EuroCommerce for retail & wholesale

Position Paper
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Retailers' and Wholesalers' views on the directive on corporate sustainability due diligence

Key points

Retailers and wholesalers welcome the objectives of the draft directive on corporate sustainability due diligence to support the activities and commitments our sector already engages in with our partners in the supply chain and to give guidance and legal certainty to businesses. Legislation supporting such mechanisms and processes can achieve compliance more easily. **We, therefore, ask for:**

- The Directive to aim to achieve sufficient harmonisation and clear definitions to avoid divergence in Member State implementation and ensure a level playing field, including a better balance between enforcement/supervision and facilitating companies to learn from any mistakes.
- The provisions to be risk-based, and consistent with existing EU or national legislation, with no duplication of already established processes, as well as clear and practical prioritisation criteria and guidelines in line with international standards and practice.
- Further clarification of the provisions affecting wholesale in high-impact sectors, along with ensuring SME interests are fully reflected and supported whether or not they fall within the scope of the Directive.
- Flexibility for companies to determine how to establish internal due diligence frameworks, and companies to have discretion to evaluate complaints, with greater clarity on "appropriate follow-up" in the directive
- Guidance on model contract clauses is needed as soon as possible to give businesses clarity and how to deal with SMEs with who they have a contractual relationship
- Overarching interpretative guidance are needed before guidelines for specific sectors or specific adverse impacts can be developed, with close consultation of our sector
- Amending the directive to include a smart mix of measures as defined under the UN Guiding Principles, and much clearer reference to industry and multi-stakeholder initiatives
- Specify climate protection provision and maintain restriction on civil liability
- The provisions on liability should be brought into line with OECD Guidelines – these are at present too vague and broad
- Deadlines, guidelines, transition periods and accompanying measures need to be reasonable and give companies sufficient time to prepare for compliance
- Many international wholesalers and retailers have introduced mechanisms and processes based on established principles under international frameworks. This means that compliance can be achieved more easily if such principles are supported in the legislative process.
- Clear definitions and terms are needed to provide legal certainty and a proper basis for compliance with the due diligence obligations.
- Better reflection in the Directive of concepts of prioritisation and proportionality in line with international standards on due diligence, with clear Commission guidelines.

Detailed issues

Our sector has long been committed to be part of the solution and has been involved in setting measurable and transparent actions such as:

- Respect for Human Rights through voluntary internal due diligence measures and voluntary initiatives and responsible business agreements with suppliers.
- Developing and participating in company schemes focused on improvements in their commodity or regions or both
- Environmental protection through sectoral or commodity schemes
- Cooperation among multinationals to tackle human rights and environmental challenges
- Commitments to carbon neutrality.

We, therefore, support the intentions of the proposal and call for a practical and realistic EU due diligence legislation creating an EU level playing field, helping streamline related reporting requirements. The legislation needs to acknowledge that due diligence is a dynamic process and thus choose an educative and cooperative approach, encouraging learning and experience sharing. Importantly it should be shaped in a practical and supportive way that reflects businesses' day-to-day operational challenges and the international standards they already use.

In this position paper, we highlight the points summarised in the Key Points above which we believe should be given special consideration in further discussion in the Council and Parliament.

Close alignment with established international frameworks, especially on prioritisation and proportionality with definitions providing legal clarity

Articles 4 to 11 form the key part of the proposal. Article 4 sets out the core due diligence obligations which companies will need to adhere to and Articles 5-11 provide detail of these.

Legal certainty is essential to businesses in establishing compliance systems with such ambitious objectives as the draft Directive pursues. We understand that the EU aims to transpose and implement the due diligence requirements and practices laid down in the international standards but that this is not fully possible, as it needs to consider existing European legislation and competences of Member States. Nevertheless, the closer the substantive provisions of the draft Directive are aligned with established principles under international frameworks such as the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises, the better. This would not only support the compatibility and role-model function of the EU legislation, but also help businesses to adapt more easily, as many already use the international frameworks as the basis of their due diligence regimes.

