

European Commission's proposal for a directive on Corporate Sustainability Due Diligence *A comprehensive analysis*



Contents

Introduction	3
Key points	4
Civil liability and access to justice	4
Material scope	4
Value chain scope	5
Due diligence obligations	5
Climate obligations	5
Company scope	6
Full analysis	7
Company scope	7
Material scope	8
Value chain scope	9
Due diligence obligations	11
Stakeholder consultation	14
Complaints procedures	15
Communication obligations	16
Climate obligations	17
Public enforcement	19
Civil liability and access to justice	20
Directors' duties	22
Endnotes	23

Introduction

On 23 February 2022, the European Commission released its proposal for a directive on Corporate Sustainability Due Diligence.

The European Coalition for Corporate Justice (ECCJ), representing over 480 civil society, trade union and consumer organisations from 17 countries, welcomes the long-awaited text.

This directive could represent a landmark step forward in the direction of minimising the negative impacts of businesses on workers, communities and the environment worldwide, and advancing corporate accountability and justice.

However, despite many positive elements, the proposal falls short on numerous fundamental points. The text is riddled with flaws and shortcomings that risk dramatically limiting its positive impact on human rights and the environment. These call for significant improvements over the course of ensuing negotiations.

In particular, and for the purpose of strengthening the text, we encourage the European Parliament and EU Member States to take into account the following reflections and recommendations from the largest European network of civil society organisations working on corporate accountability.

Key points

Civil liability and access to justice Would victims of corporate abuse be able to obtain judicial remedy?

The proposal includes a civil liability regime, a crucial element to advance corporate accountability, ensure judicial remedy and incentivise compliance. However, claimants will still find it extremely hard to prove in court the company's breach of its duties, and the causal link between this and their harm. The directive should ensure a fair distribution of the burden of proof. Companies must also remain liable, even where they have sought to verify compliance through industry initiatives and third-party audits.

Other major barriers to justice often faced by claimants in business-related human rights and environmental cases remain unaddressed. In particular, the directive should ensure that the limitation periods for bringing liability claims is reasonable, that claimants have recourse to collective redress mechanisms, that civil society organisations and trade unions are entitled to bring representative actions on behalf of victims, and that Member States set up accompanying measures to provide support to claimants.

Material scope Would all human rights and environmental impacts be sufficiently covered?

The proposal defines human rights impacts by reference to an Annex, which covers an incomplete list of violations but includes a catch-all clause that refers to relevant UN and ILO instruments. This twofold approach creates ambiguities and risks promoting a selective application of standards. Moreover, a number of key, additional human rights standards need to be explicitly incorporated, including, for instance, on violence and harassment in the world of work. A non-limitative list of human rights instruments would be a more suitable approach.

Even more worrying is the limited definition of environmental impacts, which is narrowed down to a noticeably insufficient list of environmental norm violations. Such definition raises a major problem: the current fragmented patchwork of international conventions does not provide for sufficient coverage of impacts. This regulatory gap needs to be filled by explicitly targeting all sorts of possible environmental damages, whether they have direct implications on human rights or not.

Value chain scope

Would due diligence obligations extend far enough along the chain?

The proposal requires due diligence measures that should extend throughout companies' subsidiaries and global value chains, both upstream and downstream, but only with regard to so-called 'established business relationships.' Business relationships that are not (or that are not expected to be) lasting would fall outside the scope of the directive. This approach risks leaving out short, unstable or informal relationships where severe impacts are more likely, which might incentivise companies to switch suppliers more regularly.

The directive should turn back to UN and OECD standards, adopt a risk-based approach, and prioritise impacts on the basis of their severity and likelihood, not the characteristics (duration or intensity) of their business relationships.

Due diligence obligations

Would due diligence requirements make a real difference?

The proposal stipulates general obligations to prevent or mitigate potential abuses and to end or minimise actual ones, and lays down a list of specific measures to fulfil those obligations. The prominence given to 'contractual assurances' by business partners and third-party verification of compliance with such assurances is highly problematic. Both are widely known to be insufficient for prevention and mitigation purposes and risk watering down obligations by limiting them to a mere box-ticking exercise.

The general duty should more clearly prevail over any of the specific measures listed in the proposal – such measures should always be assessed against said general duty. The role of contractual assurances and verifications should be minimised and subject to strict quality requirements, already in the directive, in order to ensure their effectiveness.

Climate obligations

Would companies be obliged to meet emissions reduction targets?

The proposal fails to explicitly include greenhouse gas emissions within the definition of environmental impacts to be prevented via due diligence. Climate impacts should be explicitly included in the Annex to the directive, among the impacts that companies must identify, prevent and mitigate through their due diligence processes.

Under the proposed text, only a few companies are expected to adopt a climate transition plan, which reads as a weak, formal requirement, limited in scope, rather than as a substantive obligation to reduce climate impacts. All companies must have concrete obligations to develop and implement an effective transition plan in line with the Paris Agreement, including short-, medium- and long-term reduction targets. These obligations must be enforceable by courts and public authorities.

Company scope

Would all companies have to adopt human rights and environmental due diligence measures?

The proposal rightfully targets both EU and non-EU companies operating in the EU, which would help level the playing field. However, it would only apply to very large companies meeting high employee and turnover thresholds.

This narrow scope falls short of UN and OECD standards, which apply proportionally to all companies, and it fails to recognise that all companies can harm human rights and the environment. Even in the clearly insufficient list of sectors recognised by the Commission as high-impact, it is only large companies that would bear due diligence obligations.

Photo © Egoreichenkov Evgenii / Shutterstock.



