Louvain School of Management

EU Directive on Corporate Sustainability Due Diligence: critical analysis and limitations of the European Commission's proposal

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Foreword

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Introduction

Deforestation, toxic pollution, land grabbing, child and forced labor, health and safety issues, poverty wages... These are just a few examples of unethical corporate actions that have multiplied over the past decades. The evolution of production models toward increased geographic dispersion and the outsourcing of activities, which has fueled the growth of global value chains, are factors contributing to this acceleration (Bright & al., 2020). Indeed, in order to cope with highly competitive business environments, some companies have significantly reduced costs by externalizing production, sourcing from countries with less stringent regulatory frameworks for human rights and environmental standards (Klassen & Vereecke, 2012). The lack of public oversight coupled with the unbridled corporate focus on profits have resulted in governance gaps, fostering a breeding ground for the negative impacts on people and the planet mentioned above (Agarwal & al., 2016).

To avoid being held accountable for such violations, many firms hide behind their complex supply chains, while their victims have little chance of accessing justice. In most cases, they receive no compensation, and the companies responsible for those actions remain unpunished. As a result, some voluntary frameworks and guidelines have emerged to provide companies with keys to identify, mitigate and account for the negative impacts of their operations as well as those of their supply chain and other business relationships. This process is referred to as "due diligence". The latest significant development in this area is the proposal for a European Directive on Corporate Sustainability Due Diligence of the 23rd of February 2022, which for the first time obliges companies falling within its scope to conduct a sustainability due diligence duty. As part of the broader European Green Deal strategy, this initiative reflects the European Union's intention to strengthen the transformation to a sustainable economy, respectful of the well-being of both society and the planet (European Commission, 2022a). With this framework, businesses are therefore expected to be able to combine long-term profitability with social justice and environmental protection.

However, although European legislation in this area has been long awaited, the publication of the Commission's proposal has so far received very mixed reviews and may fall short of expectations of the various stakeholders involved.

With this in mind, this thesis tackles the following research question, structured around three sub-questions:

Research question

"Is the Proposal for a Directive on Corporate Sustainability Due Diligence ambitious enough to achieve its objectives of addressing the negative impacts of companies on human rights and on the environment?"

1. What does due diligence imply for companies?
2. What is the content of the European Commission's proposal for a Directive?
3. What are the shortcomings of this legal act, where do they come from and what are the opportunities for improvement?

To answer these questions, this work will be articulated around three main parts. Firstly, we will describe the general context in which this proposed Directive is anchored, reviewing the characteristics of the concept of due diligence. The second chapter will provide a detailed presentation of the European Commission's proposal. The background and reasons behind such a regulation will be explained, as well as its content and its implications for the companies concerned. Thirdly, after having compared the European text with two existing national laws on the subject, we will propose an original critique highlighting its shortcomings and areas for improvement in view of an optimal application. At the end of this chapter, we will also present the position of some of the key stakeholders concerned by this future obligation.

This work will end with a conclusion outlining the main points of the analysis as well as the motivations for such a contribution. Finally, a section will be dedicated to future research possibilities and the limitations of this thesis.

Chapter 1. General context

1.1 Corporate Social Responsibility

For years, the dominant view of corporate governance in Europe was that shareholders' interests in terms of profits and dividends were central, and that the ultimate goal of companies was to make profits[1]. However, many scholars have gradually insisted on the importance of considering the firm no longer as evolving on its own, but rather as an entity in relationships with its environment. This view is generally expressed through the "stakeholder theory", defined in 1984 by Freeman as *"any group of individuals or any individual who may affect or be affected by the achievement of organizational objectives"*. It includes the company's shareholders, but also customers, suppliers, employees, local communities, governments: the environment in the broadest sense. For the board members of a company, the focus is no longer simply on managing the business and increasing shareholder value, but on assuming broad responsibilities for large groups of stakeholders: the imperative is not only of efficiency but also of legitimacy. This includes environmental, social, and ethical concerns as well as the impact of their firms' activities on communities. These developments have become so important that companies that fail to address these issues face direct action from both shareholders and stakeholders (Solomon, 2020).

It is in this partnership-oriented vision that Corporate Social Responsibility (hereafter "CSR") is rooted. It is a multidimensional concept that can be defined by the combination of certain essential characteristics: a voluntary commitment by the company beyond its legal obligations, based on a process of internalization of its externalities; a deliberate alignment of societal, environmental and economic responsibilities; the consideration of multiple stakeholders; this being based on practices and values going beyond philanthropy (Blowfield & Frynas, 2005; Desmet & Truyens, 2019; Dutton & Larouche, 2016). At the European level, it is defined by the European Commission (2001, p.6) in its Green Paper to promote a European framework for Corporate Social Responsibility of "voluntarily integrating social and environmental concerns of companies into their business operations and their interactions with their stakeholders." This

[1] According to the agency theory (Berle & Means, 1932; Jensen & Meckling, 1976), corporate governance is limited to the relationship between the principal, i.e., the shareholder, and the agent, i.e., the management, the executive board. In other words, the shareholders of a listed company delegate the day-to-day management of the company to the management. This is a separation of ownership and control.

definition was changed in 2011 in COM(2011) 681 on the new EU strategy for Corporate Social Responsibility to “the responsibility of enterprises for their impacts on society” (European Commission, 2011, p.6). We can see that the word “voluntarily” has disappeared: this does not mean that CSR has become a compulsory approach, but it does indicate a certain evolution in the positioning of the European Commission towards a more systematic application of CSR-related practices, with application frameworks, guidelines, and even regulations. This will be detailed later in this thesis.

According to the European Commission (2019), this evolution towards the concept of CSR as a basis for the activity of firms is a result of what European citizens increasingly expect from the transformation of the role of companies in the changing society in which we live today. The definition of what CSR practices represent tends in fact to go even further: Blowfield & Frynas (2005) among other authors argue that besides having a responsibility for their own impact on society and environment, companies are also responsible for the behavior of the other actors with whom they engage in business (for instance, along supply chains). CSR thus includes both internal and external dimensions for companies and they are required to react to this new expectation which comes, as will be seen, from consumers, among others.

1.2 Due Diligence

1.2.1 Definition and origins

It is within this stakeholder vision of corporate governance and the concern for Corporate Social Responsibility, both concepts presented above, that the notion of due diligence lies. In this context, due diligence is defined by the OECD as “a process enterprises should carry out to identify, prevent, mitigate and account for how they address these actual and potential adverse impacts in their own operations, their supply chain and other business relationships” (OECD, 2018, p.17). Indeed, although some companies implement sustainable policies that can contribute to social and ecological progress, human rights and environmental violations are widespread in corporate practices (Arnold, 2010): they constitute almost more the rule than the exception. Through their activities, firms can cause serious negative impacts on workers, human rights, the environment, consumers, and corporate governance.

This is actually primarily due to the growing outsourcing of business processes and the dispersion of production sites generating global supply chains, with these violations and negative impacts often occurring thousands of miles away from European headquarters (Grimm & al., 2014). Multinationals operating in developing countries are particularly exposed to environmental and social risks (Hofmann & al., 2018): not only do they face very few national regulations (and rarely enforced), but the initiatives they put in place to counter these risks are also limited, probably as a matter of cost. From deforestation, toxic pollution, derelict waste to unsafe and unethical working conditions (lack of protection and safety measures, forced labor, child labor, excessive working hours…), there are many examples of serious human rights and environmental violations involving companies, which remain a structural feature of various industries (Hofmann & al., 2018).

As an illustration, the unsafe working conditions existing in the textile industry can be mentioned. For instance, the Ali garment factory fire in Karachi, Pakistan, in 2012, killed over 300 workers because the doors and windows were locked[2], or the infamous Rana Plaza collapse in Bangladesh which caused over 1100 deaths and more than 1500 workers' hospitalization in 2013[3]. These factories, located in developing countries, were producing clothing for Western multinationals. These are not isolated cases. Countless similar incidents occur every year and hundreds of thousands of workers in developing countries are exposed to dangerous working conditions (Islam & Deegan, 2008; Brown & Soundararajan, 2016). However, most of the time, these actions are difficult to monitor and therefore go unpunished; corporate liability not being engaged. Although more emphasized in recent years, the same applies to the ecological damage caused by companies. One example among many others is the intense deforestation of the Amazon rainforest, notably caused by the action of some major fashion brands through their suppliers, as revealed by the 2019 study of Stand.earth[4], supply chain researcher. It is also worth mentioning the pollution caused by the sinking of the Erika[5], the oil tanker chartered by the company Total on the coast of Brittany or the flaring of gas by Shell in Nigeria[6] (Bommier, 2020).