The proposal as drafted does not fulfil this important condition. While referring to the OECD guidelines as an internationally recognised framework for practical due diligence, the explanatory memorandum even identifies the problem that new and emerging laws on due diligence are considerably different in the EU despite the intention of all the Member States to build on existing international standards like the UN Guiding Principles and the OECD guidelines.

The Directive itself does not follow the logic of the OECD guidelines, which differentiate between adverse impacts either caused or contributed to by an enterprise and the impacts that are directly linked to its operations, products or services by a business relationship. They recognise that due diligence is risk-based and can involve prioritisation based on the risk assessment. Companies can be

involved in adverse human rights and environmental impacts based on “cause”, “contribution” and being “directly linked”.

The Directive should take into account the terms of involvement and differentiate between these levels of responsibility. This is especially important with regard to remediation and to civil liability. We recognise the importance of understanding the impact on human rights and the environment from the products we sell and the leverage we as retailers and wholesalers can have to influence change.

Any responsibility should only extend to where a company has direct control, namely on tier 1, where our sector’s contractual relations can help and impact its partners. The inclusion of subcontractors goes beyond this direct control and allocation of responsibility should reflect the complexity of supply chains of many hundreds of thousands of products that are the result of diverse value-added networks for globally produced goods sourced from ever-changing supplier cluster. Furthermore, retailers and wholesalers handle and sell a wide variety of products but only have a direct influence on their own-brand products. EU due diligence legislation should follow the well-established approach of different layers of responsibilities appropriate for each individual party within its sphere of influence in the value chain.

EU due diligence legislation should provide businesses with enough flexibility to conduct the necessary risk assessment and prioritization appropriate to its business model. The new law should allow companies to identify general areas such as product categories or countries where the risk of adverse impacts is most significant and, based on this risk assessment, oblige them to prioritise product categories, countries and business partners for due diligence activities.

The draft Directive, however, uses undefined terms and definitions like “established business relationship” and speaks of “direct” and “indirect” relationships and “appropriate measures” in several Articles, without clarifying whether risk assessment and prioritization are the basis for deciding which measures are appropriate.

Furthermore, Articles 7 and 8 require companies to collaborate with other entities to address risks, which also is relevant from a competition law perspective. The directive must be clear about what collaboration means in this context and provide a safe harbour provision in line with the final text of the Horizontal Block Exemption Regulations. Failure to collaborate due to fear of competition law violations could lead to liability under the Directive, putting companies in a very difficult position.

The due diligence requirements should focus on the supply chain

The draft Directive uses the concepts “value chain” and “established business relationship” as the cornerstones for all the following due diligence and reporting obligations and the sanctions and liability arising from not complying with these obligations.

The combination of these two concepts is problematic, because in the current form they leave companies in an uncertain position when defining and mapping which third parties should be subject to due diligence requirements. The value chain concept is broader than the focus on supply chains traditionally used by retailers and wholesalers to work with suppliers and partners. The proposal as drafted lacks clarity and legal certainty for businesses that want to comply by creating a confusing set of provisions. Its concept of established business relationships is combined with the (insufficiently defined) parameter of the intensity or duration of the business relationship and also fails to define how to apply the exclusion of insignificant or merely incidental parts of the value chain.

Failure to further define the concept of “established business relationship” in the current proposal could also create unintended consequences. Firstly, businesses that do not want to comply with the due diligence obligations could use this as an incentive to quickly move from one supplier to another

to avoid having established business relationships. Secondly, we would like to encourage policy makers to consider the impact on the European platform economy, which gained importance for small and medium sized retailers during the Covid-19 pandemic to have access to a much broader customer base. Our sector is currently undergoing a massive transition focused on digitalisation and sustainability while consumer behaviour and preferences and market conditions are still evolving – and this in a particularly challenging economic situation. The proposal needs much better-defined concepts and terms than "established business relationship" to support retailers and wholesalers in their transition.