Comprehensive analysis

Company scope

Articles 2 and 3

The proposal rightfully targets both EU and non-EU companies operating in the EU, which would help level the playing field. However, it still only applies to very large companies. It covers a wider range of companies than the French and the German due diligence laws, but a narrower one than that of the recent Norwegian law and several national legislative proposals.¹ Even in the clearly insufficient list of sectors recognised by the Commission as high-impact, it is only large companies that would bear due diligence obligations.

- This narrow scope **falls short of UN and OECD standards**,² which apply – proportionally – to all companies. It is even narrower than that of the proposal for a directive on Corporate Sustainability Reporting,³ which covers all large companies and listed SMEs. The proposal thus fails to recognise that all companies can harm human rights and the environment. While the text risks having the burden of compliance shifted, in practice, to smaller companies, it exempts them from any responsibilities.
- The proposal ignores many harmful business operations, as staff size and annual turnover are not reliable indicators of a company's impacts and influence over its value chain. In any case, these should be alternative (not cumulative) **thresholds** – otherwise, corporations with a high turnover and, therefore, enough capacity to address impacts, may fall outside the scope simply because their business is not labour-intensive (e.g., commodity trading), or they rely on outsourced personnel. In fact, in the proposal, employee thresholds do not apply to non-EU companies.
- For the purpose of calculating the **number of employees** of EU companies, the proposal should also clarify that employees worldwide – meaning employees of the parent company and of its subsidiaries – should be taken into account, as foreseen in the French due diligence law. This approach would reflect the size and power of transnational corporations more accurately than the number of staff in their home country.
- These rigid thresholds also risk creating **perverse incentives** for large companies, which could be tempted to adapt their business structures to avoid falling within the scope of the directive.

- The Commission claims that the definition of **high-impact sectors** has been limited to sectors for which OECD guidance exists. This decision leaves out extremely high-risk businesses, including, for instance, construction, infrastructures, energy, transport, logistics, electronics or auditing. It even fails to cover the **financial sector**, for which an OECD sectoral guidance does exist.^{4,5} The narrow list proposed is based on a restrictive understanding of high impacts, which not only stem from specific economic sectors, but also from specific activities, products or services, as well as specific areas (e.g. conflict- and post-conflict areas, weak governance zones, repressive regimes).

Material scope

Article 3 and Annex

The proposal defines human rights impacts by reference to an Annex, which covers an incomplete list of violations but includes a catch-all clause that refers to relevant UN and ILO instruments. More worrying is the limited definition of environmental impacts, which is narrowed down to a noticeably insufficient list of environmental norm violations.

- The combination of a list of violations of specific articles of international instruments with a catch-all clause creates ambiguities⁶ and risks promoting a **selective** application of standards. This approach is at odds with the principles of indivisibility and interdependence of human rights. A non-limitative list of human rights instruments would be more suitable.
- The proposal defines human rights impacts as those resulting from the **‘violation’** of human rights, as opposed to international standards, which define impacts as those which remove or reduce the ability of individuals to enjoy their human rights. By requiring the actual or potential existence of a ‘violation’, the proposal risks limiting the notion of ‘impact’ and thus the scope of the due diligence obligations and of the associated liability regime.⁷
- A number of key **human rights instruments are missing** from the list in the Annex, including the ILO Convention 190 on violence and harassment in the world of work, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, the International Convention for the Protection of All Persons from Enforced Disappearance, the ILO Convention 169 on indigenous and tribal peoples, and the UN Declaration on Human Rights Defenders.⁸
- While the Annex rightfully includes the violation of the right to a safe and healthy working conditions, there is no explicit reference to the relevant ILO instruments on **occupational safety and health**. Their inclusion is advisable, as they are expected to be recognised, in 2022, as part of the ILO’s framework of fundamental principles and rights at work.⁹

- Likewise, while the Annex rightfully includes the violation of the right to a fair wage as a human right impact, it does not explicitly mention the **right to a living income**. While the former applies in the context of hired workers, the latter is relevant in the context of any other income earner, such as smallholder, self-employed farmers.¹⁰
- Environmental impacts are defined by reference to environmental conventions, which raises a major problem: the current **fragmented patchwork of international environmental conventions** does not provide for sufficient coverage of impacts.^{11,12,13} This regulatory gap needs to be filled by targeting environmental damage in general, as the French due diligence law does,¹⁴ and not specific violations of international standards.
- In any case, the list in the Annex is far from comprehensive. Key **environmental conventions are missing**, including the Paris Agreement, the Ramsar Convention on Wetlands of International Importance Especially as Waterfowl Habitat, the International Convention for the Prevention of Pollution from Ships, the UN Convention on the Law of the Sea, the UN Convention to Combat Desertification or the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention).
- The Annex includes a provision that rightfully expands the list of environmental impacts by covering environmental degradation with **human rights implications**. While the recognition of the deep connection between the environment and human rights is remarkable, this limiting approach risks having companies ignore environmental harms whose link to human rights is not evident.
- There is also no reference to **general principles of environmental law**, such as the prevention, precautionary, rectification-at-source and polluter-pays principles, which companies should ensure respect with.

Value chain scope

Article 3

The proposal requires due diligence measures that should extend throughout companies' subsidiaries and global value chains, both upstream and downstream, but only with regard to so-called 'established business relationships.' Thus, business relationships that are not (or that are not expected to be) lasting, in view of their intensity or duration, would fall outside the scope. This approach risks leaving out short, unstable or informal relationships where severe impacts are actually more likely.

- The concept of 'established business relationships,' borrowed from the French due diligence law but new to the EU acquis, is **poorly defined** in the proposal. It is unclear how "lasting" a business relationship should be in order to be considered as

'established.' Recital 20 positively clarifies that if a direct relationship is established, all linked indirect relationships should also be considered as such. However, the relevant article is ambiguous and leaves room for divergent interpretations.

