SVENSKT NÄRINGSLIV
SWEDISH ENTERPRISE

May, 2022

Comments on Corporate Sustainability Due Diligence[1]

Companies can and want to be part of a sustainable transition…

It is the fundamental nature of businesses to pursue long-term economic viability and sustainable profitability, so it is also in their interest to pursue the environmental and social sustainability that underpins this. Market developments and changing attitudes are key drivers in this regard. Competitive companies are also a precondition for a sustainable transition for society as a whole, as they provide the goods, services, innovations and economic resources necessary to attain environmental and social sustainability. Any legal framework should therefore avoid undermining competitiveness while at the same time making use of, and further incentivising, individual companies' own drive towards more sustainable operations.

…which requires that the due diligence framework be harmonised…

In order for a binding framework to deliver on its objectives, and to maintain a level playing field and maintain the ongoing competitiveness of European companies, it must be applied in the same manner throughout the EU. The current proposal contains several far-reaching and unclear definitions and concepts, which risks seeing individual Member States undertake extensive and differing interpretations. This would not only go against one of the main rationales behind the proposal - namely to counter fragmentation in the EU single market - but would provide little or no legal certainty to companies. This would increase risks and costs, harming the companies' ability to work to achieve real change. At minimum, the definitions of *company*, *business relationship*, *stakeholders* and *appropriate measure*[2] need to be demarcated and clarified.

…applied to supply chains rather than value chains….

In many industries, it is - to all intents - impossible for a company to control all aspects of its value chain, particularly downstream (e.g. clients, retailers). Making the downstream control mandatory would not only incur disproportionately high costs but would also put European companies at a direct disadvantage *vis-a-vis* third country competitors who are not obliged to put similar demands on their customer. In addition, when companies are required to perform due diligence on each other it creates practical problems. As with all other binding due diligence legislation to date, this Directive should be restricted solely to supply chains. The option to conduct downstream due diligence where appropriate will still exist.

…with a workable, proportionate and risk-based approach…

Supply chain due diligence is a proactive way for companies to identify problems and risks and to initiate improvements. In line with this, companies also seek to minimise all avoidable (legal) risks, often having whole compliance departments devoted to ensuring this happens. Consequently, the chances are that - without a workable and proportionate due diligence framework - companies will choose to terminate risky business relationships, something that is evident from recent studies.[3] This would deter constructive engagement, which counteracts the stated aim of minimising adverse human rights and environmental impacts. To ensure the efficient use of resources, it is also essential that the company be allowed to focus its attention on where the real risks lie. These depend on the size and nature of the operations, the links with the business in question and the extent to which the business may have contributed to any potential impact. Some companies need to focus on decreasing climate emissions generated by the supply chain, while others will need a stronger focus on their social and human rights impacts.

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[1] Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937.

[2] See Art 3a, 3e, 3n, 3q.

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

…where legal liability is limited to what companies can reasonably control...

The existing international standards for a company's due diligence work - in particular, the guidelines from the OECD and the UN - provide for a voluntary risk-based system. This means it is up to each company, based on its specific circumstances, to contribute to improving human rights and the environment by the means whereby the company assesses that it can have the greatest impact. This system, based on an obligation of means, can and should continue. However, with legally binding rules, it is fundamental that legal responsibility is clarified and restricted to what the companies can reasonably control and manage. In practice, this means that legal liability should be limited to direct contractual relationships. This would still have an impact along the supply chain, as contractual demands on the supplier to control his subcontractors will in turn be passed on to their suppliers, and so forth.

…due diligence at group level is allowed…

Many companies already have due diligence measures in place at group level. The proposal needs to open up to flexible solutions, so that companies have the opportunity to continue organising their due diligence group-wide, according to their respective business model, instead of each legal entity relying on its own processes and reporting systems. Solutions at group level would create coherence for disclosure mechanisms, reporting procedures, handling of reports and complaints as well as aiding educational efforts within companies. It would also help improve groupwide compliance management systems and measures generally, thus allowing for synergies between centralised group solutions to build trust in the process. This in turn would ensure the effectiveness of the due diligence policy and processes.

…the material norms that companies are expected to adhere to are clearly defined…

The Annex to the proposal lists those conventions and agreements that could be violated by adverse human rights and environmental impacts. These are principally meant to be implemented and fulfilled by States. Several of them are not even ratified by all EU Member States. Hence, there is no practical guidance for how companies are supposed to ensure their fulfilment within a binding framework. Consequently, the legislation should offer a more precise and demarcated list of the responsibilities that can reasonably be placed on companies to apply when performing their due diligence.

…and with the focus on due diligence instead of national corporate governance

Remaining corporate governance articles[4] should be deleted, as they are not directly connected with due diligence and thus add no value within such a framework. Existing EU and national company law, as well as national corporate governance codes, already provide sufficient incentives for directors to apply a duty of care. To include governance provisions in the Directive means mixing what should be a purely external relationship - the legal obligations of due diligence for the company's conduct - with the internal structures for governance and the company's decision-making process. This creates unnecessary legal uncertainty, interferes in well-functioning national systems, infringes private property rights and – as the Commission's own Regulatory Scrutiny Board's negative opinions[5] show – does not follow the principles of basic better regulation, such as subsidiarity.

In addition, making this a genuine due diligence framework requires that the work on achieving emission reductions[6] is conducted within the dedicated EU climate legislation, rather than in this area. Regulating it in this proposal fills no purpose, risks creating legal uncertainty and as a result should also be deleted.

[4] See Art 15.3, 25 and 26.
[5] https://ec.europa.eu/transparency/documents-register/detail?ref=SEC(2022)95&lang=en
[6] See Art 15.1 and 15.2.