As the Regulatory Scrutiny Board opinion states, in this proposal, "Key policy choices are not identified nor fully assessed" and similarly "impacts are not assessed in a sufficiently complete, balanced and neutral way [and] uncertainty related to the realisation of benefits is not sufficiently reflected."[1]. Therefore, the co-legislators should seek to use the simpler and established concept of supply chains. As stated above retailers and wholesalers are used to working with suppliers and partners in their supply chains and would therefore welcome such a clarification, because it is in these that real leverage to cooperate and address adverse impacts exists.

As a fallback option, a more detailed definition or explanation of the concepts "value chain" and "established business relationship" is needed. This could build upon the OECD Guidelines, which lay down how a companies' due diligence may be adapted, appropriate to its circumstances, for example its position in the supply chain – for a downstream user like a retailer or wholesaler the guidelines explain that conducting assessments of mid-stream suppliers' due diligence on their upstream suppliers for a specific risk or adverse impact is a possible solution.[2] Adding similar qualifying statements to the definition here would increase legal certainty for businesses and improve the legal text.

Definitions of key terms need to be clearer to ensure legal certainty

The proposal in its current form does not provide legal certainty and imposes numerous substantive norms on companies which are unclear and/or unfit for application by them. As set out above, key terms in Article 3 like "established business relationship", "business relationship" and "value chain" which are critical for the scope of a companies' due diligence obligations yet appear to be contradictory and difficult to apply in practice. Definitions of "direct" and "indirect" relationship in Article 3(e) and (f) are unclear and insufficiently focussed, as are the essential concepts of "preventing adverse impacts" in article 7 and "bringing adverse impacts to an end" in article 8 are not precise. Without further clarification these leave businesses in serious legal uncertainty about how to implement the new requirements.

Especially important is the need for a clear definition of the term "company" and what groups based in a Member State with subsidiaries or legal offices in other Member States would need to do. If groups have to comply with several different – and potentially diverging – national transpositions of the Directive, how would this work in practice and which rules would they need to apply? Groups with subsidiaries or legal offices in several Member States should only have to comply with the national transposition of the Directive of the Member State in which the company has its headquarters.

The proposal's annex contains six pages of generally formulated international agreements on human rights and the environment, which are often government-to-government, and unfit for direct application by companies. The absence of applicable material norms is an essential concern, as legal

[1] REGULATORY SCRUTINY BOARD OPINION SEC(2022) 95 about the Proposal for a Directive of the European Parliament and of the Council on Sustainable Corporate Due Diligence and amending Directive (EU) 2019/1937, page 1

[2] OECD (2018), OECD Due Diligence Guidance for Responsible Business Conduct, page 47

certainty for companies, supervisory authorities and courts depends on it. Practical guidelines and guidance could help businesses to better implement and understand the requirements.

Another important definition that is unclear is which stakeholders need to be consulted. The current definition in article 3(n) is too broad and should be amended to provide for stakeholders to be duly consulted who can show a legitimate and substantive interest. Equally stakeholder complaints should be required to be substantiated.

For the definition of "appropriate measures" in article 3(q) key sentences of Recital 15 on page 31: *"this Directive should not require companies to guarantee, in all circumstances, that adverse impacts will never occur or that they will be stopped"* and on page 32: *"the main obligations in this Directive should be 'obligations of means"* should be incorporated in the definition to provide better guidance not only to companies but also public authorities and courts that will need to implement and enforce the Directive.

We would therefore suggest amending the proposal to clarify the following definitions and terms:

- established business relationship
- direct and indirect business relationship
- appropriate measures
- necessary
- appropriate resources
- not negligible
- ancillary
- company
- stakeholders
- Director

The Directive need to be more aligned in this respect with the UN Guiding Principles and the OECD Guidelines. The following table presents an overview of the different involvement terms and the actions that follow for each category according to the UN Guiding Principles and the OECD Guidelines:

Involvement term	Explanation	Scope of measures
Cause	to make happen or bring about the risk of the impact	• prevent • mitigate • remediate
Contribute	to help make happen or bring about the risk of the impact	• cease or prevent the action contributing to the harm • use leverage to mitigate the risk mitigate • contribute to the remediation of the harm to the extent a company has influence
Directly linked	to have established a relationship for mutual commercial benefit in performing activities within the scope of that relationship, the business partner increases the risk of the impact	• use leverage to prevent risk • use leverage to mitigate risk • no remediation required, but effort to it