- This lack of clarity as regards the limitation of the value chain scope **risks leaving out short, unstable or informal relationships**, where, however, severe impacts exist. Companies may decide to focus exclusively on impacts among their established business partners, and ignore recurrent, severe impacts in other parts of the value chain that the company has the ability to influence.
- It is crucial that the value chain scope clearly covers **less stable layers** of activities, including semi-formal and informal working schemes as well as unofficial subcontracting and home-based work. For instance, it is essential that activities such as home-based workers in artisanal embroidery or self-employed workers in farming, fall within the scope of the due diligence of a garment or a cocoa corporation, respectively, even when the individual relationships with each of them may not be long and intense enough.

↓ Photo © tcl / Shutterstock.



- The proposal risks creating **perverse incentives**: as short-term relationships would not be covered, companies could be tempted to switch suppliers regularly in order to avoid due diligence obligations and their associated liability. This clearly runs against the spirit of the UN Guiding Principles, which aim to foster longer lasting and cooperative business relationships.
- Limitations of the value chain scope run counter to international due diligence standards, under which companies must prioritise impacts on the basis of their severity and likelihood, not the characteristics (duration or intensity) of their business relationships. The directive should turn back to UN and OECD standards, adopt a **risk-based approach**, and use severity and likelihood as the central concepts of due diligence, without discriminating between different types of business relationships.¹⁵

- The definition of ‘business relationships’ should also explicitly include certain types of activities that are linked to a company’s operations but **not commercial** in nature. As per UN standards, due diligence should take into account the activities of both state or non-state actors directly linked to a company’s products, services or operations, which extends, for instance, to situations such as state-led repression of human rights defenders denouncing business impacts.
- The definition of value chain scope also explicitly excludes relationships that “represent a negligible or merely ancillary part of the value chain.” This is problematic, as activities and business relationships that may be considered ‘**negligible or merely ancillary**’ can also carry serious adverse impacts, such as a private security firm working for a mining company or a toxic waste disposal contractor hired by an electronics enterprise.
- Further **limitations** apply to the scope of due diligence obligations in the **financial sector**. Financial institutions would only have to conduct due diligence with regard to the activities of their clients and other companies belonging to the same group. Moreover, they would not have to observe due diligence requirements when the client is an SME. This adds to the overall watering down of financial institutions’ obligations throughout the proposal, further detailed in sections (1) and (4) of this document.

Due diligence obligations

Articles 4, 5, 6, 7, 8 and 10

The proposal stipulates general obligations to prevent or mitigate potential abuses, and to end or minimise actual ones, and lays down a list of specific measures to fulfil those obligations. The prominence given to ‘contractual assurances’ by business partners and third-party verification of compliance with such assurances, raises major concerns. Both are widely known to be insufficient for prevention and mitigation purposes.

- **The general duty to prevent or mitigate, and to end or minimise harm should be strengthened and more clearly prevail over any of the specific measures listed in the proposal – such measures should always be assessed against said general duty. The role of contractual assurances and third-party verifications should be minimised and subject to strict quality requirements, already in the directive, in order to ensure their effectiveness.**
 - A heavy reliance on **contractual assurances** risks watering down the general obligations by limiting them to a mere box-ticking exercise, and shifting responsibility from the lead company onto its business partners. It neglects often indispensable changes to the lead company’s own practices, such as purchasing and pricing practices. It also neglects the myriad of active, not passive, means companies may need to employ to influence direct and indirect partners, for example, by training, communicating or collaborating

with suppliers or by cooperating with local governments on the enforcement of protective laws.

- Resort to **verification through industry initiatives and third-party audits** is worryingly promoted by the proposal, sending the dangerous message that companies can rely on them as an adequate means of due diligence. This vision risks the continuation of prevailing and ineffective business practice, driving audit costs yet failing to make an impact. This is a major problem not only because of the well-documented^{16,17,18,19,20} ineffectiveness of social auditors and certifiers in identifying impacts and preventing harm,²¹ but also because focusing on such measures shifts attention away from the crucial approaches needed to effectively address root causes of corporate abuse.²²
- Under the proposal, **auditors** are required to be “accountable for the quality and reliability of the audit,” which should be clarified as **legally liable** to third parties harmed as a result of faulty audits.— Companies are expected to take “appropriate measures” to identify, prevent and mitigate impacts. The term “appropriate measures” is defined by reference to a series of circumstances, including the **company’s influence** over the specific business relationship. However, it is not only the company’s influence (i.e., actual leverage) but also its ability to influence the behaviour of a third party (i.e., potential leverage) that must be taken into consideration. Such clarification would better align with international standards, under which companies must not only exercise leverage to address impacts, but also seek to increase their leverage when they lack it.
- There is no reference to **purchasing and pricing practices** in the articles of the proposal. Only the recitals mention that companies should identify and assess the impact thereof, and that codes of conduct should apply thereto. It is crucial that the text explicitly requires companies to make sure that the price they pay to their suppliers enables them to produce with respect for human rights and the environment,^{23,24} as proposed by the European Parliament.²⁵
- To properly identify risks and monitor the impact of operations and measures taken later on, the obligation to identify risks and impacts must explicitly comprise **gender-sensitive** human rights and environmental impact assessments, including by gathering and using disaggregated data (based on sex, ethnicity, age, migration status and others).
- Prevention and corrective **action plans** are only mandated “where relevant” and “where necessary due to the nature or complexity of the measures required for prevention.” Whether more or less complex, action plans should always be developed and effectively implemented whenever potential or actual impacts are identified, no matter the nature of the response required.
- The proposal qualifies the corporate obligation to end impacts by clarifying that where the adverse impact cannot be brought to an end, companies should ‘minimise’ the extent of such an impact. This novel notion of **‘minimisation’** should be clarified to make sure companies are obliged to use and increase their leverage in order to bring impacts to an end, and only if that proves impossible, reduce impacts, in any case, to the greatest extent possible.
- Companies are expected to remedy impacts by the payment of damages. The proposal fails to mention other **forms of remedy** beyond financial compensation. As per UN standards, remedy may also include, for instance, apologies, restitution, rehabilitation, non-financial compensation or guarantees of non-repetition. These

additional forms of remedy need to be included. Due attention should be paid to overcoming the barriers that women and other marginalised groups face in accessing and securing remedy.