As these numerous failures have gradually become publicly exposed, stakeholders' awareness has led to pressure firms to implement sustainable supply chain management, which means that

[2] Press release: https://www.nytimes.com/2012/09/13/world/asia/hundreds-die-in-factory-fires-in-pakistan.html
[3] Press release: https://www.bbc.com/news/world-asia-22476774
[4] Study report available at: https://slowfactory.earth/supplychange
[5] For more information, see for e.g., Laubier, L. (2004). La marée noire de l'Erika : conséquences écologiques et écotoxicologiques: Bilan d'un programme de recherche. *Natures Sciences Sociétés*, 12, 216-220.
[6] For more information, see for e.g., https://www.business-humanrights.org/en/latest-news/lawsuit-against-shell-and-nnpc-re-gas-flaring-nigeria/

some companies have begun to integrate environmental, ethical, and social initiatives through supply chain strategy (Lai & al., 2013; Mani & Gunasekaran, 2018). Motivations range from a genuine belief in maximizing positive contributions to society to rather less noble interests, such as concerns about reputational risks. Indeed, some firms are afraid of the detrimental impact of heavy criticism from influential stakeholders on their reputation (Alghababsheh & Gallear, 2020). Other fear disruptions in the sourcing process of their business as a result of these adverse actions or simply want to use the opportunity to identify ways to reduce costs by improving their understanding of the market and strategic sources of supply (OECD, 2018).

Theoretically, implementing due diligence allows companies to anticipate and address their actual and potential negative impacts, and this throughout their supply chain. Obviously, some are more likely than others to generate negative impacts: this depends on their industry, their risk profile, their business partners, the size of their supply chain and its characteristics. In some cases, the due diligence process may even lead them to end some of their activities or business relationships because the actual negative impact or the risk of negative impact is unacceptable, or because they have failed to mitigate that risk.

1.2.2 Practices of due diligence

In recent years, although still not very numerous, some companies have gradually committed themselves to due diligence practices (Camoletto & al., 2022). This has led to the emergence of frameworks, guidelines and standards in this area. In addition to helping and guiding companies, these resources aim to allow a certain standardization of both practices and ways to implement and communicate them.

The most widely recognized and used frameworks are the *OECD Guidelines for Multinational Enterprises* (latest edition in 2018) and the *UN Guiding Principles on Business and Human Rights* (2011). Among other things, these two guides provide a fairly detailed description of the steps constituting a due diligence process (*see Figure 1*). At the heart of the process is the integration of responsible business conduct into the company's policies and management systems. More concretely, this means, for instance, developing specific policies on the company's most challenging risks in terms of respect for human rights and the environment, integrating these policies into the company's supervisory bodies, and, of course, communicating the main aspects of the policies to all company stakeholders, suppliers and other relevant business relationships (OECD, 2018; United Nations, 2011). It involves identifying the actual or potential negative impacts generated by companies. This requires a large amount of information, consultation of various business relationships, and assessment of the nature and extent of actual and potential impacts related to the company's activities in the broadest sense (Camoletto & al., 2022; d'Ambrosio, 2020). Once identified, companies must take all necessary steps to prevent and mitigate these impacts, and even stop activities that cause or contribute to such negative effects. It also means developing plans to prevent similar potential adverse impacts happening again in the future. At the same time, companies must continually monitor and track the implementation and effectiveness of their due diligence commitments. Finally, they must communicate externally and report on their processes. In addition to these five steps, as more specifically outlined in the UN Guide (2011), when companies have caused or contributed to negative impacts, they must provide reparations. This includes cooperating with judicial mechanisms to enable remediation (OECD, 2018).

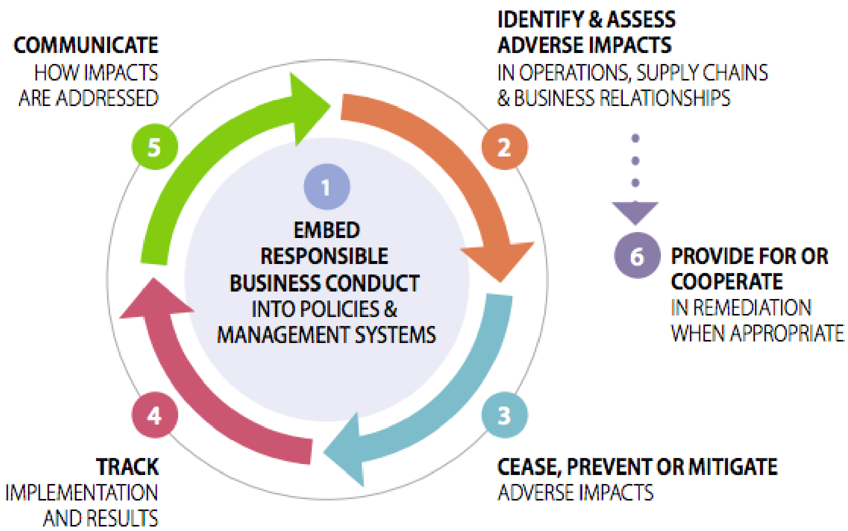

Fig 1. Due Diligence process and supporting measures. Source: OECD, 2018

Other comparable international public initiatives exist and propose reference frameworks for companies to address this duty of care, for instance the recommendations issued by the ILO in terms of responsible business (Tripartite Declaration of principles concerning Multinational enterprises and Social Policy). Similar guidelines have also been developed by private issuers, such as the ISO 26000 norm or the PRI network (Principles for Responsible Investment).
In terms of concrete actions, addressing human rights and environmental issues among business partners can therefore lead to sustainability upstream, but also downstream. Think of socially responsible purchasing and pricing practices like, for instance, the adoption of fair-trade

principles and responsible corporate governance mechanisms (Formentini & Taticchi, 2016) such as codes of conduct, compliance with international framework agreements as presented above, contractual clauses specifying the obligations of stakeholders in the same supply chain, *etc*. (d'Ambrosio, 2020). These are enforced not only by the issuing company but must also be accepted by its entire supply chain.

Despite the existence of these initiatives and the momentum of civil society pushing for the effective adoption of these due diligence principles for companies (Abdessalem & al., 2021), still too few comply (*see Figure 2,* according to the EU Commission, only 16% of European companies voluntarily monitor their entire value chain). Recently, the Corporate Human Rights Benchmark (World Benchmarking Alliance, 2020) assessed the human rights disclosures of 230 companies across five sectors presenting high risks of negative human rights impacts (agricultural products, apparel, automotive manufacturing, extractives and ICT manufacturing). The results are striking: more than half of the organizations either presented information proving that they do not comply with the UN's Guiding Principles on Business and Human Rights, or provided no evidence at all. When looking at environmental impacts, although better, the results are hardly satisfying either. Furthermore, some existing studies have shown that, even among companies striving to implement the frameworks, most use a mere "ticking box" approach when it comes to carrying out due diligence (Abdo & al., 2018; Ackers & Eccles, 2015). The majority of them edit and disclose very basic codes of conduct in which they engage to respect and to enforce human rights, social and environmental care in their value chain (and, often, without any real involvement beyond words). For example, on the issue of salaries, according to the results of the Fashion Checker survey conducted by the Clean Clothes Campaign (2020), the majority of garment brands surveyed claim they are engaged in ensuring that a decent wage is paid to the workers who make the clothes they sell. Yet, 93% of the 303 brands surveyed are unable to prove that they actually pay clothing workers a living wage.

Fig 2. Proportion of companies fulfilling their due diligence duties according to three surveys. Source: Eldridge & al., 2020. Published by ECCJ & CORE.

1.2.3 Voluntary sources

The problem with the guidelines and standards presented above is that their adoption and adherence remain purely voluntary: meeting their requirements depends solely on the degree of willingness of companies. They can thus be considered as paralegal or "soft law" frameworks.

While they can obviously lead to improvements in corporate conduct, they are not sufficient on their own to address the widespread human rights and environmental abuses associated with global business activities, as companies are not legally bound to prevent harm (Eldridge & al., 2020). As a result, they also do not face sanctions related to such damages. A study released for the European Commission on due diligence requirements through the supply chain revealed that 68% of respondents indeed believe that voluntary measures have failed to significantly transform the way companies manage their social, environmental and governance impacts, nor to provide remedies for victims (Alleweldt & al., 2020). The majority view voluntary initiatives as the least effective regulatory option to protect people and the planet.

On top of that, according to Garsten & Jacobsson (2011), the adoption of due diligence strategies through voluntary guidelines stems from a default choice, filling gaps in hard law on these issues. Most companies implement technocratic solutions, codes of ethics and roadmaps that vary greatly in content and scope from one firm to another. Since each firm defines itself the rules to which it decides to adhere, this can lead to a risk of a race to the bottom in the protection of human rights, through a distortion of competition between companies. This not only undermines the universality of human rights, but also creates legal insecurity for companies as well as for the people affected by their activities given their non-binding nature (Abdessalem & al., 2021). Voluntary frameworks do not provide recourse for victims to challenge corporate misconduct; hence they deny their right of access to justice.

