹⁶ as well as the Council of Europe European Convention on Human Rights¹⁷ and European Social Charter¹⁸ and the ILO's Tripartite Declaration of Principles concerning MNEs and Social Policy¹⁹, set out rights, values and principles which serve as guiding compass for the EU as a whole.
- 3.8 The EESC is of the opinion that the directive has to be clearly improved with a view to greater harmonisation, legal clarity and certainty. A mandatory due diligence framework would be achieved by applying an agreed standard that is enforced by proportionate, effective and dissuasive sanctions, whereas liability would have to be based on the violation of a clearly defined set of human rights.

4. Specific comments

- 4.1 The EESC is concerned that the Commission proposal contains numerous unclear legal concepts that are open to interpretation and may be applied differently by national authorities and courts. In particular, the EESC considers it necessary to better define the term "established business relationship", as it defines not only the scope of the directive, but also the due diligence requirements, sanctions and liabilities for damages. The concept of a "downstream value chain"

11 [OJ C 152, 6.4.2022, p. 105.](#)

12 UN Guiding Principle 12 (Commentary, paragraph 2).

13 [A/RES/217\(III\).](#)

14 A/RES/2200A (XXI).

15 A/RES/2200A(XXI).

16 [OJ C 326, 26.10.2012, p. 391 \(GA\).](#)

17 https://www.echr.coe.int/documents/convention_eng.pdf.

18 <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168048b059>.

19 [OJ C 429, 11.12.2020, p. 136. I](#)

also requires a more robust definition. It is not up to a company to control and take responsibility for their clients' action²⁰. The "appropriate measures" that companies are expected to have taken in order to be exempt from liability need to be better defined and backed up with examples. Last but not least, the proposed obligations for directors to take into account the contribution of "stakeholders" is unclear.

- 4.2 The value chain, as proposed in the draft Directive, includes not only direct and indirect suppliers, i.e. "upstream" activities, but also the use and, where appropriate, disposal of a product or service, i.e. "downstream" or end-of-life activities. In fact, the tracing of "downstream" activities leads to a variety of very practical problems. In particular, keeping track of a product after it has been placed on the market is likely to be even more difficult than tracking the procurement of raw materials and components. This is particularly the case for recycled products, where traceability might often be impossible.
- 4.3 Businesses should be expected to design their human rights due diligence processes in a way that is risk-based and proportionate to their potential and actual impacts. Therefore, the EESC considers it necessary to shape the scope accordingly, either to direct contractual partners or to indirect partners; in the event of the latter, only if it is reasonable under the circumstances of the case, to expect that adequate action is taken to prevent, mitigate, bring an end to or minimise the extent of the adverse impact, for example in cases of a high degree of vertical integration. This tried and tested method of responsibility can already be found in existing legislation, for example on traceability, as regulated by the EU Basic Regulation (Regulation (EC) No 178/2002²¹). This essentially requires a company to set up systems and procedures, based on the principle of "one step back, one step forward", to determine who is the direct supplier and the direct purchaser (excluding the final consumer) of its products. The well-established approach is appropriate because each individual party in the value chain can clearly be held responsible for processes that it can actually influence.
- 4.4 A risk-based approach can also include a sectoral method: The EESC welcomes the fact that the proposed directive acknowledges that there are sector specificities in due diligence policies that need to be taken into account. The EESC calls on co-legislators to take into account the important multistakeholder initiatives and standards that have been developed in particularly vulnerable areas (such as cocoa, bananas and palm oil).
- 4.5 The EESC recalls that the UNGP Nos 15 and 22 require remedies in cases where the enterprise itself has caused or contributed to human rights violations. However, the UNGPs do not require a company to provide remedies when the adverse impact is caused by another company in the supply chain. These provisions thereby reflect the basic legal premise that liability should only be imposed where a clear and foreseeable link exists between the victim's harm and the business responsible for the harm. Similarly, the OECD Guidelines for Multinational Enterprises also stress that seeking to prevent adverse impact in supply chains does not shift responsibility from the entity causing an adverse impact on the enterprise with which it has a business relationship.

²⁰ Relevant rules can be found in EU law on downstream operations, i.e. in terms of export control of sensitive materials (dual-use goods and military goods).