A risk-based approach for due diligence should be explicitly mentioned in the text to align with the international framework and create clarity

Based on such a differentiation of involvement terms set out in the table above, the concepts of prioritisation and proportionality of actions should be central to the Directive. The UN Guiding Principles state in this regard that:

"Where business enterprises have large numbers of entities in their value chains it may be unreasonably difficult to conduct due diligence for adverse human rights impacts across them all. If so, business enterprises should identify general areas where the risk of adverse human rights impacts is most significant, whether due to certain suppliers' or clients' operating context, the particular operations, products or services involved, or other relevant considerations, and prioritize these for human rights due diligence."

EU legislation should explicitly refer to the UN Guiding Principles and the OECD guidelines to create legal certainty and provide businesses with guidance on how to comply with the due diligence requirements using a risk-based approach as described and recommended by these international frameworks.

The Draft Directive lists in its annex infringements of international treaties and conventions on human rights and the environment. The annexes should be improved to offer a more precise guide for businesses in their due diligence activities.

SMEs need to be effectively supported

Small and medium-sized enterprises are both the majority of companies in the retail and wholesale sector and part of the supply chains of larger companies that will have to conduct due diligence as prescribed by the Directive. From the perspective of our sector this presents a particular challenge: SMEs have limited resources to make a thorough risk assessment and practice due diligence in the same way as larger businesses. In line with the OECD Guidelines, the Directive should take into account the size of companies and apply proportionality, given that they will be administratively more burdensome and cost-intensive for smaller companies. These, often mid-sized, businesses need more flexibility and should be allowed to voluntarily engage with larger companies because they see a business opportunity to integrate and focus on specific value chains in their due diligence activities. This should still allow the possibility of dialogue on a voluntary basis with their larger business partners who will seek more exchange with all parts of the supply chain based on this Directive.

The Directive acknowledges that SMEs will be indirectly subject to due diligence requirements and proposes a series of support measures, from guidelines and guidance, dedicated websites and one-stop-shops up to financial support for SMEs. For us these support measures are an essential part of the Directive and policymakers need to ensure that all of these tools are deployed and implemented in a timely manner in the necessary quantity and quality. In line with the SME Act, legislators should carefully assess how SMEs will be impacted by the legislation. SMEs will need to be effectively supported, whether or not they fall within the scope of the Directive.

Many international wholesalers and retailers have already established mechanisms and processes based on established principles under international frameworks. This means that compliance is much more easily achieved if such principles are upheld in the legislative process.

Key definitions and terms need to be clarified to ensure legal certainty and a proper basis for the due diligence obligations.

Prioritisation and proportionality are key concepts of relevant international standards on due diligence and should be added and better reflected in the Directive. Clear and practical prioritisation criteria and -guidelines are needed. Companies need to know what actions are deemed sufficient.

Policymakers need to keep the SME angle in mind and ensure that the support tools are ready once the due diligence requirements start to apply. SMEs need to be effectively supported, whether or not they fall within the scope of the Directive.

Setting fully harmonised requirements and enforcement at EU level is essential to ensure a level playing field

The draft only partially achieves the objective of harmonising due diligence requirements at EU level and fails to contribute to the proper functioning of the Single Market or create a level playing field. Many provisions leave Member States wide discretion in implementation (e.g. article 9 on the complaints procedure; article 14 on support and stakeholder initiatives; Articles 17 and 21 on supervisory authorities; article 20 on sanctions). Member States are explicitly allowed to maintain or adopt legislation which could go further than the draft Directive, which will almost certainly lead to diverging national laws and fragmentation. In similar legislation such as the Non-Financial Reporting Directive, diverging implementation has been shown to lead to substantial problems, prompting the current revision of the directive to include harmonisation of reporting via common standards.

