

European Commission proposal for a Directive on Corporate Sustainability Due Diligence

ICI Summary, February 2022

On February 23rd, 2022, the European Commission publishes the long-awaited [proposal for a Directive on Corporate Sustainability Due Diligence](#), developed under the leadership of European Commissioners Didier Reynders (DG Justice) and Thierry Breton (DG Internal Market).

This summary, **prepared by ICI for its members**, provides an overview of the main expectations set out in the text. It also includes a high-level comparison with the European Parliament's legislative initiative of March 10th, 2021, as well as a comparison with ICI's key messages.

Context

On April 2020, Didier Reynders announced its commitment to introduce an EU legislation on corporate human rights and environmental due diligence as part of a Sustainable Corporate Governance initiative. In response to this announcement, Members of the European Parliament (MEPs) started working on developing a European Parliament position in relation to such a law. On January 27th, 2021, the European Parliament's Committee on Legal Affairs (JURI) adopted a report, developed under the leadership of the Dutch MEP Lara Wolters, including recommendations to the European Commission on mandatory corporate due diligence and accountability. The final report was adopted by the European Parliament on March 10th, 2021.

After conducting a public consultation, the European Commission's legislative proposal was originally announced for mid-year 2021 before being delayed twice.

In 2021, ICI, together with other members of the Cocoa Coalition, issued a [joint position statement supporting an ambitious European HRDD legislation](#), and in February 2022, ICI joined over 100 other organisations in [calling for effective EU corporate accountability legislation](#).

To support the analysis of the different policy options in the areas of corporate due diligence duty and directors' duties, an impact assessment was among others conducted by the European Commission and submitted to the Commission's Regulatory Scrutiny Board, first in April 2021, and then in November 2021, who rejected it twice. According to the Directive's preamble, the Board considered the following insufficiencies: (1) Provide convincing evidence that EU businesses, in particular SMEs, do not already sufficiently reflect sustainability aspects or do not have sufficient incentives to do so; (2) present a scope of policy options and identify/assess policy choices; (3) assess the impacts in a complete, balanced and neutral way; (4) demonstrate the proportionality of the preferred option.

The today's European Commission proposal for an EU Directive, which is presented as having been significantly revised as compared to the package of policy options put forward by the impact assessments, reflects the Board's finding.

Main elements of the legislative proposal

The Directive, composed of 32 articles, has been designed with the objective of improving corporate governance practices and increasing corporate accountability in relation to human rights and environmental risks, improving access to remedy for those affected by adverse impacts as well as avoiding fragmentation of

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due diligence requirements in the single market. Overall, it is estimated to cover about 13,000 EU companies, and about 4,000 non-EU companies. The key elements of the Directive are summarised in the table below.

Objective	<ul style="list-style-type: none"> - Defines means through which companies shall conduct human rights and environmental due diligence. - Does not constare grounds for reducing the level of protection of human rights or the environment provided by the law of the Member States.
Scope	<ul style="list-style-type: none"> - EU companies which fulfil one of the following conditions in the last financial year: <ul style="list-style-type: none"> o > 500 employees on average and > EUR 150 million net turnover o > 250 employees on average and > EUR 40 million net turnover, provided that at least 50% of it was generated in one or more of the following sectors¹: Textile; Agriculture, forestry, fisheries, food/beverages, wood; Minerals and metals. - Non-EU companies which fulfil one of the following conditions in the last financial year: <ul style="list-style-type: none"> o > EUR 150 million net turnover in the EU o > EUR 40 million net turnover but not more than EUR 150 million in the EU, provided that at least 50% of its net worldwide turnover was generated in one of more of the sectors listed above.
Obligations	<ul style="list-style-type: none"> - Conduct human rights and environmental due diligence by complying with specific requirements, in line with the OECD Due Diligence Guidance², including: <ol style="list-style-type: none"> 1) Integrating due diligence into their policies and have a due diligence policy (to be updated annually) 2) Identifying actual or potential human adverse impacts [on human rights and the environment] 3) Preventing and minimising potential adverse impacts, and bringing actual adverse impacts to an end and mitigating their extent, incl: <ul style="list-style-type: none"> ▪ Develop and implement a prevention action plan where necessary ▪ Seek contractual assurances from business partners with whom it has a direct business relationship ▪ Provide targeted and proportionate support to SMEs with which the company has established business relationships 4) Establishing and maintaining a complaints procedure <ul style="list-style-type: none"> ▪ From persons or organisations 5) Monitoring the effectiveness of their due diligence policy and measures 6) Publicly communicating on due diligence <i>Established business relationships are defined as business relationship, whether direct or indirect, which is, or which is expected to be lasting, in view of its intensity or duration and which does not represent a negligible or merely ancillary part of the value chain. The nature of business relationships as 'established' shall be reassessed periodically, and at least every 12 months.</i> - Directors' duty of care: Directors shall take into account the human rights and environmental consequences of their decisions and corporate strategy, and oversee the implementation of the due diligence process.
Reach	<ul style="list-style-type: none"> - Own operations, their subsidiaries and at the level of their established direct or indirect relationships in their value chains.
Complaints	<ul style="list-style-type: none"> - Persons who are affected or might be affected, trade unions and other workers' representatives shall be granted the possibility to submit complaints in case of legitimate concerns regarding the potential or actual adverse impacts. - Any natural or legal person that has reasons to believe that a company does not appropriately comply with its due diligence obligations is entitled to submit substantiated concerns.
Guidelines & supporting measures	<ul style="list-style-type: none"> - Guidelines for specific sectors and specific adverse impacts may be issued . - Companies may rely on industry schemes or multi-stakeholder initiatives to support the implementation of their obligations.
Sanctions	<ul style="list-style-type: none"> - Should be effective, proportionate, and dissuasive. Pecuniary sanctions, if applicable, shall be based on the company's turnover. - Civil liability: For damages arising due to failure to comply with due DD process. Concerns only established business relationships (lasting relationships).