Finally, it is quite difficult to control or assess their actual implementation as well as their concrete effectiveness. Currently, the most common practice for companies to ensure and "demonstrate" it is to rely on social audits or certifications. These are increasingly seen as an adequate means of monitoring and even improving labour and environmental standards in global production, in the absence of real state involvement. Indeed, in terms of due diligence, companies are pushed to self-regulate, and the spread of audits illustrates the shift of public regulatory power to the private sector via market-based instruments (Abdessalem & al., 2021).

However, as revealed by a growing number of surveys, audits are ineffective tools to detect, report or correct environmental and human rights problems in supply chains (LeBaron & Lister, 2015). As an example, the Rana Plaza garment factory in Bangladesh, whose collapse has already been mentioned, had passed a compliance audit a few months earlier[7]. This calls into question the reliability of these social audits as a guarantee of the sound application of voluntary frameworks at the global supply chain level.

1.2.4 Legal binding rules

A legal framework with binding measures is thus crucial for a real enforcement and control. As mentioned at the beginning of this chapter, some mandatory institutional arrangements for due diligence have emerged in recent years. Here, we will focus more specifically on this development in Europe. Some EU Member States were early adopters: France (*Loi relative au devoir de vigilance*, 2017) and Germany (*Sorgfaltspflichtengesetz*, 2021) have already introduced a horizontal binding due diligence law. These developments represent sound progress and show that policymakers are increasingly acknowledging the ineffectiveness of voluntary and incentive-based measures and thus the need for corporate due diligence legislation (Eldridge & al., 2020).

As for the European Union, it has developed a particular approach to Corporate Social Responsibility in general by integrating it more and more systematically into its various strategies (Daugareilh, 2009). The primary objective was to establish what socially responsible behavior means for companies, and to guide them in this direction. This is reflected in particular in the policies of the so-called European Green Deal, which will be discussed in the next chapter.

For instance, the Commission launched a Work Programme on Sustainable Corporate Governance in 2020 that is in line with this objective, encouraging sustainable business conduct by pushing companies to integrate sustainability issues into the governance of their operations and value chains with respect to social and human rights, the environment, climate change, etc. The focus is on long-term sustainable value creation rather than short-term profits (European Commission, 2022a). Besides, the EU Commission has included an initiative on sustainable corporate governance among the objectives to be achieved in many of its policies such as the

[7] Press release : https://www.nytimes.com/2013/09/02/business/global/superficial-visits-and-trickery-undermine-foreign-factory-inspections.html

Action Plan on a Circular Economy[8], the Strategy for Financing the Transition to a Sustainable Economy[9], the Biodiversity strategy[10], the EU Action Plan on Human Rights and Democracy[11]... The European Union has also addressed due diligence through some limited sector-specific measures (Bommier, 2020), such as the Timber Regulation and the Regulation on Minerals from Conflict Zones. However, no horizontal EU law on due diligence had been put forward until now, although it was long awaited and repeatedly called for by many stakeholders, including NGOs.

But this is now a reality: a proposal for a Directive on Corporate Sustainability Due Diligence was submitted by the European Commission on the 23rd of February 2022[12]. It comes after two request proposals formulated by the Parliament and one by the Council. This legal text reinforces the requirements in this area and formalizes, in a clear and precise manner, the due diligence obligations for companies at the European level, and even for some third-country companies. For the first time, it imposes on certain organizations the duty to implement practices aimed at identifying and mitigating human rights and environmental impacts risks in their supply chains.

This proposal for a Directive will be explored more thoroughly in the next chapter.

[8] More information on https://environment.ec.europa.eu/strategy/circular-economy-action-plan_en
[9] COM(2021) 350 Final: Updating the 2020 New Industrial Strategy: Building a stronger Single Market for Europe's recovery
[10] More information on https://environment.ec.europa.eu/strategy/biodiversity-strategy-2030_en
[11] JOIN(2020) 5 Final Joint Communication to the European Parliament and the Council: EU Action Plan on Human Rights and Democracy 2020-2024
[12] COM(2022) 71 Final: Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence And Amending Directive (Eu) 2019/1937.

Chapter 2: Proposal for a Directive

In this chapter, we will present the general framework as well as the main elements composing the proposal for a Directive on due diligence made by the European Commission in February 2022, reviewing its objectives as well as the novelties that it contains.

2.1 Background, context, and general framework of the proposal

After almost two years of gestation and many delays, the European Commission has recently unveiled its proposal for a Directive on corporate due diligence. This section will retrace the development of this text, its background, and the reasons that led the Commission to its conclusion.

2.1.1 How did we get there?

To understand the origin of the present proposal, one should go back to 2018, when the Commission revealed its Action Plan on Financing Sustainable Growth[13]. Within this Plan, Action n°10 provides a clear mandate with respect to due diligence: EU Commission should "*carry out analytical and consultative work with relevant stakeholders to assess: (i) the possible need to require corporate boards to develop and disclose a sustainability strategy, including appropriate due diligence throughout the supply chain, and measurable sustainability targets; and (ii) the possible need to clarify the rules according to which directors are expected to act in the company's long-term interest"* (European Commission, 2018).
This resulted, two years later on the 20th of February 2020, in the final release of a nearly 600-page report on due diligence requirements through the supply chain, already mentioned on page 9 conducted by the British Institute of International and Comparative Law (BIICL) with LSE Consulting and Civic Consulting[14]. The purpose of this study was to assess the potential development of regulatory measures on the due diligence topic at the European level, based on stakeholders' perceptions of the different possible legal approaches as well as their current practices (Alleweldt & al., 2020).

[13] COM(2018) 97 Final: Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions: Action Plan - Financing Sustainable Growth.
[14] Study on due diligence requirements through the supply chain: Final Report. Available at: https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en

It was conducted mainly on the basis of evidence gathering on market trends through case studies, market research, interviews and surveys with a very broad panel of respondents: 334 companies of all sizes and sectors and 297 members of industry associations, civil society representatives, trade unions and government agencies. Among the outcomes of this study, the failure of voluntary measures was reaffirmed and the suggestion to introduce new mandatory due diligence requirements was the most favored, unanimously recognized as having the potential to bring many benefits both to the companies themselves and to society at large.

It was then against this background that Didier Reynders, the European Commissioner for Justice, announced on the 29th of April 2020 that a legislative initiative on human rights and environmental due diligence obligations for companies would be launched by the EU in 2021. As usual in the European legislative process, a large wave of public consultation followed. The subject generated considerable interest: the initial inception impact analysis (called "the roadmap"), which ran from the 30th of July 2020 to the 8th of October 2020, received 114 feedbacks and then the public consultation launched by the Commission from 26th of October 2020 to 8th of February 2021 collected 473 461 public responses. In addition, 149 position papers were submitted outside the EU survey. Once again, the importance of implementing a binding due diligence framework for companies active in the EU was widely emphasized (*see Figure 3*).

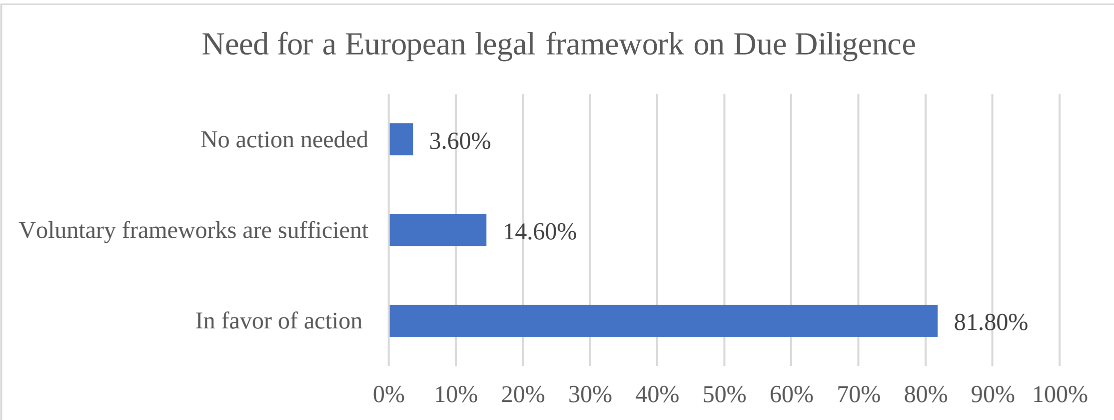

Fig 3. Evaluation of the need for a European legal framework on due diligence.
Source: European Commission, public consultation, 2021.