- Companies are requested to **end a business relationship** if adverse impacts are not expected to be prevented, mitigated, ended or minimised in the short term, and, in any case, if they are 'severe.' The proposal over-simplifies this question and opens the door to irresponsible disengagement. Companies should only consider termination provided that they lack leverage to prevent and mitigate impacts, and are unable to increase their leverage whether in the short or the longer term, or in cases where actual or potential impacts are so severe that disengagement is the only option. They should also take into account any additional human rights consequences of such termination. In any case, for as long as the abuse continues and the company remains in the relationship, it should be able to demonstrate its own ongoing efforts to end or minimise and remediate the impact, or be otherwise exposed to liability.²⁶
- Due diligence obligations are unreasonably watered down for large, as opposed to very large, companies operating in **high-impact sectors**. While situations of high risk demand enhanced due diligence, large companies operating in such sectors are only required to address 'severe' impacts – which are ambiguously defined. According to international standards, severity may play a role in prioritising prevention and mitigation action, but all impacts should be first identified, regardless of severity, for a company to be able to adequately assess which ones to tackle and how. This approach moreover ignores the cumulative impacts of many smaller 'non-severe' impacts, such as underpaying across a notable number of employees thereby depriving whole communities of large sums of money; or small but consistent amounts of toxic leakage that build up over time.
- Further limitations apply to the **financial sector**: financial institutions are only required to conduct due diligence before granting a credit, loan or other financial services. This limitation is at odds with what UN and OECD sectoral standards dictate. Due diligence processes should extend throughout the entire duration of corporate credits, loans and the provision of other financial services.

Photo © Sergii Molchenko / Shutterstock.



Stakeholder consultation

Articles 6, 7 and 8

The proposal suggests that, “where relevant”, companies shall consult stakeholders when identifying impacts, and when developing prevention and corrective action plans. Stakeholders – including employees, and other individuals, groups, communities or entities potentially affected – are thus given a very limited role. Strengthening stakeholder engagement is key to ensure companies adequately identify and address impacts.

- In accordance with international standards, stakeholder engagement should not be done only “**where relevant**,” but as a general rule. It is always relevant for companies to consult stakeholders – without them, companies cannot be sure that they have adequately identified and assessed adverse impacts and taken the appropriate measures to prevent or mitigate them.
- Stakeholder engagement should not be done only in the context of the development and implementation of prevention and corrective action plans, but as part of **every step of the due diligence process**.
- The proposal fails to provide **quality requirements** for stakeholder consultation. It should be clarified that consultations must be carried out in good faith, and be effective, meaningful, timely, and informed.²⁷ They should be adapted to the needs and rights of specific, vulnerable groups. Companies need to ensure that due account is taken of the outcome of the consultation and that these outcomes are adequately communicated to stakeholders.– Consultations should also ensure the **safe participation** of stakeholders without fear of reprisal. For this purpose, companies should be obliged to ensure that stakeholders are not put at risk due to their participation in the consultations.^{28,29}
- When defining stakeholders, the proposal could more explicitly recognise **NGOs and human rights and environmental defenders**.³⁰
- The proposal should more clearly recognize the necessary **role of trade unions**, as legitimate representatives of workers where unionized, and their right to negotiate the due diligence process with the company.³¹ Trade unions and workers’ representatives in the company’s subsidiaries and value chain should also be explicitly involved.
- There is also no reference to the **right to Free, Prior and Informed Consent**, as enshrined in the UN Declaration on the Rights of Indigenous Peoples, which goes beyond the right to a mere consultation, granting a stronger role for indigenous peoples regarding decisions affecting their lands and natural resources.³²

Complaints procedures

Articles 9 and 23

The proposal expects companies to establish ‘complaints procedures’, which certain stakeholders can access, while rightfully clarifying that recourse to these procedures should not preclude claimants from having access to judicial mechanisms. However, the text should further emphasise the prevalence of judicial procedures over complaints ones, and provide strict quality requirements, which are key to ensuring the effectiveness of the latter.

- Complaints procedures have a proven track record of failure and should in no possible way preclude access to justice. Complaints mechanisms will continue to be **ineffective** if affected people lack the real possibility of going to court to assert their legal right to a proper remedy. This also means victims should never be forced to turn to complaints procedures before bringing a legal case.



- In any case, as set out in the UN Guiding Principles, complaints procedures should be **legitimate, accessible, predictable, safe, equitable, transparent, rights-compatible and adaptable**, and should ensure timely and effective responses to stakeholders.
- Companies should ensure that stakeholders can draw on the complaints procedures without fear of reprisal. To this end, the proposal suggests extending the

Photo © 1000 Words / Shutterstock.

Whistleblower Protection Directive³³ to the reporting of due diligence breaches. However, this directive would only cover employees and other persons with a professional relationship to the company, but leave other stakeholders, such as human rights and environmental defenders, unprotected.³⁴ It also only applies to the reporting of breaches of Union law and to reprisals from the respective company, while not considering the risk of reprisals from other actors. Companies should therefore be obliged to ensure that stakeholders are not put at risk when submitting a complaint.

