AmCham EU
SPEAKING FOR AMERICAN BUSINESS IN EUROPE

Our position

Updated recommendations to the Corporate Sustainability Due Diligence Directive

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American Chamber of Commerce to the European Union
Speaking for American business in Europe

Avenue des Arts/Kunstlaan 56, 1000 Brussels, Belgium • **T** +32 2 513 68 92
info@amchameu.eu • amchameu.eu • European Transparency Register: 5265780509-97

Executive summary

The EU's Corporate Sustainability Due Diligence Directive proposal (Directive) is a commendable effort to create a harmonised due diligence framework aimed at improving companies' responsible business conduct and accountability in their activities. However, more must be done to ensure the regime is proportionate, workable and conducive to achieving the primary goal of the legislation, while respecting the due diligence preferences and approaches of other jurisdictions. Specifically, the EU must focus on strengthening the risk-based nature of the new regime, minimising the potential for diverging application, tackling the onerous civil liability regime and addressing the unduly extraterritorial nature of the law.

Introduction

The Directive's objective to prevent companies from contributing to environmental degradation and human rights abuses in their business operations is laudable. When implemented appropriately, due diligence measures can improve the efficiency, resilience and long-term sustainability of global supply chains.

However, the misalignment between the goals of the Directive, the potential requirements and their enforcement risk the legislation's requirements being too wide-ranging, disproportionate and unworkable for both in-scope companies and regulators, as well as unduly extraterritorial in nature. As a result, the new regime could have significant legal consequences and serious competitiveness implications for businesses with EU presence, as well as for the EU as a global economic player.

Therefore, during interinstitutional negotiations on the Directive, the EU must reconsider issues related to value chains, extraterritoriality, civil liability, adverse impacts, transition plans, directors' duties and implementation, as further explored below. In addition, language that would enable the legislation to achieve its objective without adverse impact is suggested in the annex of this document.

Value chain

It is of the utmost importance that the definition of value chain is reasonable and foreseeable. The EU should adopt a proportionate, risk-based approach which captures only direct contractual relationships and allows for the prioritisation of measures to address the most critical and actionable risks.

Extraterritoriality

As proposed by the European Commission, the Directive could apply to the provision of goods and services with no nexus to the EU. As a result, third-country parent companies would be required to perform activities that might be inconsistent with their local legal requirements and violate well-established principles of corporate separateness. For example, the UK, Australia and Canada have different requirements for companies to examine, understand and disclose impacts on human rights

issues within their supply chains. International fragmentation of due diligence standards would create significant complexity and compliance problems for global financial services companies without enhancing human rights or sustainability protections. It could give rise to level playing field problems and hamper firms competing with regional competitors outside the EU. Instead, the EU should limit the Directive's scope to products sold in the EU and services provided in the EU. This proportionate and workable solution would maintain the level playing field between EU and non-EU headquartered companies.

Civil liability

While the proposed regime would have to be enforced effectively, its far-reaching proposals create serious concerns about civil liability. There is a real risk that companies would face excessive and disproportionate consequences unless the EU addresses the reversal of the burden of proof and the application beyond companies' own operations to the value chain. As proposed by the European Commission, the regime would effectively upend the established principles of civil law by making companies liable for damage not caused by their own actions, but rather by the actions of others and create incentives for undue legal challenges. The inclusion of suppliers and subcontractors that are indirectly linked to the undertaking or placed along of its value chain is thus problematic and potentially impractical. Therefore, the EU should explicitly limit civil liability to circumstances where a breach occurs 'intentionally or through gross negligence' that causes or directly contributes to the adverse impact. In addition, any civil liability should not have a presumption in favour of the claimant. Burden of proof should remain the responsibility of the accuser as any reversal would compromise the integrity of the legal system and encourage reckless behaviour from competitive interests.

Adverse impacts

The Directive should disperse with the requirement to terminate a business relationship with respect to the activities concerned if the potential adverse impact is severe. First, it does not align with the principle of continuous improvement and sustainable remediation. Second, when the company has limited leverage with the partner, this may lead to undue termination of the contract, as it may be seen as a simpler course of action. Also, suspending or terminating contracts based on potential impacts, without due verification of the nature and presence of those impacts, may have severe, unfair consequences on smaller suppliers.

In addition, to ensure that stakeholder engagement is targeted and valuable, companies should be obliged to engage with relevant or key stakeholders only at certain stages in the due diligence process, consistent with UN Guiding Principles 31(h) (on their design and performance). In cases where a complaints procedure is ongoing, the company should determine its follow-up action based on the circumstances and report only as it pertains to the outcome of the investigation. This would ensure that the procedure does not create undue burden for firms.

