

What is needed for an effective Directive on Sustainability Due Diligence?

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A Directive on Corporate Sustainability Due Diligence (CSDDD) could represent a landmark step forward in ensuring the contribution of business to a green and just transition to a net-zero economy and minimising negative impacts of businesses on workers, communities and the environment in global value chains. For the proposal to live up to its ambition and not undermine the Directive's effectiveness, the following points should be addressed.

1 Material scope – Ensuring effective protection of human rights and the environment

The central objective of the CSDDD is to tackle negative environmental and human rights impacts of business activities where they occur in global value chains. For a risk-based approach to due diligence to work across sectors, a clear and sufficiently comprehensive understanding of what constitutes an adverse impact on human rights or the environment is necessary. We identify several shortcomings with current proposals as regards the protection of human rights:

- The Council's definition of "adverse human rights impact" **risks a selective application of due diligence** that runs counter to the indivisibility of human rights. It is also a departure from UN and OECD standards, which clearly identify the responsibility of companies to consider human rights impacts at all stages in the value chain, and in their relations to both state and non-state actors.
- The **list of human rights instruments that must be considered by companies is incomplete** [1].

Similarly, the protection of the environment should also be clarified and be coherent with EU legislation and international developments:

- The fragmentation of international environmental law makes the approach adopted for human rights impacts inappropriate for defining environmental harm. In addition to environmental conventions, environmental impacts should be defined in relation to **environmental impact categories** (such as those applied in the CSRD, EU Taxonomy, and Batteries Regulation). The OECD Guidelines are also currently being updated regarding environmental due diligence and propose a similar list of impact categories. This would enable an effective risk-based approach and promote alignment across EU legislation.
- **Environmental due diligence should include a consideration of a company's climate impacts**, which should be tackled through science-based measures and aligned with the goal to keep global warming to 1.5°C as enshrined in the Paris Agreement.

[1] Since the adoption of the Commission proposal, ILO Conventions 155 and 187 on Occupational Safety and Health have been recognized by ILO as fundamental conventions and should therefore be included. Other key instruments are missing, such as 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 Geneva Conventions and their protocols, 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.

2 Personal scope – Focusing action where it is needed

Under international standards, all companies are expected to carry out due diligence in proportion to their specific circumstances and characteristics. To guarantee that the directive will be effective in tackling human rights and environmental harm, it is critical that it mandates action by the companies behind such impacts in due time – without unusual periods of phasing-in the application nor risking a comprehensive approach by all actors in global value chains. Moreover:

- The **list of high-risk** sectors for which thresholds are lowered leaves out high-risk operations in construction, energy, transport, and electronics. In addition, the directive should specify that companies are obliged to conduct heightened, conflict-sensitive due diligence in all cases where they operate in a conflict-affected or high-risk area or are linked to it in their upstream and downstream value chains.
- The **financial sector** plays a crucial role in enabling the activities of other companies. **Banks, insurers, and investors** – including institutional investors and asset managers – must be included and provided with a clear specification of their due diligence obligations. A fragmented inclusion of financial undertakings risks undermining the effectiveness of the directive and giving rise to anti-competitive market conditions.

3 Value chain coverage – Addressing impacts where they happen

Adverse environmental or human right impacts may arise at any point in the value chain. In this regard:

- The limitation of due diligence obligations to “established business relationships” in the Commission proposal leaves out **short, unstable, or informal business ties**. However, **adverse impacts are often more likely** in precisely these relationships, especially at the beginning of value chains. International standards provide for the prioritisation of impacts, which should be based on the severity and likelihood of adverse impacts rather than through criteria unrelated to risk (such as the nature of the business relationship).
- For the **definition of the value chain** to make sense across sectors and enable a risk-based approach it should sufficiently cover activities related to the sale, distribution, and use of good or the provision or use of services, as in some sectors higher risks of adverse impacts arise in the use phase.

4 Due diligence obligations – Guaranteeing timely and appropriate action

Due diligence must be adapted to the impacts being addressed. Therefore, the CSDDD should avoid prescribing a too narrow set of steps to be taken. Instead, detailed expectations can be spelled out in sector-specific guidelines.

- **Companies must retain their due diligence duty** even where they use multi-stakeholder approaches or promote due diligence among their partners.
- As a critical channel to identify risks, design measures, and track implementation, stakeholder involvement is a key component of due diligence. As such, the CSDDD must **ensure good-faith, effective, meaningful, timely and informed consultation** at all steps of the due diligence process.

To ensure that the directive is appropriately enforced and that companies are held accountable for their actions:

- **Public enforcement must be supported by a strong civil liability regime** that guarantees the effectiveness of the duty to prevent, mitigate or bring negative impacts to an end, including by providing remediation. This requires that liability is maintained even where companies have sought to verify compliance. Administrative enforcement carries the risk that differently resourced agencies will follow up on implementation differently [2].
- **Barriers in access to justice must be tackled**, ensuring a fair distribution of the burden of proof and the possibility to seek non-financial measures that prevent, cease or mitigate adverse impacts.
- The due diligence efforts of companies should be supervised at the highest possible level and integrated into the overall business model of the company. To ensure the synergy of incentives, the directive must clearly establish the **duties of directors to consider the sustainability impacts of company operations**.

For a more detailed assessment of the proposal by the European Commission for a Corporate Sustainability Due Diligence Directive, please consult the comprehensive analysis prepared by the European Coalition for Corporate Justice (ECCJ).



About us:

Frank Bold Society is a public interest law organisation with offices in the Czech Republic, Poland and Brussels working to solve social and environmental problems. We closely cooperate with the European Coalition for Corporate Justice, which we help to steer as a member of its Board. In 2018, Frank Bold initiated the Alliance for Corporate Transparency, to provide evidence on the need for a reform of the EU legislative framework for sustainability reporting. We participate in the development of the mandatory EU Sustainability Reporting Standards and coordinate alignment and mobilisation of civil society organisations.

[2] Compare our [research](#) on the enforcement of the NFRD across EU Member States in 2020.