- It should also be clarified that complaints procedures must provide for the possibility to raise concerns either **anonymously or confidentially**.
- The directive should stress remediation expectations in the context of complaints procedures. These should also allow complainants to **propose appropriate remedy**, as recommended by the European Parliament.³⁵
- The proposal entitles civil society organisations to submit complaints, but only those “active in the areas related to the value chain concerned”. If interpreted restrictively, this could impede relevant NGOs from bringing complaints on the basis that they have not been active in the economic sector at issue before. **Standing** should thus be broadened.
- The **obligation to inform** of complaint procedures only applies towards workers and trade unions, unreasonably excluding other relevant stakeholders and civil society organisations.
- Complainants are only entitled to meet with the company’s representatives to **discuss severe impacts** – a restriction based on a concept (severity) of ambiguous definition, and which again ignores the cumulative effect of many ‘non-severe’ adverse impacts that may be ongoing or widespread.

Communication obligations

Article 11

The proposal does not introduce new reporting obligations for EU companies, as the proposal for a directive on Corporate Sustainability Reporting already sets those out. It does try to complement the latter by compelling non-EU companies to publish an annual statement. However, such formal reporting is of little use – enhanced communication and supply chain transparency is crucial.

- The **content and criteria** for this reporting requirement is to be elaborated by the Commission via delegated acts. The Commission should ensure that a full report, in line with UN standards, is required. For the purpose of ensuring a level playing field, reporting requirements of EU and non-EU companies should be aligned as much as possible.

- Companies should be required to upload their reports or statements on a **European centralised platform**, supervised by the national supervisory authorities, as proposed by the European Parliament.³⁶ Such a platform could be the Single European Access Point.
- Communication requirements will fall short of UN and OECD standards if they stop at formal reporting. Communication must also include **regular and public disclosure** of detailed, relevant, timely and meaningful information about the company's operations and value chain, as well as their due diligence processes and the findings, activities and outcomes thereof. Continuous and accessible **reporting to affected stakeholders** in a manner appropriate to their context (e.g., in a language that is understandable for them) is also key.
- Companies should also be required to **map their value chain** and, with due regard for commercial confidentiality, publicly disclose relevant information about it, including names, locations, types of products and services supplied, amongst other relevant information,³⁷ as proposed by the European Parliament.³⁸
- **Documentation requirements** are also missing from the proposal. Due diligence processes must be continuously documented by and within the company. Written records should be kept for a sufficient period of time, as provided for in the German due diligence law.³⁹ This is essential for supervisory authorities and courts to be able to eventually assess the company's compliance.⁴⁰

Climate obligations

Article 15

The proposal fails to explicitly include greenhouse gas emissions within the definition of environmental impacts to be prevented via due diligence. Instead, it expects just a few companies to adopt a climate transition plan. While being a positive starting point, this provision reads as a weak, formal requirement, limited in scope, rather than as a substantive obligation to reduce climate impacts.

- Climate impacts should be explicitly included in the Annex to the directive, among the impacts that companies must identify, prevent and mitigate through their **due diligence** processes.⁴¹ This addition is of the utmost importance, given the unique and disproportionate ways in which both climate change and the transition towards a low-carbon economy may impact human rights and the environment.
- Companies should not just be obliged to adopt, but also to **effectively implement** an effective transition plan in line with the Paris Agreement, including short-, medium- and long-term reduction targets. The proposal fails to provide **quality requirements** for climate transition plans, which are crucial to ensure their adequacy and effectiveness.



- Only very large companies are subject to the obligation to adopt climate transition plans. The proposal leaves large companies in high-impact sectors off the hook. This is an unacceptably **narrow scope**. To have a real impact, all companies, including but not limited to the extraction of mineral resources, should be subject to this requirement.
- The proposal seems to refer exclusively to the climate impacts of the **company's operations**, which could be interpreted as excluding indirect emissions. This exclusion would run counter the overall spirit of the directive itself, as well as the objective of UN and OECD standards, which aim to address both internal and outsourced impacts. Both direct and indirect emissions should be explicitly tackled, as concluded by the recent Dutch court ruling against Royal Dutch Shell.⁴²
- Climate transition plans would have to include emission reduction objectives only if climate change is identified as a **'principal' risk or impact** of the company. In the absence of a definition of 'principal' risk or impact in the text, this is a confusing and, once again, unnecessary limitation of the scope. Whether or not the company has correctly identified climate change as a 'principal' risk or impact needs to be reviewable by the competent authorities.
- **Civil liability** should apply for the failure to comply not only with human rights and environmental due diligence obligations but also with climate transition requirements. This is necessary to ensure affected stakeholders can challenge climate plans before courts, not only supervisory authorities, and request relief or redress.⁴³

Photo © Longfin Media / Shutterstock.

Public enforcement

Articles 16, 17, 18, 19, 20, 21 and 24

The proposal includes important provisions on public enforcement.⁴⁴ It compels Member States to designate truly independent supervisory authorities, which may initiate investigations, either on their own motion or as a result of substantiated concerns, and issue orders, impose sanctions or adopt interim measures. This regime however raises some questions and could be improved by enhancing transparency, setting minimum pecuniary sanctions across the EU and by clarifying the interplay between administrative and civil liability.

- According to the proposed text, inspections shall be conducted with **prior warning** to the company, except where prior notification would hinder effective supervision. However, advance notice of inspections should be the exception and not the rule.
- The proposal expects Member States to lay down a regime of effective, proportionate and **dissuasive sanctions**, which should be based on the company's turnover, but leaves the amounts to their full discretion. For the purpose of levelling the playing field and preventing a race to the bottom between Member States, the directive should also provide for detailed criteria for the determination of sanctions and a specific minimum level of fines.
- Companies applying for public support would need to provide evidence that they have not been sanctioned for due diligence breaches. However, the proposal fails to provide for the exclusion of non-compliant companies from **public procurement**, as stipulated in the German due diligence law and as proposed by the European Parliament.
- The directive should also foresee the explicit exclusion of non-compliant companies from public support schemes including those of **Export Credit Agencies**, as proposed by the European Parliament.
- The proposal rightfully provides that taking remedial action does not preclude the imposition of sanctions or the triggering of **civil liability** for damages. However, the interrelation between administrative and civil liability deserves some further clarification – public enforcement proceedings should in no way pre-empt judicial ones, and supervisory authorities' decisions over due diligence breaches should by no means pre-condition or -determine courts' assessments.
- The proposal does not provide for any form of **criminal liability**, which is a concern given that companies may foresee paying for fines with the profits generated through lucrative business practices that breach the directive. Criminal liability ought to be provided for repeated breaches of the directive in order for penalties to be guaranteed dissuasive.

