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SVENSKT NÄRINGSLIV
SWEDISH ENTERPRISE

Due diligence for sustainability

The business sector plays a central role in delivering sustainable development. Without the goods, services and ideas, jobs and economic resources business create, it will be impossible to attain environmental or social sustainability. It is also in the long-term self-interest of business. Acting in ways that are socially and/or environmentally unsustainable will inevitably undermine the continuing economic viability of any company; and, if a company is not economically viable, it will be unable to survive.

One way of contributing to sustainable development, above and beyond the direct market activities of a company, is to influence the behaviour of other parties along the supply chain. Today, practically all larger companies in Sweden are pursuing an active sustainability policy and are working to improve the human rights and the environmental impact of their supply chains. Developments in markets and changing attitudes in society at large are also leading companies to increase their engagement not only in their own activities but also that of their suppliers and business partners.

The European Commission's initiative for a due diligence duty relating to human rights and environmental impact would change what is an essentially voluntary system today to one that is legally binding for companies. Given that several countries have, or intend to, put national legislation in place, this may be a way of avoiding a patchwork of national rules that drive up costs as well as contributing to a more level playing field. However, legally binding rules carry many risks. They may negatively impact on international trade and force companies to leave, or refrain from entering, complex markets. Detailed and inflexible rules may lead to compliance costs soaring without any tangible impact on sustainability. Companies may be held accountable for third party actions over which they have little or no control.

Consequently, a properly designed legal framework for supply chain due diligence is vital. We believe that the benchmark for any such framework must be that it is effective in promoting sustainable development and constitutes a reasonable burden for companies to undertake. In our view, this means that the framework must fulfil the following conditions.

Maintain a focus on human rights and the environment

To provide legitimacy and efficacy of the legal instrument, it is essential that it is not hijacked to meet other purposes. Proposals to change the inner workings of companies, or to increase the influence of certain groups of stakeholders, should be deemed unacceptable. They would have far-reaching consequences for business competitiveness and efficiency, with dubious benefits for human rights and the environment. The legality of such measures under current EU treaties could also be called into question. The involvement of stakeholders should be in line with existing EU and national rules, above and beyond which companies should be free determine which stakeholders should be involved and in what way. As a case in point, any social rights or collective rights - including co-determination - inferred through this legislation should not exceed, duplicate or disrespect what is already provided for in Member States' labour market legislation or collective agreements. Consequently, proposals that are covered by TFEU Art 153 should not be included.

Restrict legal obligations to what companies can reasonably be expected to control

Even where applying all possible means for verifying and controlling its suppliers, it will never be possible for a company to have full oversight of everything that happens within a supply-chain. In

Confederation of Swedish Enterprise
Address: SE-114 82 Stockholm Visitors: Storgatan 19 Phone: +46 (0)8 553 430 00
www.swedishenterprise.se

addition to violating legal principles and raising the cost of doing business, introducing liability for third-party actions is likely to be counterproductive. European companies, which are often at the forefront of efforts to improve human rights and the environment, would need to become more risk averse and could leave complex markets and risk being replaced by other less ambitious companies. Any legislation must therefore be based on the obligation of means (process) and not on the outcome. Furthermore, as it can be very difficult to wield influence without a contractual relationship; only first tier suppliers should be covered. This would still have an impact along the line of supply, as contractual demands on the supplier to control his subcontractors will, in turn, be passed on to their suppliers and so on.

…but encourage companies to do more

It is important that any legal framework does not deter companies from going beyond their legal obligations. Companies' own initiative work is, and will remain, central to improving human rights and the environment.

Ensure that rules are fit for purpose

What constitutes reasonable due diligence depends 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 a potential impact. For some companies, for example, climate emissions in the supply chain are relevant, for others this may be less important. Therefore, any binding rules must allow for due diligence to be risk-based, proportionate and context specific. For example, companies need be able to prioritise the risks. This is also the basis for the OECD and UN guidelines; any new rules should be aligned with these and build upon them. Furthermore, regardless of whether SMEs are covered directly by legislation, or are excluded by some turnover threshold and indirectly exposed as suppliers to larger companies, it is important to apply the 'Think Small First' principle when designing any due diligence framework.

... and minimise the administrative burden

It is essential that any rules are transparent and avoid generating unnecessary administrative costs. They must not overlap with other existing EU legislation or reporting requirements. All reporting requirements should be aligned and conducted under the Non-Financial Reporting Directive. Legal certainty must also be safeguarded, which means it must be feasible for a company to self-assess when they have taken sufficient efforts to avoid liability (safe harbour).

Harmonise in Europe

The resulting framework should be harmonised throughout the EU, i.e. with no specific national requirements and avoiding gold plating. This is essential in order not to undermine the Single Market and to minimise compliance costs, thus safeguarding European competitiveness. Any binding rules in this area should therefore be in the form of a Regulation.

...but strive towards the spread of higher standards globally

A due diligence duty at an EU level cannot and should not be expected to have any major impact on all related human rights and environmental issues and problems. Furthermore, if the rest of the world does not move in the same direction, any stricter requirements placed on European companies will damage our competitiveness. This in turn will make us poorer and undermine our ability to contribute to further sustainable development. The EU must therefore use its international leverage wherever possible to push other countries and their businesses to adopt standards similar to those enacted within the Union. Important instruments here will include multilateral cooperation and agreements within institutions such as the WTO and the UN, as well as bilateral or unilateral action through, *inter alia,* further developing and enforcing the sustainability chapters within free trade agreements