¹ The sectors are those for which OECD Guidelines exist.

² OECD Due Diligence Guidance for Responsible Business Conduct (2018): <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>

Each Member State shall establish one or more **supervisory authorities** and a **European Network of Supervisory Authorities** shall be created to facilitate the cooperation of the supervisory authorities.

Member States will be given **2 years** to transpose the Directive into national law once adopted. Smaller companies (> EUR 40 million net turnover and 250 employees operating in textile, agriculture or metals/minerals) will be given **2 additional years** after the end of the transposition period of this Directive to comply with the provisions.

The Directive's effectiveness will be evaluated **seven years** after the date of entry into force.

Comparison with the European Parliament's proposal and ICI's key messages

European Parliament

Overall, the European Commission's proposal of February 2022 is quite aligned with the European Parliament's resolution of March 2021. It is especially to be noted that, whereas the European Parliament encouraged the European Commission to develop complementary trade policy measures, the European Commission presents today its Communication on December Work Worldwide, including its [strategy to promote decent work worldwide and prepares an instrument for ban on forced labour products](#).

ICI's key messages

In line with recommendations put forward by the Cocoa Coalitions' joint position paper (mentioned on page 1) which reflects ICI's key messages, the Directive's due diligence process is based on the OECD Due Diligence Guidance and aligns with the UN Guiding Principles in Business and Human Rights (UNGPs) as well as the OECD Guidelines for Multinational Enterprises.

Overall, the Coalition's main recommendations are reflected in the European Commission's Directive proposal, with the following main similarities and differences:

- **Rights:** Concerns all human rights and environmental issues as defined by international standards, while companies should pay special attention to more vulnerable persons, including children, and prioritise actions where risks are most severe. However, the Coalition's joint position paper also made a specific reference to achieving a living income, which is not mentioned in the Directive.
- **Scope:** While the Coalition requires all companies to fall under the scope of application, the EU Directive mainly concerns larger companies. In both cases, EU companies and non-EU companies placing products/services on the single market are concerned.
- **Obligation of ongoing and risks based due diligence:** In line with the Coalition's recommendations, the Directive defines a due diligence obligation of companies with regards to human rights and the environment, which should be appropriate, expecting companies to take appropriate measures to cease and prevent adverse impacts, commensurate with the degree of severity and the likelihood of the adverse impact, also taking into account the circumstances of the specific case and the need to ensure prioritisation of action. In addition, while the Coalition's paper includes an expectation for improved purchasing practices, the Directive requires the implementation of a code of conduct applicable to all relevant corporate functions and operations.
- **Complaints/grievance mechanisms:** While the Coalition requires operational grievance mechanisms to be in place, the Directive requires complaints to be received and addressed.
- **Sanctions and enforcement:** In line with the Coalition's recommendation, effective, proportionate, and dissuasive sanctions should be taken, incl. in form of fines. The civil liability of the company should also be engaged.
- **Guidance:** As proposed by the Coalition, the Directive foresees the development of sector specific guidance.

ICI will continue monitor the process and inform its members of further developments.