Civil liability and access to justice

Article 22

The proposal includes a civil liability regime, a crucial element to advance corporate accountability, allow workers and communities affected by corporate abuse to obtain judicial remedy, and incentivise compliance with due diligence obligations. However, major barriers to justice often faced by claimants in business-related human rights and environmental cases remain unaddressed.

- The proposal puts forward a fault-based liability regime, but tort law in Member States will put the burden of proof for a wide range of evidentiary parts on the claimants, including the violation of a human right or environmental standard, the harm suffered by the victim, and the causal link between them. In addition, the proposal does not regulate who should prove whether the company breached its duty or not. This is all **extremely hard for victims to prove in court**, especially since it requires access to information in the hands of the company (particularly considering the compliance-focused approach to due diligence measures in the proposal).
- The proposal currently leaves the question of **burden of proof** to national law. As highlighted by the EU Fundamental Rights Agency,⁴⁸ Member States' rules on the burden of proof constitute a major barrier in these cases, and disclosure – the obligation to release company documents in a legal dispute – either does not exist in most European legal systems or is available in only a limited way. The directive should clarify that it should be on the defendant company to clarify its connection to the violation and the harm, and to prove that it took all appropriate measures.
- Civil liability applies only for the **breach of the obligations** to prevent or mitigate potential impacts and to end or minimise actual impacts (Articles 7 and 8). Failure to comply with other articles of the directive should also give rise to liability. In addition, civil liability for auditors toward third parties harmed as a result of faulty audits should be clarified, as outlined in section (4) of this document.
- The proposal only refers to judicial recourse for the claiming of damages, but courts may also play a crucial role in providing for **injunctive relief**, that is, a remedy that requires a party to act, or restrains a party from acting, in a certain way. For instance, injunctive relief is needed to confront union busting activities, or in the event of a danger to the environment. The directive should explicitly allow stakeholders to request courts to order companies to act or to refrain from acting in a certain way with the aim of preventing harm or an infringement of due diligence requirements. Often, such relief may be more important than compensatory relief, for instance, in order to save a territory from pollution.
- Companies are exonerated from liability for harms caused by indirect partners if they sought contractual assurances and verified compliance therewith. The exemption would not apply if it was unreasonable to expect that such contractual assurances would prevent the harm, which one could argue in a significant number of cases.⁴⁹ However, it opens a potential loophole and dangerously **over-emphasises the role**

of contractual means and audit/verification processes, despite all their risks and limitations, as outlined in section (4) of this document.

- It should also be reconsidered whether any **due diligence defence** should be available for companies when harm is caused by their **subsidiaries**, considering that subsidiaries are part of the corporate structure, not a business relationship.



Photo © Longfin Media / Shutterstock.

- Other major **barriers to justice** routinely faced by claimants in business-related human rights and environmental cases remain unaddressed. In particular, the directive should ensure:
 - that the **limitation period** for bringing civil liability claims is reasonable, as proposed by the European Parliament;
 - that claimants have recourse to **collective redress** mechanisms, as recommended by the EU Fundamental Rights Agency;⁵⁰
 - that civil society organisations and trade unions are entitled to bring **representative actions** on behalf of victims, as foreseen in the German due diligence law;⁵¹ and
 - that Member States set up accompanying measures to **provide support to claimants**, including by regulating legal costs in light of the disparity of resources between the parties, as recommended by the EU Fundamental Rights Agency.⁵²
- The proposal makes liability of **overriding mandatory** application in cases where the law applicable to a claim is not the law of a Member State. This would ensure companies can be held liable as per the directive, no matter where the harm occurred. This provision can help overcome one common barrier to justice as seen in previous business-related human rights cases where the application of foreign law led to the case being dismissed.⁵³ However, this provision only works if the liability regime set out in the directive is strong and does not fall short of legislation otherwise applicable. For this reason, ideally, the Rome II Regulation should be modified so that claimants can opt for the law that is most favourable to them, as recommended by the EU Fundamental Rights Agency.⁵⁴

Directors' duties

Articles 15, 25 and 26

The proposal, initially referred to as Sustainable Corporate Governance, has been presented with only very few elements to foster integration of sustainability and long-term thinking in corporate governance rules. Nonetheless, it retained the directors' duty to address human rights, climate and environmental impacts, and to take responsibility for oversight and decisions on due diligence. However, these provisions direly require further specification.

- It is important that corporate governance keeps pace with sustainable finance and the demands of stakeholders and investors, who have supported the call on clarifying directors' obligations.⁵⁵ However, the current wording of the **directors' duty of care** in Article 25 is **extremely vague** - directors are expected to "take into account the consequences of their decisions for sustainability matters" - and should be strengthened.
- Connecting due diligence to directors' responsibilities in Article 26 strengthens the due diligence approach and can prevent corporate responsibility or compliance departments from operating in a silo. The **obligation to oversee due diligence** is based on the UN Guiding Principles⁵⁶ and should be further specified, as governance can be one impactful way of evaluating compliance. The article should specify the regularity of reporting to the board and assign a more proactive role to boards.