The provisions in article 21 to create a European Network of Supervisory Authorities and in article 13 to provide guidelines to support companies or Member State authorities on how companies should fulfil their due diligence obligations are important. The legislation should aim for uniform enforcement and harmonisation as far as possible to ensure a level playing field. In addition, the Directive should be aligned with reporting requirements in other EU legislation like the Corporate Sustainability Reporting Directive (CSRD). We welcome in this context the provision in article 11, which should be maintained to reduce the administrative burden, especially with regard to consolidated group reporting.

The Directive should aim to achieve at least minimum harmonisation and avoid leaving room for divergence to Member States to ensure a level-playing field.

The provision in article 11 on reporting requirements in line with the CSRD should be maintained.

Consistency with existing EU or national legislation & no duplication of already established processes

Several Member States have already passed or are preparing national legislation on corporate sustainability due diligence. To comply with this domestic legislation wholesalers and retailers already invested heavily in setting-up group-wide internal reporting standards, adapting their purchasing policies and in structuring information flows from and about their suppliers.

Other relevant EU legislation like the Deforestation Regulation and the Conflict Minerals Regulation are regulating due diligence for specific product groups, while reporting requirements under the Corporate Sustainability Reporting Directive will also impact a company's due diligence activities. Further proposals are expected shortly on products produced by Forced Labour. Retailers and wholesalers offer a broad assortment of products and are therefore impacted by all of these laws. The legislation should avoid imposing new obligations creating double or overlapping reporting with those

under these laws. **In line with the opinion of the Regulatory Scrutiny Board[3], we call on the EU institutions to ensure consistency with existing EU or national legislation and to avoid duplication of already established processes.**

The proposal also should clarify how the concepts of concepts of corporate governance and due diligence are distinguished. In general terms, corporate governance, covering the Board's responsibility towards the company/shareholders, and due diligence are clearly distinguishable in approach and scope. How would these two concepts be combined in the final legislation and what would be the long-term implications for companies in the EU? Furthermore, the question if elements of the due diligence process would then be part of required publicly available information under corporate governance needs to be answered as well as how to ensure confidentiality of business sensitive information – including what information needs to be shared with competent authorities and what needs to be passed along the chain.

Article 2: Further clarification is needed for the wholesale aspect of the high-impact sectors mentioned in article 2(1)b

The proposal usefully recognises the role of wholesalers in supply chains, but we believe that the wholesale aspect of the sectors listed in article 2(1)b needs further clarification. Article 2 defines the two groups of EU companies within the scope of the Corporate Sustainability Due Diligence proposal, who together cover the majority of trade conducted in the EU. However, the current text lacks clarity in some parts, for example for basic and intermediate mineral products the following examples are given:

"basic and intermediate mineral products (including metals and metal ores, construction materials, fuels, chemicals and other intermediate products)"

This list is too general and should be more specific – what is meant with "other intermediate products", which chemicals and what kind of construction materials would be in scope according to the proposal? The legislation should more clearly define what high impact sectors are, and for example define which products from these high-impact sectors are within the scope by use of customs tariff numbers. As currently drafted, the definitions will inevitably lead to confusion as to whether a company's products are part of a high-impact sector and thus in scope.

The list is too general and should be more specific in clarifying which sectors and products would be in scope.

Article 5: Flexibility needed in establishing internal due diligence frameworks

Article 5 requires Member States to integrate due diligence into all their corporate policies and have in place a due diligence strategy. To avoid duplication with existing national due diligence legislation and to streamline document requirements, there should be more flexibility in how to establish an internal due diligence framework. Due diligence strategies and related procedures should of course be clearly defined and described by companies. However, many retailers and wholesalers already

[3] REGULATORY SCRUTINY BOARD OPINION SEC(2022) 95 about the Proposal for a Directive of the European Parliament and of the Council on Sustainable Corporate Due Diligence and amending Directive (EU) 2019/1937, page 3

practice due diligence and have their own established processes: it should be the content and outcomes of such procedures rather than the prescribed format that matters. Therefore, companies should have some flexibility how to lay down their internal due diligence frameworks.