Transition plans

The EU should revise provisions on transition plans to reflect existing reporting initiatives and compatibility with relevant law. Notably, it is essential to consider that significant work is already underway on the reporting of transition plans for certain sectors in the EU and internationally, for example in the context of the upcoming Corporate Sustainability Reporting Directive (CSRD). To this end, the CS3D's requirements should not exceed the specification of transition plans included in the CSRD and that the requirement to have a transition plan will be fulfilled by compliance with CSRD. Firms operating globally are likely to already be subject to obligations within their home jurisdictions to adopt transition plans (e.g., the UK's Task Force on Climate-related Financial Disclosures). Given the different transition pathways of each jurisdiction, transition plans developed according to the EU rules might not be compatible with those developed according to third-country rules. As a result, overlapping or even conflicting requirements would make it more difficult for firms operating globally to develop a coherent and consistent plan to align their business model and operations with a net-zero economy, thereby undermining the overall decarbonisation effort.

The European Commission and the European Parliament's proposal to link the variable remuneration of directors to the achievement of climate transition plan targets is concerning. It is difficult to see how this requirement could be implemented given transition plans' long-term objective and the fact that climate objectives are not defined to date with a yearly measure of progress, while directors' variable remuneration are determined each year for a performance period limited to 12 months. Therefore, this requirement should be deleted, as per the Council's general approach.

Directors' duties

The European Commission proposal introduces broad changes to directors' duties which would give rise to liability and potential litigation risk, as well as significant uncertainty as to how these directors could meet these duties in practice. In principle, an EU directive should not regulate directors' duties, as Member States already have different frameworks in place. The Directive should reflect the Council's decision to delete provision on directors' duties and, as stated above, the proposal to link directors' remuneration to setting climate plans.

Implementation

The final rules should ensure that Member States cannot meaningfully diverge from the Directive in their national transposition. Failing to achieve this would defy one of the main purposes of the Directive, namely, to create a unified due diligence regime across the EU. For firms, 27 different due diligence regimes would lead to legal uncertainty and unnecessarily increase the administrative burden and the cost of doing business in the EU. In this vein, the EU should guarantee coherence with other legislation (including but not limited to definitions and risk assessment processes) and avoid repetition and overlaps of legal elements present in other legislations.

Given the broad and horizontal nature of the Directive and with a view of ensuring orderly implementation, the European Commission should issue general guidance on coherence and due diligence efforts well before companies have to apply the legislation. As proposed by Parliament, the

Directive should require Member States to provide additional support to stakeholders, including by setting up a single helpdesk functionality that would serve as a platform for access to free third-party assessment of industry schemes.

Co-legislators should reconsider the originally proposed implementation timeline and provide sufficient transition time because of the breath of change that this Directive would bring to business conduct and contractual relationships.

Conclusion

The Directive has the potential to enhance responsible business conduct and accountability while applying harmonised standards across all 27 Member States. However, its implementation will determine its success in achieving these goals. As interinstitutional negotiations continue, the business community appreciates the opportunity to contribute input and stands ready to provide any further information requested.

Annex

Proposed amendments

Value chain

Definitions (Art. 3):

1. New definition for 'Operations' means referring to a company's own operations, or the operations of its subsidiaries, this should not include the relationships within the company's (or the subsidiary's) value chain.
2. Amended definition of business relationship: 'business relationship' means a direct relationship of a company with a contractor, subcontractor, or other entities in its value chain.
3. Definition of 'Value Chain': Preference for the Council's wording
4. **Extraterritoriality (Art. 2.2)**

This Directive shall also apply to companies which are formed in accordance with the legislation of a third country, and which have a registered branch in the EU, and which fulfil one of the following conditions:

(a) generated a net turnover of more than EUR 150 million in the Union in the financial year preceding the last financial year.

(b) generated a net turnover of more than EUR 40 million but not more than EUR 150 million in the Union in the financial year preceding the last financial year, provided that at least 50% of its net worldwide turnover was generated in one or more of the sectors listed in paragraph 1, point (b).

2(a) For the purposes of paragraph 2, the due diligence measures referred to in this Directive shall apply only to:

1. the third-country company's own operations;
2. the operations of its branches established in the EU; and
3. the third country company's value chain operations related to products sold in the Union and services provided in the Union.

In each case only to the extent related to products sold in the Union and services provided in the Union.