The institutional co-legislators (the European Parliament and the Council) have also formulated several calls for an EU regulation and provided some guidance on what was expected. In particular, the European Parliament presented two initiatives on value chain and directors' duties: a first report was published on the 2nd of December 2020, calling for more sustainable corporate conduct, clarifying the duties of directors and addressing the shortcomings of the existing policy framework[15]. Subsequently, the Parliament's final position was adopted on the 10th of March 2021[16] and encompasses many of the elements taken up by the Commission in its official proposal. The Council also issued its Conclusions on Human Rights and Decent Work in Global Supply Chains on the 1st of December 2020, calling on the Commission to come forward with a legal framework for cross-sectoral due diligence obligations along supply chains[17].

Initially, the Commission's proposal was supposed to be published in the first half of 2021 but was later delayed until December 2021. The Regulatory Scrutiny Board indeed gave a red light to the impact assessment accompanying the proposal (for technical reasons) twice, and the text as it stands was finally proposed in February 2022.

2.1.2 What are the motivations and reasons for the proposal?

Among the grounds invoked by the Commission for its proposal Directive's recitals, we can find many elements that were identified by the stakeholders involved in the 2021 public consultation as being crucial (*see Figure 4*).

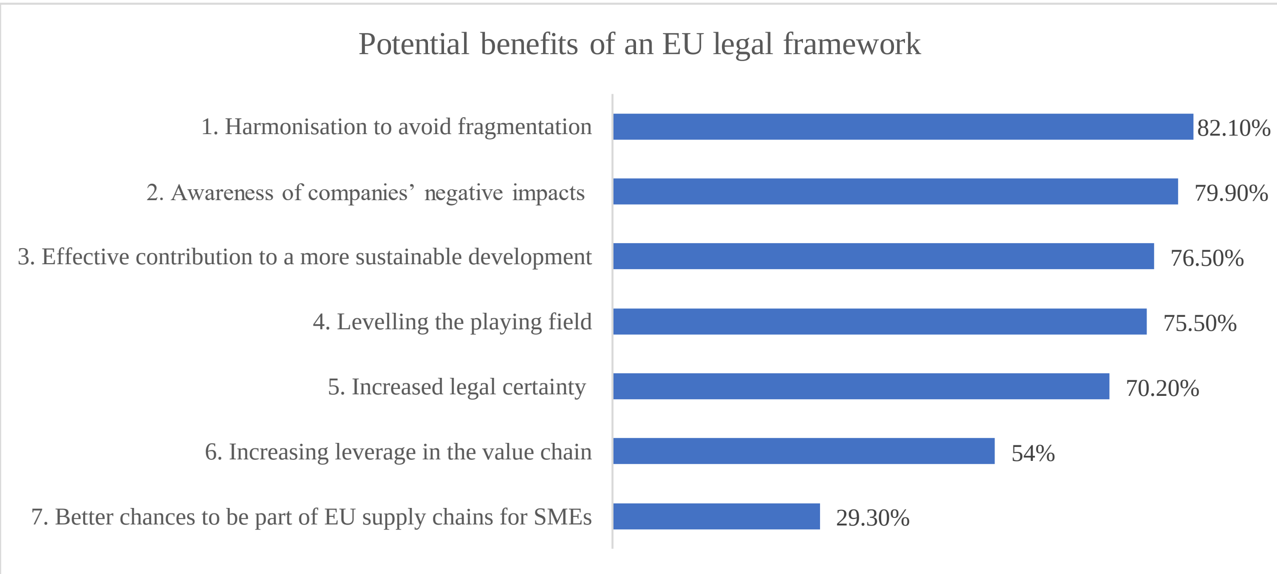

Fig 4. Evaluation of the potential benefits of a European legal framework on due diligence. Source: European Commission, public consultation, 2021.

[15] European Parliament resolution of 17 December 2020 on sustainable corporate governance (2020/2137(INI)). https://www.europarl.europa.eu/doceo/document/TA-9-2020-0372_EN.html
[16] European Parliament Resolution with recommendations to the Commission on due diligence and corporate responsibility (2020/2129(INL)). https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.html
[17] Council Conclusions on Human Rights and Decent Work in Global Supply Chains, 13512/20. https://www.consilium.europa.eu/media/46999/st13512-en20.pdf

Above all, the Commission's proposal is motivated by two main observations (European Commission, 2022a):

(1) currently, stakeholder risks in terms of sustainability are not enough taken into account in corporate governance and decision-making.

(2) companies are not sufficiently mitigating their negative impacts on human rights and the environment, and their policies are not adequate to do so.

The purpose of such a regulation is therefore to make companies aware of the negative impact they may have by forcing them to take measures to remedy it. By proposing a unified legislation at the European level, the aim is also to avoid a potential legal fragmentation (European Commission, 2022a). As stated above, some Member States already dispose of their own rules in the field of corporate due diligence. By increasing their number, national texts could risk compromising legal security (multiplication of regulatory burdens, compliance difficulties, incompatibility of standards, *etc.*) and creating distortions of competition for companies on the internal European market. The Corporate Sustainability Due Diligence Directive is therefore intended to establish a common horizontal framework, subjecting all companies to the same set of requirements and creating a level playing field for businesses operating in the EU.

2.2 Content of the proposal

As said, this proposal tends to regulate sustainability due diligence obligations for companies, covering as well corporate management systems and corporate directors' duties in the field. The content of the proposed Directive is inspired by the main principles existing in the voluntary frameworks mentioned in the previous sections: the OECD and United Nations guides. It is notably based on their recommendations concerning the steps of due diligence processes, and on the definition of high-risk sectors.

As far as the legal basis is concerned, this text is built on articles 50 and 114 TFEU. The former is *lex specialis* for measures adopted in order to attain freedom of establishment, which is rather surprising, as it will be explained in our critical analysis. The latter allows the European Union to adopt measures aimed at harmonizing the laws, regulations, and administrative provisions of the Member States which have as their object "the establishment and functioning of the internal market" (Schütze, 2021).

2.2.1 Scope of application

The first thing to clarify is the personal scope of the proposal. Indeed, the rules set out do not apply to all companies. More specifically, the concerned entities are divided into two distinct groups, as presented in Article 2 of the proposal.

	Criteria	*Scope*
Group 1	More than 500 employees More than €150 million net of turnover	Representing +/- **9400** EU companies and +/- **2600** non-EU companies
Group 2	More than 250 employees More than €40 million net of turnover, with at least €20 million of it generated in a high impact sector	Representing +/- **3400** EU companies and +/- **1400** non-EU companies

Note that the definition of what a "company" encompasses can be found in Article 3 of the proposal.

The criteria for application are those listed in the table, concerning both the number of employees of the company and its turnover. The specificity of the second group is that it only concerns companies that are active in at least 50% of their turnover in "at risk" sectors. More precisely, these include the following:

- Garment and footwear: manufacture of textiles, leather and related products and their wholesale trade.
- Agriculture: agriculture, forestry, fisheries, manufacture of food products and the wholesale trade of agricultural raw materials, live animals, wood, food, and beverages.
- Minerals: extraction of mineral resources (natural gas, crude petroleum, metals, coal…), manufacture of basic metal and mineral products and the wholesale trade of mineral resources.

For this second group, the rules will apply to constituent companies two years after the beginning of the application for group 1.

An interesting aspect of the proposal is that it also applies to non-EU companies, but conditioned to the fact that all the turnover composing the threshold must be generated in the EU. However, as can be seen, SMEs are excluded from the scope of application of the proposed rules, therefore exempted from the due diligence duty.

2.2.2 Content of the obligation

In terms of content, the proposed Directive requires Member States to impose six main obligations on the companies concerned, which will have to prevent all serious negative human rights and environmental harm generated by their activities, those of their subsidiaries or partners with whom they have a well-established business relationship.

Article 5	Companies must incorporate appropriate due diligence into all their policies. This includes the development of a code of conduct incorporating this duty and the obligation to ensure that all participants in the value chain comply with it.
Article 6	Companies must proactively identify actual or potential negative corporate impacts on human rights and the environment by examining the implications of their entire value chain.
Articles 7 - 8	Companies must prevent and mitigate potential adverse impacts and must end actual adverse impacts (or for both at least must mitigate their extent if prevention or termination is not immediately possible).
Article 9	Companies must establish and maintain a complaints procedure for people harmed by the negative impact of their activities or those of their value chains, for trade unions representing individuals working in the value chain and for civil society organizations.
Article 10	Companies must periodically monitor the effectiveness of their due diligence policies and actions.
Article 11	Companies (even those not subject to the obligations of the Non-Financial Reporting Directive (NFRD)) must publicly disclose their due diligence processes as part of their non-financial information communication.