Directors should also be responsible for approving **transition and sustainability plans**, including science-based targets and adapting the business model and strategy in that regard. Climate obligations should be part of directors' responsibilities, not only a company obligation, to enforce the forward-looking facet of the climate obligation. Before setting up a plan or a target, companies should properly assess their risks and impacts based on the double materiality determination in the future directive on Corporate Sustainability Reporting and the identification part of the due diligence process.

- The proposal to align **incentives** remains voluntary and non-binding. It can be expected that this provision, in Article 15, has little effect in practice because the companies where the exercise of linking variable remuneration to the achievement of sustainability targets is inexistent will not be required to do so. The link to Articles 25 and 26 is missing, which creates an accountability gap.

Endnotes

1. ECCJ, Comparative table: Corporate due diligence laws and legislative proposals in Europe, March 2022: <https://corporatejustice.org/publications/comparative-table-corporate-due-diligence-laws-and-legislative-proposals-in-europe-2>
2. UN Guiding Principles on Business and Human Rights, 2011: https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf
3. Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021PC0189>
4. OECD, Due Diligence for Responsible Corporate Lending and Securities Underwriting, 2019: <https://mneguidelines.oecd.org/final-master-due-diligence-for-responsible-corporate-lending-and-securities-underwriting.pdf>
5. OECD, Responsible business conduct for institutional investors, 2017: <https://mneguidelines.oecd.org/RBC-for-Institutional-Investors.pdf>
6. The Danish Institute for Human Rights, Legislating for impact: analysis of the proposed EU corporate sustainability due diligence directive, March 2022: <https://www.humanrights.dk/publications/legislating-impact-analysis-proposed-eu-corporate-sustainability-due-diligence>
7. Ídem.
8. FrontLine Defenders and others, The EU Corporate Sustainability Due Diligence Directive proposal and protecting human rights defenders: <https://environment-rights.org/eucsd>
9. Jeffrey Vogt and others, A Missed Opportunity to Improve Workers' Rights in Global Supply Chains, March 2022: <http://opiniojuris.org/2022/03/18/a-missed-opportunity-to-improve-workers-rights-in-global-supply-chains>
10. Professor Valerie Nelson and others, Making human rights due diligence frameworks work for small farmers and workers in global supply chains, June 2020: <https://fairtrade-advocacy.org/wp-content/uploads/2020/06/UoG-HRDD-Full-Report-60pp-FINAL-SECURED.pdf>
11. ECCJ and others, Putting the Environment in Human Rights and Environmental Due Diligence, May 2021: <https://corporatejustice.org/publications/putting-environment-in-due-diligence>
12. Friends of the Earth Europe and others, How to make corporations effectively respect the environment and climate, October 2021: <https://friendsoftheearth.eu/wp-content/uploads/2021/10/Briefing-How-to-make-corporations-effectively-respect-the-environment-and-climate-7.pdf>
13. ClientEarth, Close the Loop, July 2021: <https://www.clientearth.org/media/kjxi2rje/clientearth-briefing-close-the-loop-addressing-businesses-adverse-environmental-impacts.pdf>
14. LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre: <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000034290626>
15. Shift, Shift's Analysis of the EU Commission's Proposal for a Corporate Sustainability Due Diligence Directive, March 2022: <https://shiftproject.org/resource/eu-csdd-proposal-analysis>
16. ECCHR and others, The human rights fitness of audits and certifiers, 2020: <https://www.ecchr.eu/en/publication/human-rights-fitness-of-audits-and-certifiers>
17. Richard M. Locke and others, Does monitoring improve labor standards? Lessons from Nike, 2007: https://eprints.lse.ac.uk/59405/1/Qin_etal_Does-monitoring-improve-labor-standards_2007.pdf
18. Richard Locke and others, Virtue out of Necessity? Compliance, Commitment, and the Improvement of Labor Conditions in Global Supply Chains, July 2009: <https://journals.sagepub.com/doi/10.1177/0032329209338922>
19. Genevieve LeBaron and others, Ethical Audits and the Supply Chains of Global Corporations, January 2016: <http://speri.dept.shef.ac.uk/wp-content/uploads/2018/11/Global-Brief-1-Ethical-Audits-and-the-Supply-Chains-of-Global-Corporations.pdf>
20. Clean Clothes Campaign, Fig Leaf for Fashion: How social auditing protects brands and fails workers, September 2019: <https://cleanclothes.org/file-repository/figleaf-for-fashion-brief.pdf>
21. ECCJ and others, Urgent request to ensure social auditors' liability and effective legislation on human rights and environmental due diligence (HREDD) and corporate accountability, September 2021: https://corporatejustice.org/wp-content/uploads/2021/09/Social-auditing-Open-letter-to-EU-policymakers_Final_130921.pdf
22. Business & Human Rights Resource Centre, Beyond social auditing, October 2021: https://media.business-humanrights.org/media/documents/2021_Beyond_social_auditing_v5.pdf
23. Fair Trade Advocacy Office and others, Why purchasing practices must be a part of upcoming due diligence legislation: <https://fairtrade-advocacy.org/other-information/why-purchasing-practices-must-be-a-part-of-upcoming-due-diligence-legislation>
24. ECCJ and others, Complementary action needed to address unfair purchasing practices and achieve goals of the upcoming Sustainable Corporate Governance directive, July 2021: https://corporatejustice.org/wp-content/uploads/2021/07/210715_EU-CSOs_Purchasing_Practices_Letter_FINAL.pdf
25. European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)) (see Article 4(8)): https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.html
26. SOMO, Should I stay or should I go?, April 2016: <https://www.somo.nl/should-i-stay-or-should-i-go-2>
27. ECCJ and others, Principal elements of EU due diligence legislation, September 2020: <https://corporatejustice.org/publications/principal-elements-of-eu-due-diligence-legislation>
28. Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32019L1937>
29. FrontLine Defenders, Preventing reprisals against human rights defenders through effective due diligence legislation, 2021: https://www.frontlinedefenders.org/sites/default/files/front_line_defenders_briefing_-_protecting_hrds_through_effective_hredd.pdf
30. Business & Human Rights Resource Centre, Hearing the human, 2021: https://media.business-humanrights.org/media/documents/2021_Hearing_the_Human_Briefing_v6.pdf