This Directive shall respect the principles of corporate separateness and limited liability, and apply to legal persons, not to corporate groups composed of two or more legal persons, except if each legal person individually is subject to this Directive.

Civil liability

Art. 22, Recital 57: AmCham EU position:

Legal liability provisions, including sanctions, need to be balanced, follow legal traditions around breach-damage-causality and truly incorporate the widely accepted principle that due diligence is first and foremost an obligation of means. The complexity of value chains cannot be underestimated when

analysing impacts which can have multiple competing causes, players and dynamics. Therefore, companies cannot be made liable for damages they have not caused or contributed to intentionally or through gross negligence.

Burden of proof (Recital 58): Preference for the Council position:

The liability regime does not regulate who should prove that the company's action was reasonably **adequate, therefore this is left to national law.**

Art. 22, Revised

Civil Liability for damages caused by companies will be determined in accordance with existing Member State tort law mechanisms. The obligations under this Directive do not create new duties for the purpose of establishing civil liability. Any liability arising independently of this Directive under existing law remains unaffected.

Adverse impacts

Suggestion to delete Art. 3(b) and (c) of the Parliament position and support the Commission and Council positions.

Prioritisation of adverse impact (Art. 6a[2]): Preference for the Council position:

The prioritisation of adverse impacts shall be based on severity and likelihood of the adverse impact. Severity of an adverse impact shall be assessed based on its gravity, the number of persons or the extent of the environment affected, and difficulty to restore the situation prevailing prior to the impact.

Prevention of adverse impacts (Art. 7.5 [a]): Preference for the Council position:

The company shall be required as a last resort to refrain from entering into new or extending existing relations with the business partner in connection with or in the chain of activities of which the impact has arisen and shall:

(a) temporarily suspend the business relationship with respect to the activities concerned, while pursuing prevention or mitigation efforts, if there is reasonable expectation that these efforts will succeed in the short term. If there is no such reasonable expectation or the efforts did not succeed, the company shall terminate the business relationship;

(b) terminate the business relationship If the potential adverse impact is severe.

Member States shall provide for the availability of an option to temporarily suspend and terminate the business relationship .

Stakeholder engagement (Art. 9): AmCham EU position:

1. Member States shall ensure that companies provide ***access to*** effective notification and non-judicial grievance mechanisms ***so that*** persons and organisations listed in paragraph 2 ***may*** submit complaints where they have legitimate information or concerns regarding actual or potential

adverse human rights or environmental impacts with respect to the companies' own operations, the operations of their subsidiaries and their value chains. Member States shall ensure that companies ***may*** provide such ***access*** to notification and grievance ***mechanisms*** through collaborative arrangements, including industry initiatives, with other companies or organisations, by participating in multi-stakeholder grievance mechanisms or joining a global framework agreement.

2. Member States shall ensure that the complaints may be submitted by:

(a) persons who are affected or have reasonable grounds to believe that they might be affected by an adverse impact, and the legitimate representatives of such individuals.
Legitimate representatives of such individuals may include civil society organisations active in the areas related to the value chain concerned, human rights defenders, trade unions and other worker representatives of value chain workers.

3. Member States shall ensure that the companies establish a procedure for dealing with complaints submitted to such notification and grievance mechanisms referred to in paragraph 1. Member States shall ensure that where the complaint is well-founded, the adverse impact that is the subject matter of the complaint is deemed to be identified within the meaning of Article 6.

(a) Member States shall ensure that when companies establish or participate in notification and grievance mechanisms, those mechanisms are effective within the meaning of Principle 31 of the United Nations Guiding Principles on Business and Human Rights and designed and operated in a manner that is informed by the perspectives of affected stakeholders and adapted to the needs of people who may be most vulnerable to adverse impacts.

Complaint Procedure (Art. 9.3): Preference for the Council position:

Companies shall establish a fair, accessible, and transparent procedure for dealing with complaints referred to in paragraph 1, including a procedure when the company considers the complaint to be unfounded, and inform the relevant workers and trade unions of that procedure. Member States shall ensure that complainants are entitled to request appropriate follow-up on the complaint from the company with which they have filed a complaint and to meet with the company's representatives at an appropriate level to discuss potential or actual severe adverse impacts that are the subject matter of the complaint.