There is one further obligation comprised in Article 15 that only applies to group 1 companies: they must adopt a plan to ensure that their business model and strategy are compatible with the Paris Climate Agreement. This plan will have to determine the extent to which climate change is a risk to or an impact of the company’s operations and should include emission reduction targets.

2.2.3 Control, liability, and sanctions

In terms of enforcement and sanctions, one of the major novelties of the proposed Directive is that it establishes a liability regime for companies in case of failure to their duty. This is therefore a big step forward from the voluntary regimes discussed before: in addition to moving towards an obligation and no longer a self-initiated approach, companies will now be sanctioned and held accountable if they fail to meet these legal commitments.

First of all, and as stated in Articles 17 and 18, Member States will have to designate a national supervisory authority responsible for ensuring the effective implementation of due diligence obligations. In order to carry out their oversight tasks, these authorities will have the power to investigate the companies concerned and to request information from them. In case of breaches, these authorities will be able to impose sanctions of several types. They could impose fines on companies, or issue orders requiring the company to comply with due diligence, or even exclude them temporarily or indefinitely from State aid, public procurement processes, or any government support regime (Richmond & al., 2022). It should be noted, nonetheless, that these penalties are decided by the Member States, which will have full discretion to set sanctions as long as they are proportionate, effective, and dissuasive, as provided for in Article 20.

Another element to keep in mind is the civil liability regime. Article 22 indeed imposes an obligation on Member States to establish rules governing the civil liability of companies for any damages they cause as a result of their failure to comply with due diligence obligations. This means that aggrieved claimants will be able to hold companies accountable through judicial mechanisms. Victims will have the right to pursue damages and civil liability claims before the relevant national courts, and companies found responsible will be required to provide them reparations for the harm suffered as a result of negative impacts on human rights and the environment caused by their activities or those of their supply chain partners. It should be recalled that this will be based on the existing civil liability regimes for each of the Member States. As discussed in the next chapter, a certain regulatory disparity can then be expected. The Directive does not provide for an additional uniform application regime, nor does the proposed act contain provisions for any criminal liability.

Finally, the text also includes two articles on the duty of care of directors (Articles 25 and 26). Article 25 specifies the directors’ obligations. In particular, Member States must ensure that, in

fulfilling their duty to act in the best interests of the company, the directors of the businesses concerned take into account the consequences of their decisions on human rights and environmental issues. Article 26 goes on to require directors to establish and oversee the implementation of corporate sustainability due diligence processes and measures and to align the company's strategy with that due diligence. With these two provisions, the Commission is breaking new ground and really aims to increase the involvement of corporate directors in the exercise of due diligence (Connellan & al., 2022).
However, again, in this case, the rules regarding directors' duties are enforced by the existing laws of the Member States. The Directive does not provide for an additional enforcement regime. As mentioned above, this can potentially lead to large differences in regulation and thus impact the attractiveness of establishing companies in any given country.

2.3 Annex to the proposal, Commission's guidelines & accompanying measures

Alongside the proposed Directive, annexes to the proposal have also been published. These can actually be understood as definitions of what "negative impact" from companies concretely means. Indeed, they include lists specifying the negative environmental impacts and negative human rights impacts relevant to the Directive. These annexes are crucial because they allow to clearly identify the violations covered as well as recognized at the international level (a list of conventions on Human Rights and fundamental freedoms is also included).

It is also important to note that, as is usually the case in EU legal proposals, the European Commission, in consultation with key stakeholders in the field of due diligence, may issue certain guidelines, particularly for specific sectors or specific adverse impacts. This is provided for in Article 13 of the proposal, with the aim of providing practical guidance to Member States or directly to the companies concerned on how they should fulfil their due diligence obligations.

Finally, Article 14 also specifies that Member States shall put in place accompanying measures for companies in order to help them with the obligation, and shall provide them with the necessary information, for instance through websites, platforms or dedicated national portals. Note that the European Commission may supplement measures taken by Member States, in particular to facilitate collaborative stakeholder initiatives to assist companies in meeting their obligations, such as sectoral schemes and multi-stakeholder partnerships, to the extent that such arrangements are appropriate to support compliance.

2.4 Future of the proposal

Following the usual EU process of an ordinary legislative procedure (OLP), the proposal for a Directive proposed by the Commission is submitted for approval to the two co-legislators, the European Parliament and the Council. They will be able to suggest possible amendments at first or second reading. This is a long process that can take months. Hence, further delays in the adoption of the Directive are likely as many committees in the European Parliament have asked to be opinion committees in the process. As pointed out by MEP Manon Aubry in an Euractiv conference of May 2022, it is already known that the European Parliament hopes to strengthen the proposal both in terms of access to justice for victims, thresholds, coverage of the whole supply chain, and in terms of sanctions, just in line with what has been proposed by the Parliament in March 2021. In addition, more than 220 civil society groups (NGOs, Trade Unions, *etc.*) have issued a report calling for the proposal to be further tightened, arguing that it contains significant flaws that may prevent it from having the desired impact (ECCJ, 2022a). These are all elements that will be analyzed in the second part of this thesis.

Once adopted, Member States will have two years to transpose the Directive into their national law. According to EU law, directives are intended to be transposed into the national laws of the Member States in order to allow their application. According to Article 288 TFEU "[...] *A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods* [...]". Unlike a regulation, which is directly applicable, a directive requires transposition. In fact, a directive merely defines a result to be achieved, which leaves a relative freedom of form and means for the different Member States. The transposition must be clear and precise: citizens must be able to invoke it. It must achieve the purpose intended by the directive (Dony, 2018).

Chapter 3: Critical approach

After an extensive presentation of the main features of the European Commission's proposed Directive on Corporate Sustainability Due Diligence, this chapter will be dedicated to its critical analysis. First, we will examine how the European proposal compares to the two existing laws on the subject in France and Germany. Then, we will identify the various areas that raise questions in this legislation, highlighting its flaws and possible improvements. Finally, we will briefly outline the views expressed by stakeholders on this legal text in order to understand the interests of the different actors involved.

3.1 Comparison with existing laws

As we have previously noted, France and Germany each already have a national act regulating the due diligence obligations of certain companies. Beyond that, other Member States are in the process of legislating (Austria, Belgium, Denmark and the Netherlands) or are considering taking action in the field (Finland, Italy, Luxembourg)[18] (European Commission, 2022b). Despite the willingness of legislators to build on existing international standards (namely the UN and OECD frameworks), it is clear that existing new laws and emerging drafts on due diligence are considerably different across the EU, generating diverging requirements. For this reason, it became urgent for Europe to put a common legal proposal on the table, in order to avoid fragmentation of the internal market in this area, preventing such distortions and barriers to free movement associated with multiple national corporate due diligence obligations.

As described at the end of chapter 2, if the EU proposal is adopted, the text will have to be transposed into the national laws of Member States. However, for France and Germany, which already have equivalent legislation, the interaction between the existing national framework and the EU Proposal may be complex (Delille & Pallu, 2022). Indeed, their personal scope of application, due diligence requirements, regimes of enforcement and liability, as well as the related sanctions and duties of directors are quite different. In this section, we will review these few key points and compare the three texts (*See Table 1,* page 25).

[18] Annex 8 of the Impact Assessment accompanying the Directive proposal provides a detailed description of existing Member State laws and initiatives. https://eur-lex.europa.eu/resource.html?uri=cellar:c851d397-9584-11ec-b4e4-01aa75ed71a1.0001.02/DOC_2&format=PDF

3.1.1 On the personal scope of application

The European proposal logically has a broader scope of application than national laws. Indeed, it includes both EU and non-EU companies, following the two groups presented on page 16. The EU Commission estimates that 13.000 EU companies and 4.000 non-EU companies would be covered by the Directive. Regarding France, the law on the duty of vigilance targets French companies with at least 5.000 employees in France, or 10.000 employees worldwide, with foreign companies covered only if they have a French subsidiary. It is estimated that between 150 and 250 French firms are directly affected by the French law (Delille & Pallu, 2022). The German Sorgfaltspflichtengesetz has a progressive scope: from 2023, it will apply to companies with more than 3000 employees and, from 2024, to companies with more than 1.000 employees, which will represent about 600 German firms, rising to roughly 2.900 companies in the second phase (Bayer, 2021).