31. ETUC, ETUC Position for a European directive on mandatory Human Rights due diligence and responsible business conduct, December 2019: <https://www.etuc.org/en/document/etuc-position-european-directive-mandatory-human-rights-due-diligence-and-responsible>
32. Forest Peoples Programme, Stepping up: Protecting collective land rights through corporate due diligence, June 2021: <https://www.forestpeoples.org/en/en/stepping-up-due-diligence>
33. Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32019L1937>
34. FrontLine Defenders, Preventing reprisals against human rights defenders through effective due diligence legislation, 2021: https://www.frontlinedefenders.org/sites/default/files/front_line_defenders_briefing_-_protecting_hrds_through_effective_hredd.pdf
35. European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)) (see recital 47): https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.html
36. European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)) (see Article 6(3)): https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.html
37. Frank Bold and others, Civil society organisations call on policymakers to define meaningful supply chain reporting requirements: https://en.frankbold.org/sites/default/files/publikace/statement_civil_society_organisation_supply_chain_reporting_requirements_final.pdf
38. European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)) (see Article 4(4)(ii)): https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.html
39. German Act on Corporate Due Diligence Obligations for the Prevention of Human Rights Violations in Supply Chains (see Section 10): <https://www.bmas.de/SharedDocs/Downloads/DE/Internationales/act-corporate-due-diligence-obligations-supply-chains.pdf>
40. Stéphane Brabant and others, Due Diligence Around the World, March 2022: <https://verfassungsblog.de/due-diligence-around-the-world>
41. ECCJ and others, Putting the Environment in Human Rights and Environmental Due Diligence, May 2021: <https://corporatejustice.org/publications/putting-environment-in-due-diligence>
42. ECCJ, Landmark ruling: Shell ordered to slash CO2 emissions throughout its global value chain, May 2021: <https://corporatejustice.org/news/landmark-ruling-shell-ordered-to-slash-co2-emissions-throughout-its-global-value-chain>
43. Friends of the Earth Europe and others, How to make corporations effectively respect the environment and climate, October 2021: <https://friendsoftheearth.eu/wp-content/uploads/2021/10/Briefing-How-to-make-corporations-effectively-respect-the-environment-and-climate-7.pdf>
44. Shift and OHCHR, Enforcement of Mandatory Due Diligence: Key Design Considerations for Administrative Supervision, October 2021: <https://shiftproject.org/resource/enforcement-mhrdd-design>
45. German Act on Corporate Due Diligence Obligations for the Prevention of Human Rights Violations in Supply Chains (see Section 22) <https://www.bmas.de/SharedDocs/Downloads/DE/Internationales/act-corporate-due-diligence-obligations-supply-chains.pdf>
46. European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)) (see Article 18(2)): https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.html
47. European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)) (see Article 18(2)): https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.html
48. European Union Agency for Fundamental Rights, Business and human rights – access to remedy, October 2020 (see Opinion 1): <https://fra.europa.eu/en/publication/2020/business-human-rights-remedies>
49. Stéphane Brabant, Enforcing Due Diligence Obligations, March 2022: <https://verfassungsblog.de/enforcing-due-diligence-obligations>
50. European Union Agency for Fundamental Rights, Business and human rights – access to remedy, October 2020 (see Opinion 2): <https://fra.europa.eu/en/publication/2020/business-human-rights-remedies>
51. German Act on Corporate Due Diligence Obligations for the Prevention of Human Rights Violations in Supply Chains (see Section 11): <https://www.bmas.de/SharedDocs/Downloads/DE/Internationales/act-corporate-due-diligence-obligations-supply-chains.pdf>
52. European Union Agency for Fundamental Rights, Business and human rights – access to remedy, October 2020 (see Opinion 5): <https://fra.europa.eu/en/publication/2020/business-human-rights-remedies>
53. ECCJ, Suing Goliath, September 2021: <https://corporatejustice.org/wp-content/uploads/2021/09/Suing-Goliath-FINAL.pdf>
54. European Union Agency for Fundamental Rights, Business and human rights – access to remedy, October 2020 (see Opinion 6): <https://fra.europa.eu/en/publication/2020/business-human-rights-remedies>
55. Investor Alliance for Human Rights, Investor Statement in Support of Mandated Human Rights and Environmental Due Diligence in the European Union, October 2021: <https://investorsforhumanrights.org/sites/default/files/attachments/2021-10/Investor%20Statement%20mHREDD%20FINAL%2006%20October%202021.pdf>
56. John Morrison and others, Responsibility from the top down: Why human rights due diligence must be a mandated concern of corporate boards, March 2021: <https://www.business-humanrights.org/en/blog/responsibility-from-the-top-down-why-human-rights-due-diligence-must-be-a-mandated-concern-of-corporate-boards>

Contact us



European Coalition for Corporate Justice
Avenue des Arts 7/8
1210 Brussels
Belgium

Contacts: corporatejustice.org/contact-us/

Connect with us

Visit our website to find out more about us:

corporatejustice.org

Follow our social media to stay informed about our latest activities and resources:

Twitter: [@ECCJorg](https://twitter.com/ECCJorg)

LinkedIn: [European Coalition for Corporate Justice](https://www.linkedin.com/company/european-coalition-for-corporate-justice/)