²¹ [OJ L 31, 1.2.2002, p. 1.](#)

In order to be coherent, the EESC is of the opinion that under the EU directive too, companies should only be held liable under civil law if they themselves have directly caused or contributed to (i.e. caused in part) a violation of human rights.

- 4.6 The EESC agrees with the Commission's approach that national authorities must be equipped with sanctions that are "effective, proportionate and dissuasive". In cases of negligence and intent, the authority should be able to set appropriate fines. However, the scope of sanctions should be defined at European level.
- 4.7 The EESC calls for the proposal to be more clear regarding groups and due diligence obligations. The current text, in particular the definition of "company" (Article 3(a)) seems to indicate that the requirements of the directive apply to individual companies rather than company groups. This would imply that a company from a Member State with subsidiaries within the scope operating in other Member States has to follow the decisions of several different supervisory authorities, which is practically difficult and more cumbersome. A group solution presents multiple advantages such as more coherence when it comes to disclosure mechanisms, reporting procedures, handling of reports/complaints and training and awareness within a company. This is acknowledged in the Corporate Sustainability Reporting Directive (CSRD) proposal which provides for an exemption for subsidiaries if there is reporting at group level. A group solution is better placed to deal with differences in national legislation which are likely to occur during the transposition of this directive across all 27 Member States and can serve to align or even go beyond the highest denominator. For these reasons the EESC considers that a group solution for due diligence should be favoured.
- 4.8 Despite the primary due diligence obligation of large companies, MSMEs will be indirectly affected as companies which fall within the scope of the directive will increase their demands on suppliers with regard to their implementation of the UNGPs, their non-financial reporting and their own supply chain management. The considerable effort is easier for large companies than for smaller companies, that have not yet been included in the scope of this kind of legislation. The latter have particularly less leverage to address human rights risks in their supply chain, and much fewer resources for conducting comprehensive risks assessments. The EESC proposes that the European Commission establishes a Help Desk that provides easily accessible information on human rights risks in countries and regions. It should be possible for stakeholders to engage with such a helpdesk and for partner countries or regions to collaborate with it. This helpdesk should also support the human rights capacity building of suppliers in third countries and the strengthening of their environmental performance. The EESC additionally calls on Member States to provide assistance, particularly to MSMEs, in a manner that is practical, specific and efficient, framed in a structural cooperation with the representative organisations concerned. The EESC considers it of utmost importance that the scope of companies addressed with this directive is in accordance with other relevant EU-legislation mentioned under point 2.1.
- 4.9 The EESC notes that the Commission explicitly includes the financial sector in its proposal. Sustainable finance includes respecting human rights and is an important element of transforming the economy to make it more green and social. However, the proposal remains vague with regard to verification procedures for lending or financing, and it is to be feared that

the provisions of the directive, which– does not explicitly include MSMEs, will indirectly be extended *de facto*. MSMEs will be indirectly affected as suppliers in the supply chain and will thus face massive challenges.

- 4.10 The EESC recognises that Sustainable Corporate Governance is linked to clear, credible commitment of directors, including to setting up a robust and functioning due diligence process in a company. It serves to the accountability of companies for their impacts of their operations. The EESC refers to the Shareholder Rights Directive which clarifies how the performance of companies and directors is linked to ESG matters²². The EESC notes that directors duties have to include reliable due diligence obligations based on a system of sanctions for cases where companies fail to respect them. Achieving ecological, social and economic sustainability should be the goal for all stakeholders of a company, not only shareholders. In a number of EU member states a mandatory say by representatives of workers in boardrooms applies. Such national legislations and rules should be respected.
- 4.11 The EESC has taken notice of the Commission's own Regulatory Scrutiny Board which questioned elements going beyond due diligence by stating, inter alia, that it "is not clear [...] why it is necessary to regulate directors' duties on top of due diligence requirements" and that 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"²³. Against this background, the EESC sees a need for further development and better alignment of director's duties with the Green Deal objectives.

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Christa SCHWENG
President of the European Economic and Social Committee

²² <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017L0828&from=EN>; Article 9a.

²³ [https://ec.europa.eu/transparency/documents-register/detail?ref=SEC\(2022\)95&lang=en](https://ec.europa.eu/transparency/documents-register/detail?ref=SEC(2022)95&lang=en).