3.1.2 On due diligence obligations

In terms of the content of the obligations, although the substance is pretty similar, the form varies somewhat. First, while France requires the establishment and implementation of a “due diligence plan” and Germany speaks rather of a “risk management system”, the European requirement will be to define and incorporate due diligence policies into company operations. However, the core of the three obligations is quite comparable, and for good reason: all three pieces of legislation are based on the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights. They all require the identification of the risks of negative impacts generated by the company and its value chain, the implementation of preventive measures and their evaluation and disclosure. However, the German law is less stringent: only suppliers from the first tier of the value chain are covered. Then, one point that is not included in the two national laws and that constitutes a novelty at the European level is, as already outlined, the inclusion of a duty of care for directors. Additionally, compared to the earlier French law, both the EU proposal and the German legislation offer a more extensive range of definitions. For instance, the Directive defines what “serious negative impacts” on the environment and human rights mean, based on a list of International Conventions (included in the Annex). In contrast, the definitions in French law are relatively light. In particular, the notion of “serious impact”, which triggers the determination of the preventive measures to be taken, is not defined, making the application of the obligations controversial (Delille & Pallu, 2022). Besides, an interesting feature of the German law compared to the other two is that it obliges firms to set up a whistleblowing system. This allows any person who has knowledge of a risk or potential hazard to report it to the company, even if he or she is not personally affected. When transposing the Directive into German national law, it will therefore be important to ensure that this internal procedure, which is not envisaged in European law, remains practicable (Koppmann & al., 2021).

Finally, an important clarification to keep in mind is that the three acts create an obligation of means and not of results. In other words, this implies that if a company implements an adequate due diligence strategy (a vigilance plan, a code of conduct, *etc.*) in compliance with the content of the obligations, it should not be held liable, even if damage occurs. An obligation of result would have amounted to requiring companies to guarantee that negative impacts will never occur or will be stopped (Bayer, 2021; ETUC, 2022).

3.1.3 On liability

There are also wide distortions regarding the civil liability regimes for harm caused in companies' value chain. Indeed, French law includes a provision stating that a violation of due diligence requirements gives rise to civil liability and requires compensation for the damage that could have been avoided by the fulfillment of these obligations (Article 2). In contrast, the German act specifies that the breach of the legal provisions under the Sorgfaltspflichtengesetz does not give rise to any civil liability (Article 1§3(3)). However, the German legal framework provides that NGOs and Trade Unions will be able to legally defend plaintiffs in German courts through representative action in cases of supply chain abuses (Sharma, 2021), which is unique. With regard to the European proposal, civil liability is included (Article 22). However, it is based on the national frameworks provided by each Member State, and it is worth noting that national rules in the field of civil liability are not harmonized.

3.1.4 On control and sanctions

As regards the verification of companies' compliance with their obligations, discrepancies also remain. Under German law, the Federal Office for Economic Affairs and Export Control is responsible for verifying the proper fulfillment of due diligence obligations, in particular by carrying out on-site inspections of businesses (Sharma, 2021). In France, this is different: the law only provides for a mechanism of formal notice to be filed by a party having an interest in the case (having suffered damage with a causal link). Following this, the firm will have to comply with its obligations within three months. Once the three-month period has expired, if the party believes that the company has still not complied with its due diligence obligations, it may then apply to the relevant court to order the company to comply. It is therefore not the role of public authorities to investigate and issue formal notices to non-compliant companies (Journal Officiel du Sénat, 2019). The national transposition of the Directive on due diligence could thus require modifications to the French legal landscape. Indeed, articles 17 and 18 of the European text specify that Member States will be required to designate a supervisory authority at national level. These authorities would be empowered to verify compliance with the proposed Directive through requests for information and investigations and would have the right to order the cessation of the alleged infringement.

Finally, with respect to sanctions for failure to comply with legal due diligence obligations, France does not provide for any penalties but only for payments of damages to victims in the event of actual recognition of civil liability. Indeed, the initial provisions on fines were rejected by the Constitutional Council when the law was adopted in 2017 (Cathala, 2017). Note, however, that if after three months from the formal notice of a company, the latter still does not comply with its obligations, the judge will be able to order it to pay a periodic default fee until it complies with its obligations (CCFD, 2022). In Germany, on the other hand, although no legal basis for corporate liability is established, companies may receive monetary fines for non-compliance with their obligations. These can be up to €800.000, and for companies with an average annual worldwide turnover of more than €400 million, up to 2% of their turnover. In addition, companies may be prohibited from making public offers in Germany during a period of maximum three years (Bayer, 2021). The European rule is vaguer: fines will be possible as well as other administrative sanctions imposed by the competent supervisory authority, as described on page 18, but again, the decision will be left to the discretion of Member States in their implementation of the future Directive.

To sum up, the three acts have their own characteristics and vary on certain points, with the EU proposal being generally more far-reaching. It is important to keep in mind that the Directive, when adopted, will have precedence over national texts. Both France and Germany will need to ensure that their legal landscape is aligned with the European requirements, so as not to cause uncertainty for national companies subject to European obligations as well as to ensure uniform application of due diligence obligations across the EU.

Table 1	**Corporate Sustainability Due Diligence Directive Proposal** *Proposed in February 2022, likely to take effect in 2024*	**Loi relative au devoir de vigilance (France)** *In effect since 2017*	**Sorgfaltspflichtengesetz (Germany)** *Progressive entry into force as of 2023*
Companies in the scope of application	(EU & non-EU companies) **Group 1** > 500 employees and €150 million net of turnover **Group 2** > 250 employees and €40 million net of turnover, with at least half generated in a high impact sector	Companies > 5000 employees in France or > 10000 employees for international companies at the end of two consecutive fiscal years	Companies > 3000 employees in companies having their central administration, principal place of business, administrative headquarters or branch office in Germany (Threshold of >1 000 employees as of January 2024)
Due diligence obligations	Definition and incorporation of due diligence policies into companies' operations: • Identification of actual or potential negative impacts of their activities along the value chain • Prevention/ mitigation of negative impacts • Complaints procedure • Periodic monitoring of the effectiveness of due diligence policies • Public communication + Directors' responsibility and duty of care	Establishment and implementation of a vigilance plan including: • Mapping of the risks • Procedures for regular evaluation of the situation of these risks • Appropriate actions to mitigate risks or prevent serious harm • Mechanism for alerting and collecting reports on the existence/ realization of risks • System for monitoring/ evaluation of the measures implemented	Establishment of a risk management system: • Performance of regular risk analysis • Prevention measures in own business areas and vis-à-vis suppliers • Remedial actions and internal complaints procedures • Documentation and reporting The supply chain comprises only partners from tier one.
Liability	Civil liability, based on MS national regimes	Civil liability	Exclusion of civil liability
Penalties	Administrative or pecuniary sanctions based on companies' turnover, decided by MS	n/a	Possibilities for administrative fines up to €800 000 or up to 2% of annual turnover if it is > €400 million

Tab1. Comparison of the European proposal with the French and German national laws on due diligence

3.2 Analysis of the proposal

The emergence of a European Directive on Corporate Sustainability Due Diligence constitutes a significant step forward, not only given its binding nature and its geographical scope, but also thanks to the control and liability mechanisms envisaged. Nevertheless, this proposal contains elements that raise questions about the actual impact of such an act. In this section, we will analyze the potential shortcomings of the proposal as it currently exists, pointing out how we believe it could be strengthened.

- Scope of application

The first point of attention concerns the personal scope of these due diligence obligations. As discussed in the previous chapter, only certain companies meeting specific employees and turnover thresholds are subject to the Directive. In reality, this concerns a very narrow sample of firms, since according to the EU Commission, approximately 99% of all businesses in the Union are excluded from the due diligence requirements. The European Coalition for Corporate Justice (ECCJ, 2022b), based on Eurostat censuses, even estimates that the draft Directive would only apply to less than 0.2% of EU companies. The question therefore arises as to whether the number of employees and the annual turnover are good indicators of a company's impact on workers' welfare and on the planet (Martin-Ortega & O'Brien, 2022). Indeed, the scope of application is so narrow that it seems clear that many companies operating overseas and having a catastrophic impact on human rights and the environment will not be affected by the Directive. The justification put forward by the European Commission for this choice is that such obligations would represent a too high financial and administrative burden for smaller companies. However, the EU assures that these businesses will still be covered in the sense that they are potentially part of the value chain of companies that are subject to the Directive (Touw, 2022).

As pointed out by some NGOs in their submissions to the Commission and repeated by Martin-Ortega & O'Brien (2022), this narrow scope also departs from the UN requirement that all companies should be confronted with due diligence responsibilities (Principle 11) using flexible processes according to their own realities, risks and resources. This was also the point of view defended by the European Parliament in its final position, providing for proportionate obligations for SMEs.