Give companies flexibility in how they set up internal due diligence frameworks to ensure that the content rather than the prescribed format matters.

Article 9: Companies need discretion to evaluate and address complaints

Complaint and grievance mechanisms to promote respect of human rights and as an instrument to detect potential breaches in this field at an early stage have been proven effective and successful. We are therefore in favour of setting up a complaint mechanism as foreseen by article 9. Grievance mechanisms should not be confused with whistleblowing procedures. Grievance mechanisms give voice to stakeholders and allow a wide range of potential human rights impacts to be addressed, adverse or not, before they escalate. As the Member States are currently transposing the Whistleblower Directive into national law, it would be better to ensure consistency between the two mechanisms and avoid overlap.

Article 9 requires Member States to ensure that companies in the scope of the Directive establish complaint procedures. In the fourth paragraph the proposal states that complainants are entitled to meet the company's representatives. We do not believe that this right should be automatic. A company should be given discretion to evaluate complaints and meet complainants as reasonably appropriate. Forcing companies to meet all complainants regardless of a complaint's merit, the risk or severity of the issue could lead to complaints being filled merely to interfere with a company's operations.

There should also be clarification on the meaning of "appropriate follow-up" to complaints. Companies should be allowed to use reasonable business judgment in following up complaints based on the merit of the complaint or severity of the risk raised. The Directive is not clear in this regard and leaves room for potentially mischievous interpretation.

Companies should be given discretion to evaluate complaints and meet complainants as reasonably appropriate. The meaning of "appropriate follow-up" to complaints needs to be spelled out.

Article 12: Guidance on model contract clauses needed as soon as possible

We welcome the proposal's recognition that businesses will also use contracts to implement and handle their own due diligence obligations. It is therefore essential that the Commission prepares as soon as possible after adoption of the directive and in good time before companies need to apply the directive, guidance on voluntary model contract clauses. The Commission and co-legislators should explore if model contract clauses could be used for compliance more widely rather than being restricted to article 7(2)(b), and article 8(3)(c), and that these better reflect companies' perspectives.

To verify compliance with contractual assurances in these articles, companies should be allowed to demonstrate that they have applied commercially reasonable efforts. Given the number of suppliers that a typical retailer or wholesaler works with, this could otherwise become a huge and unmanageable administrative and financial burden.

Similarly, there needs to be further clarification on what is meant by companies needing to provide support for SMEs where compliance with a code of conduct or remediation plan would jeopardize the viability of the SME. Businesses and their suppliers enter into arrangements at arm's-length, and companies will have little insight into whether an SME is viable. Companies will work collaboratively with SMEs who face problems, but it is unreasonable to expect companies to subsidize SMEs who have engaged in systemic practices that cause supply chain and human rights risks.

Commission guidance on model contract clauses should be prepared as soon as possible to give businesses clarity and should better reflect companies' perspectives.

Companies should be allowed to use commercially reasonable efforts to verify compliance with contractual assurances. Further clarification is needed on support for SMEs by companies that sought contractual assurance from an SME. Usually, businesses are not aware of a SME's viability as this is sensitive information that is not shared when entering into a business relationship.

Article 13: Overarching interpretative guidance needed before preparing guidelines for specific sectors or adverse impacts

Article 13 provides for the Commission to issue guidance for specific sectors or specific adverse impacts. We are concerned that this could lead to sector-specific guidelines without providing guidance on a wider front. This would not work for our sector with its many supply chains, wide range of many thousands of products and activities in several sectors.

This is why the Commission first needs to provide overarching interpretative guidance covering prioritisation of impacts and actions in particular. Based on this overarching guidance, sector-specific guidance should then be developed as a second step. Sector-specific guidance needs to be harmonised as much as possible and should not establish divergent standards.

When it comes to sectors or impacts that are of relevance for the retail and wholesale sector, like garments and footwear, we urge the Commission not to diverge from the relevant OECD guidelines. Furthermore, stakeholders should be appropriately consulted before any EU guidelines may be developed and adopted.