Transition plans

Climate change (Art. 15): Preference for the Council position:

Member States shall ensure that companies referred to in Article 2(1), point (a), and Article 2(2), point (a), shall adopt a plan, including implementing actions and related financial and investments plans, to ensure that the business model and strategy of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C in line with the Paris Agreement and the objective of achieving climate neutrality by 2050 as established in Regulation (EU) 2021/1119, and where relevant, the exposure of the undertaking to coal-, oil- and gas-related activities, as referred to in Articles 19a(2), point (a)(iii), and 29a(2), point (a)(iii), of Directive 2013/34/EU. This plan shall, in particular, identify, on the basis of information reasonably available to the company, the extent to which climate change is a risk for, or an impact of, the company's operations. 2. Member States shall ensure that, in case climate change is or should have

been identified as a principal risk for, or a principal impact of, the company's operations, the company includes greenhouse gas emission reduction objectives in its plan.

Directors' duties

Directors' duty of care (Art. 25 and 26): Preference for the Council position:

Deletion of Art. 25 and Art. 26.

Implementation

Harmonisation (Art.1 (a)[2]): As per the opinion of the European Parliament's Committee on Internal Market and Consumer Protection:

Member States shall not lay down, in their national law, provisions diverging from those laid down in this Directive, unless otherwise provided for in this Directive.

Industry schemes (Art. 14.4): Preference for a combination of the Parliament and Council positions: Recognition of industry initiatives (e.g., RBA/RMI) to meet due diligence expectations; guidance from governments on what constitutes meeting the legal compliance bar; and a way for economic operators to ask questions and receive timely replies.

Imposition of codes of conducts to business partners (Art. 7.2[b], Art. 8.3 [c]):

Replacement of the words 'code of conduct' in the relevant sections (e.g., Art. 7.2[b] or Art. 8.3 [c]) to 'appropriate due diligence processes in place to prevent and, or where prevention is not possible, mitigate adverse impacts'.

Sectoral guidance (Art. 13 .1):

The Commission shall issue general guidance on coherence and due diligence efforts in consultation with Member States and stakeholders 12 months before companies have to apply this directive.

Coherence with other legislation and accompanying measures (Art. 13, Art. 14, Recital 44):

Coherence with other legislation should be guaranteed. Repetition and overlaps of legal elements present in other legislation should be avoided. Definitions and risk assessment processes should be aligned.

Implementation (Art 30): Preference for the Council position:

After four years (five years for smaller companies in sectors at risk). After three years if more than 1000 employees and/or €300 million in turnover.

Sanctions (Art. 20): Preference for the Council position:

Member States shall lay down the rules on penalties, including pecuniary penalties, applicable to infringements of national provisions adopted pursuant to this Directive, and shall take all measures necessary to ensure that they are implemented. The penalties provided for shall be effective,

proportionate and dissuasive. 2. In deciding whether to impose penalties and, if so, in determining their nature and appropriate level, due account shall be taken in particular of the company's efforts to comply with any remedial action required of them by a supervisory authority, any investments made and any targeted support provided pursuant to Articles 7 and 8, as well as collaboration with other entities to address adverse impacts in its chain of activities, as the case may be. 3. When pecuniary penalties are imposed, they shall be commensurate with the company's worldwide net turnover. 4. Member States shall ensure that any decision of the supervisory authorities containing penalties related to the infringements of the national provisions adopted pursuant to this Directive is published, publicly available for at least 3 years and sent to the European Network of Supervisory Authorities. The published decision shall not contain any personal data within the meaning of Article 4(1) of Regulation (EU) 2016/679.

Group due diligence (Art. 4(a)): Preference for the Council position:

Member States shall ensure that parent companies falling under the scope of this Directive may fulfil the obligations set out in Articles 5 to 11 and Article 15 on behalf of companies which are their subsidiaries falling under the scope of this Directive. This is without prejudice to civil liability of subsidiaries in accordance with Article 22. 2. The fulfilment of due diligence obligations by a parent company in accordance with the paragraph 1 is subject to all the following conditions: (a) the subsidiary provides all the necessary information to and cooperates with its parent company to fulfil the obligations resulting from this Directive; (b) the subsidiary must abide by its parent company's due diligence policy accordingly adapted to ensure that the obligations laid down in Article 5(1) are fulfilled with respect to the subsidiary; (c) the subsidiary integrates due diligence into all its policies and risk management systems in accordance with Article 5; (d) where relevant, the subsidiary seeks the contractual assurances in accordance with Article 7(2), point (b), or 8(3), point (c); (e) where relevant, the subsidiary seeks to conclude a contract with an indirect business partner in accordance with Article 7(3) or 8(4); (f) where relevant, the subsidiary temporarily suspends or terminates the business relationship in accordance with Article 7(5) or 8(6).