A second point of discussion regarding the scope of application concerns the qualification of the companies forming the "second group" (see page 16). As a reminder, these companies are included on the basis of their sector of activity, which is considered as of "high impact". In order to select the sectors covered, the Commission has based itself on the OECD guidelines which already define risk sectors in this respect. However, this choice seems a bit arbitrary: the EU has only included three of the four high-risk sectors of the OECD, excluding financial services. Yet many small caps tend to invest heavily in very high-risk industries (e.g., financing deforestation[19]) and could be leveraged to promote sustainable business conduct if they were covered by the due diligence requirement. Furthermore, financial undertakings are not subject to the same obligations as all other sectors. Indeed, as regards services provided by financial undertakings, the definition of "value chain" includes only the activities of the clients receiving loan, credit and other financial services, excluding SMEs (Article 3(g)). This means that the proposed Directive requires these firms from the financial sector to perform due diligence only on their large immediate customers and thus not on their entire value chain (Schufft, 2022), which somewhat challenges the very purpose of these obligations. Beyond that, the EU Commission has also ignored some of the other sectors that it had previously identified in its impact assessment (2022) as being on the list, like the automotive sector. More globally, the definition of a high-risk sector, by rather focusing on "physical risks", seems to exclude a number of other serious threats: for instance, a lot of industries are prone to psychological suffering, moral and sexual harassment or excessive working hours, such as the service sectors. In this regard, the International Labour Office (ILO, 2019) has specifically identified in its Recommendation 206 the sectors of night work, emergency services, health, hospitality, social services, education or entertainment as being more exposed to this kind of violations.

Finally, it is also interesting to consider the fact that the proposal sets out due diligence obligations for companies with respect to their own operations as well as for value chain operations carried out by entities with which they have an established business relationship (Article 1). What does this "established" qualification mean? The following definition can be found in Article 3(f): "*a 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*. It is also specified that the nature of the

[19] See for instance Global Witness (2021). *Deforestation Dividends*. Retrieved from https://www.globalwitness.org/en/campaigns/forests/deforestation-dividends/#deutsche-bank-risks-inaction-are-substantial (cited by Schufft, 2022).

business relationships deemed to be "established" should be reassessed periodically. In other words, this means that the requirements do not apply to parties in the value chain with whom companies will not have had a lasting relationship: they are outside the scope of the Directive. But what does this really mean in terms of duration of the relationship, in terms of commercial value? The proposal doesn't set any threshold. In addition to significantly limiting the extent of the obligations, this uncertainty can then create a dangerous loophole: since short-term business relationships will not be considered, this could encourage companies to regularly change trade partners and restructure their value chains in order to escape their obligations and avoid liability (ECCJ, 2022b). This behavior is contradictory to the mere concept of due diligence, which aims to foster long-lasting business relationships precisely as a means to exercise influence and leverage (Schufft, 2022). This view is also shared by the 220 NGOs that signed the civil society open letter calling for the strengthening of the proposal (ECCJ, 2022a), who also underline that this particular provision is less ambitious than the current international standards.

Furthermore, the Commission's act thus excludes accountability for informal, less stable or one-off trade relationships, which are precisely the most risky in terms of environmental and human rights violations since they lack structure (Wintgens, 2022). Companies should not be able to take advantage of saying that they are only dealing with a punctual transaction: covering the entire value chain regardless of the nature of the business relationships is necessary (Touw, 2022; Wintgens, 2022).

- Minimum harmonization

Once a Directive is adopted at European level, all Member States must transpose it into their national law within a certain timeframe, by choosing the form and the means but respecting the objective imposed by EU law (Dony, 2018). There exist two types of Directives, referred to in European jargon as of "minimum harmonization" and "maximum harmonization". In the case of maximum harmonization, Member States must introduce the standards as set out in the Directive. National law may not exceed the terms of the legislation. As a result, the same rules exist almost everywhere, which limits the differences between countries. On the other hand, minimum harmonization leaves room for Member States to "gold-plating", which means extending the powers of the Directive when transposing it into their national laws: the MS goes further than required by the EU Directive, which is therefore detrimental to a level playing field (Sibony, 2022).

The analyzed Directive lies however in the second category, being of minimal harmonization (Bégasse de Dhaem & Lambrecht, 2022). Indeed, some elements are left to the discretion of Member States, which can define their own standards as long as they respect the minimum established by the European text. This seems to be in contradiction with the main objective of the Commission's act which is to create a uniform playing field. This minimal harmonization risks in fact to create disparities between the different national legal orders. Among the examples we can mention the liability regime as well as the provisions for sanctions. Indeed, as stated in the recitals of the Directive: "*in order to ensure effective compensation of victims of adverse impacts, Member States should be required to lay down rules governing the civil liability of companies for damages arising due to its failure to comply with the due diligence process* […]" [Consideration 56] or "*the civil liability rules under this Directive should be without prejudice to Union or national rules on civil liability related to adverse human rights impacts or to adverse environmental impacts that provide for liability in situations not covered by or providing for stricter liability than this Directive*" [Consideration 59]. This means that the Directive offers possibilities for divergence, or in a more positive sense, for improved legal protection for some states. However, in practice, as Touw (2022) points out, it is unlikely that Member States will actually go beyond these minimum requirements in terms of protection. Yet, this does not necessarily mean that the national regimes will be similar.

The same applies for sanctions: "*in order to ensure effective enforcement of national measures implementing this Directive, Member States should provide for dissuasive, proportionate and effective sanctions for infringements of those measures […] Where the legal system of a Member State does not provide for administrative sanctions as foreseen in this Directive, the rules on administrative sanctions should be applied in such a way that the sanction is initiated by the competent supervisory authority and imposed by the judicial authority [...]*" [Consideration 54]. This is problematic because, in addition to creating legal uncertainty at the European level, it can lead to distortions of competition as well as a regulatory race to be more attractive as a country of establishment.

- Contractual assurances

Another point of the proposal that has been severely criticized is that it actually contains a defense mechanism against civil liability and damages, possibly constituting a loophole that may undermine the effective enforcement of due diligence obligations beyond the first level of the supply chain. Indeed, the text seems to suggest that the liability regime is limited in its reach: companies may add guarantee clauses to the contracts they have with their value chain stakeholders (their suppliers), thereby relieving themselves of third-party verification and shielding themselves from civil liability claims (Allenbach-Ammann & Ellena, 2022). These assurances are set out in Articles 7 and 8 regarding companies' obligations, and in Article 22§2 on civil liability, repeating that "*companies shall not be liable for damages caused by an adverse impact arising as a result of the activities of an indirect partner with whom it has an established business relationship*" in case of prior establishment of some of these contractual assurances. More precisely, it involves asking a business partner to contractually assure that it will ensure compliance with the company's code of conduct, including by requesting corresponding contractual assurances from its own partners if their activities are part of the company's value chain (thus generating a "contractual cascade") (European Commission, 2022a). In addition, companies must put in place measures to verify compliance with these contractual assurances. These can be based on existing sectoral initiatives or rely on independent third-party verification. This type of provision allowing companies to offload their responsibilities onto their suppliers and escape liability merely weakens the Directive. The whole approach should be based on the active engagement of stakeholders at all stages of the process. In this case, this amounts to allowing the parent company to absolve itself of taking concrete steps by carrying out administrative formalities instead. Furthermore, as clearly stated by eight NGOs[20] in a recent press release, the use of private audits and sector initiatives is precisely what has led to the advocacy of a binding duty of care in light of their ineffectiveness, as presented in the first chapter.

It should in turn be noted that even if a firm has implemented the abovementioned contractual measures, the defense will only be valid if these are appropriate. Indeed, the Directive specifies that if the assurances taken are not adequate, then the company will be liable. However, it will be left to the plaintiffs to prove this. This brings us to the next point in our analysis, which concerns the burden of proof: this kind of requirements create significant barriers to effective corporate liability (Martin-Ortega & O'Brien, 2022).

[20] ActionAid France, Amis de la Terre France, Amnesty International, CCFD-Terre Solidaire, Collectif Éthique sur l'étiquette, Notre Affaire à Tous, Oxfam & Sherpa. See https://ccfd-terresolidaire.org/directive-sur-le-devoir-de-vigilance-des-entreprises-la-proposition-enfin-devoilee-par-la-commission-doit-imperativement-etre-amelioree/

- Burden of proof

Another pitfall of this proposal is that it does not overcome the significant legal obstacles that plaintiffs may encounter if they engage in transnational lawsuits against companies whose activities or those of their supply chain are responsible for human rights or environmental damage. Not only this implies very high procedural costs (especially given the often-precarious situation of victims), but also very short deadlines, extremely restricted access to the evidence needed to support their claim and limited legal capacity (ECCJ, 2022b; Kawakami, 2022). Second, the burden of proof remains with the victims. This means that they must themselves prove damage resulting from a breach of companies' obligations of due diligence and thus a causal link between the fault and the damage suffered. This represents a major obstacle and a laborious task for injured parties seeking justice in the face of large multinationals with far greater leverage and influence. The burden of proof should rather be on the companies to demonstrate that they have not committed any wrongdoing. This is the view held by many NGOs and stakeholders, and repeated by MEP Manon Aubry (2022), who specifies that this is a point that the Parliament will appeal to during its upcoming consultation on the Directive. Bommier (2020) further reports that the United Nations Committee on Economic, Social and Cultural Rights (CESCR) also invites the legislator to follow this recommendation in its General Comment N°24 (2017): "*shifting the burden of proof may be justified where the facts and events relevant for resolving a claim lie wholly or in part within the exclusive knowledge of the corporate defendant".*

It is nevertheless interesting to add a nuance to the criticism. First, the role of the national supervisory authorities to be instituted under Article 17 has yet to be determined. They could potentially assist plaintiffs in defending their claims in future civil litigation, as Kawakami (2022) suggests. Second, one may read in the recitals of the Directive that: "*the liability regime does not regulate who should prove that the company's action was reasonably adequate under the circumstances of the case, therefore this question is left to national law*" [Consideration 58]. Thus, it appears that the proposal would actually allow for national considerations on the subject (Touw, 2022). What will happen in practice, however, remains largely uncertain...