Overarching interpretative guidance is needed as a first step, to provide a coherent basis for harmonised sector-specific guidance. Retailers and wholesalers need to be appropriately consulted before any EU guidelines are developed and adopted on specific sectors or specific adverse impacts that are relevant for them.

Article 14: A smart mix of measures, fully recognising the value of industry and multi-stakeholder initiatives

EU legislation should embrace the concept of a smart mix of measures as defined under the UN Guiding Principles, creating an interplay between regulations, policy measures and support to voluntary efforts by business, with each strengthening the effect of the other.

The legislation should be part of a toolbox of complementary measures and multilateral cooperation and bilateral and unilateral actions such as development aid, investments and enforcement of sustainability chapters in trade agreements. Capacity-building, especially in third countries, is key to addressing the underlying causes of systemic issues; this needs strong collaboration among a wide range of actors in a holistic and aligned approach on a global level to bring about changes to build more sustainable development.

Supporting investments, innovation and recognizing existing leading industry and multi-stakeholder initiatives to promote harmonization in implementation will be important. Mentions in Article 14 and Articles 7 and 8 of industry and multi-stakeholder initiatives, need to be spelled out more clearly and facilitate collaborative efforts with industry on joint stakeholder initiatives in companies' due diligence strategy, rather than unilateral action by the Commission. Due diligence is an ongoing process, where mistakes should be discovered and remedied: this learning dimension that joint stakeholder initiatives provide for businesses is not sufficiently reflected in the proposal.

We suggest that the proposal should be amended to:

1. Adopt the concept of a smart mix of measures as defined under the UN Guiding Principles.
2. Build on and complement the Directive with EU multilateral cooperation, bilateral and EU actions and capacity building within and outside the EU.
3. Elaborate further the concepts and roles of joint stakeholder initiatives, with a view to ensuring a harmonised approach between Member States.
4. Ensure that the Directive contains a better balance between enforcement and supervision on the one hand and facilitating learning experiences on the other.

Article 15: Specify climate protection provision and maintain restriction on civil liability

Article 15 requires companies within the scope of the proposal to adopt a climate change mitigation plan that ensures the business model is consistent with the goal of limiting global warming to 1.5°C. Our sector fully supports this objective of the Paris Agreement, but there is wide room for interpretation when assessing climate impacts of a business model (in particular whether only Scope 1 and Scope 2 emissions, or also Scope 3, are included). The proposal should be clear that only scope 1 and 2 emissions are included, as these are able to be directly influenced by a company.

It is in this context essential that the exemption from civil liability under Article 22 in article 15 is retained. The wide range of possible interpretations of article 15 could otherwise create a gateway for actions for damages involving high legal costs without creating any added value for climate protection.

Article 15 (3) strays from the issue of due diligence into pure company law, a Member State competence, and should be deleted.

Article 15 should only include scope 1 and scope 2 emissions, and obligations under article 15 should continue to be exempted from civil liability under Article 22, and the third paragraph deleted.

Article 22: The provisions on liability are too vague, too broad, and not in line with the OECD Guidelines

Article 22 makes companies liable for damages if they fail to prevent potential adverse impacts (article 7) and to end actual adverse impacts (article 8) resulting in damage. The proposal also requires Member States to limit liability of companies if they have complied with a set of requirements.

The provisions on liability are too vague, too broad, and not in line with the OECD Guidelines and the UN Guiding Principles. These draw a clear distinction between on the one hand 'cause and contribute to' and on the other hand 'directly being linked to'. Thus, creating a sharp dividing line between liability and responsibility.

The flawed wording of the proposal does not include the required causal link between a company's actions and the adverse impact, necessary to establish liability. Companies, supervisory authorities and courts need to know on what exactly the liability is based, as the directive combines liability with high fines in article 20. The Regulatory Scrutiny Board mentioned in its second negative opinion on this proposal also that the Commission discarded mandatory due diligence policy options that do not include a civil liability regime, and that stakeholders considered administrative supervision the preferred option for enforcement[4].

The risk of civil liability and claims for substantial damages implicit in the current vague, broad provisions on liability could lead to companies withdrawing from potential risk areas, irrespective of whether actual and potential negative impacts on human rights and the environment exist there. EU due diligence legislation should help promote responsible business conduct and the disengagement of responsible actors would be counterproductive to that aim. Co-legislators should ensure that the **liability provisions are proportionate and delete the civil liability provision**.

The directive should also clearly set out the scope of the relevant legal actions, who can bring a relevant legal action before the relevant court and under which circumstances. It is essential to find the right balance between enabling access to justice or a right to remedy and reaffirming the principles of the burden of proof for everyone pursuing legal action against a business.

We suggest that:

1. The provisions should be clarified and brought into line with the definitions and distinctions in the OECD Guidelines. The distinction between own acts and acts of others, as recognized in Recital 38, should be part of the main text of the Directive.
2. Civil liability provisions should be deleted to ensure that liability is proportionate.
3. A more coherent text incorporating Recital 15 (on the reasonable limitation of what is expected from companies), article 3(q) (the definition of appropriate measures) and article 22.1.a (civil liability based on the efforts to prevent or bring to an end adverse impacts) should be drafted. It is essential to clarify what is expected from companies.
4. The scope of legal action should be made clear to strike the right balance between enabling access to justice and reaffirming the principles of the burden of proof.

[4] REGULATORY SCRUTINY BOARD OPINION SEC(2022) 95 about the Proposal for a Directive of the European Parliament and of the Council on Sustainable Corporate Due Diligence and amending Directive (EU) 2019/1937, page 2

Articles 25 and 26 should be deleted: company law is a national competence

The Director's duties in Articles 25 and 26 mix due diligence and company law, impinging on Member States competence for company law, without contributing in any way to improving due diligence by the companies in scope. The other provisions of the Directive for robust enforcement by Member States and supervisory authorities are sufficient to ensure that businesses conduct proper due diligence, as the proposal foresees.

In this context EuroCommerce refers to the Shareholder Rights Directive which already clarifies how the performance of companies and directors is linked to ESG matters[5]. For example, several EU member states provide a mandatory voice for representatives of workers in boardrooms. Such national legislation and rules should be respected.

EuroCommerce furthermore refers to the Commission's 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"[6]. Against this background, EuroCommerce believes to keep the legislation streamlined and **speed up the negotiations during the legislative process, these two Articles should be deleted**.

Delete Articles 25 and 26 which infringe on the Member States national competency for company law and support a speedy adoption of the Directive.

Article 30: Deadlines, guidelines, transition periods and accompanying measures need to be reasonable and introduced in due time

In some important cases in the past, such guidelines have only been available after the legislation is applied despite being foreseen in the legislation as appearing a lot earlier. The accompanying measures and guidelines need therefore to be in place in good time to be able to support companies once the Directive and the national laws transposing the Directive start applying.

To give businesses sufficient time to comply with the new legislation, it is necessary to allow for an adequate transition period between the deadline for Member States to transpose the Directive and the date from which the obligations under the Directive start applying. The Draft Directive mentions in several Articles that further guidelines and guidance will be provided and in our experience delays for these crucial supporting documents as well as for the transition by the Member States should be expected. Therefore, a reasonable transition period should be introduced to account for such delays.

The legislation should not result in adverse effects on people employed in or dependent on supply chains in scope of the legislation. This is a real risk should companies as a result disinvest and abstain

[5] Shareholder Rights Directive (EU) 2017/828

[6] REGULATORY SCRUTINY BOARD OPINION SEC(2022) 95 about the Proposal for a Directive of the European Parliament and of the Council on Sustainable Corporate Due Diligence and amending Directive (EU) 2019/1937, page 2

from high-risk sources due to fear of penalties and/or litigation. We urge the European Commission to put more focus on additional measures to provide support (financial, training, capacity building, etc.) in high-risk areas and sectors for companies to be able to tackle these environmental and human rights risks.

A reasonable transition period between the deadline for Member States to transpose the Directive into national law and the date of application of the new obligations should be introduced.

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