- Binding force: risk of another "*ticking box exercise*"?

The final point of discussion around this proposed Directive concerns its power of coercion. The enforceability and binding force of the text may be somewhat questioned. More precisely, this point comes into play in view of the numerous European Regulations and Directives that have already been transposed into national laws concerning mostly the social impacts of companies that are not properly applied. It is therefore legitimate to ask what the weight of an additional rule will be. As an example, when it comes to workers' rights in value chains in Europe, plenty of laws have existed for a long time. Most notably, the Framework Directive 89/391/EEC[21] from 1989 has already been revised three times. It places particular emphasis on prevention and aims to promote the improvement of the safety and health of workers at work. This Directive has served as the basis for 25 specific Directives in various fields[22] relating to the protection of human rights at work as well as for Council Regulation (EC) No. 2062/94 establishing a European Agency for Safety and Health at Work (Hoffmann, 2021). Practically all of these legal texts have been incorporated into the national laws of the 27 EU Member States, and yet compliance is far from guaranteed.

As a matter of fact, the ITUC's Global Rights Index annually ranks countries around the world in terms of their respect for workers' fundamental rights. In addition to showing that many European multinationals are ignoring the most basic workers' rights in the developing countries in which they operate, the survey also exposes that even in Europe, many violations persist. For instance, the number of European countries that expose workers to physical violence has doubled, from 12% in 2021 to 26% in 2022 (ITUC, 2022). Besides, in 2020, an extensive study conducted by the Clean Clothes Campaign and Bread for the World highlighted disastrous working conditions in European garment factories, notably in Bulgaria and Croatia, which are yet subject to the aforementioned EU regulations. At issue are premium fashion brands based in Germany such as Hugo Boss, Adidas, Tom Tailor among others, which are sourcing in these countries. Flagrant violations of European and national laws were reported, including the non-payment of a living wage, forced labor, threats and intimidation, unsafe sanitary conditions, irregularities regarding sick leave, dismissal and overtime, *etc.* (Aleksić & al., 2020).

[21] Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work. ELI: http://data.europa.eu/eli/dir/1989/391/oj

[22] For examples, rules on the use of work equipment (Directive 2009/104/EC), manual handling (Directive 90/269/EEC), on pregnant workers (Directive 92/85/EEC), the protection of young people at work (Directive 94/33/EC), on exposure to carcinogens (Directive 90/394/EEC) or mutagens (Directive 2004/37/EC), chemical agents (Directive 2009/161/EU); biological agents at work (2000/54/EC), and so on.

One of the reasons why such infringements continue to occur in is the lack of enforcement of all these laws. Very few resources are in fact allocated to control and labour inspections have become scarcer throughout Europe over the past decade, reports the European Trade Union Confederation (2021). In Bulgaria and Croatia, the two countries cited above, they have dropped by 28% and 35% respectively in the last ten years[23]. Therefore, when long-standing laws that only apply to companies in the EU are not being upheld, how can we expect the new Directive on due diligence along the entire supply chain to be truly binding? As a reminder, in order to ensure the monitoring of the proper implementation of the due diligence obligations of companies, the proposed Directive requires Member States to designate one or more national supervisory authorities (Article 17). The Commission's text further states that "*Member States should ensure appropriate financing of the competent authority*" [Consideration 53]. No European budget has yet been evoked at the present time. With this provision alone, and without European resources, it will be difficult to carry out verifications and to give real enforceability to this text.

In view of the points discussed above, one may therefore fear that this Directive is not ambitious enough and will result in yet another compliance or "tick the boxes" exercise for the companies concerned. In order for it to achieve its goal, it is important that the Directive creates a real awareness, that it implies genuine efforts from all companies and not only from their legal department that will make a "clean sheet". For this, a cultural and structural change is necessary, in addition to the mere intention to comply. Among others, article 15 is a good example to reflect this doubt. In accordance with the 1.5-degree maximum increase target set by the Paris Climate Agreement, this article mandates businesses to adopt a climate transition plan. However, the lack of explicit sanctions for non-compliance with this climate commitment may actually render the proposal ineffective by essentially making the exercise voluntary (Tenwick, 2022). Indeed, companies will not be held accountable for failing to conduct sufficient climate due diligence. Nor is the responsibility to establish a transition plan and emissions reduction targets included in the board's oversight. Yet this would be more meaningful and even more logical in light of the directors' obligation to implement a sustainability strategy set out in Article 25, which is subject to liability.

[23] Calculated on the basis of the number of labor inspection visits to workplaces during the year, data provided by the ILO (2020).
https://www.ilo.org/shinyapps/bulkexplorer10/?lang=en&segment=indicator&id=LAI_VIST_NOC_NB_A

Another way to generate corporate involvement beyond mere compliance would perhaps be to involve shareholders. The latter are indeed totally absent from the proposed Directive. This contrasts with the orientation documents released prior to the proposal, which strongly emphasized the role of shareholders and the negative and short-term pressure that the capital markets exert on companies (in particular the "Study on directors' duties and sustainable corporate governance" conducted by EY in 2020 for the European Commission). The report suggested, among other things, that directors should be shielded from investor pressure. Due to their propensity for short-term profits over long-term investments, investors typically have a detrimental impact on companies' sustainability performance (EY, 2020). But the Commission has not followed this path, and while this leaves the door open for more positive investors' engagement towards sustainability, it mostly blurs the role of shareholders in the desired transition towards addressing corporate impacts on people and the planet (Och, 2022).

3.3 Stakeholders' intake

Whether before or after its release, this proposal for a Directive on Corporate Sustainability Due Diligence has generated a lot of interest from various stakeholders. In this section, the positions of these interest groups regarding the Commission's text will be briefly outlined and an attempt will be made to shed light on their influence.

3.3.1 NGO's and Trade Unions

NGO's and Trade Unions across Europe were mostly dissatisfied with the Commission's proposal. Indeed, while they welcome the initiative for which they have long been advocating, they describe it as unambitious and are disappointed by the many loopholes it contains. In response, more than 220 NGOs and Trade Unions from around the world issued a statement in May 2022 calling on the European Parliament and EU Member States to strengthen the Commission's text so that it can effectively prevent corporate harm (ECCJ, 2022a). Furthermore, the European Trade Union Confederation (2022) regrets that the Commission did not follow better the suggestions that were made by the European Parliament in its requests. They point out that the latter were much stronger and more promising, better reflecting what the EU should provide to ensure that firms and suppliers are held accountable for the negative impacts of their activities.

> "*We need a law that lives up to the Commission's 'gamechanger' aspirations. One that makes all companies, not just the biggest, responsible for their human rights or environmental violations and for damage to the climate. One that holds companies to a high standard of care with no chance to escape their obligations through the small print.*"
>
> Marc-Olivier Herman, Oxfam EU's Economic Justice Policy Lead

Their main demands are the following: improve access to justice for victims, strengthen corporate climate obligations and broaden the Directive's scope of application (ECCJ, 2022a). The NGOs' perspective on the proposal is thus already largely represented in the previous section. However, some additional points have been put on the table. For example, the inclusion of more dissuasive sanctions such as criminal liability in addition to civil and administrative liability. Defenders of this type of stricter sanctions (like Aubry, 2022) argue that they could indeed be better integrated into the risk assessment that companies undertake, and thus generate a deeper focus on due diligence duties.

Another very strong demand from NGOs and Trade Unions is the systematic introduction of active stakeholder participation throughout the due diligence process (Lunder, 2022). This request was further reiterated by the European Parliament, whose draft was more detailed on stakeholder participation. This is an essential point for Trade Unions and civil society organizations that wish to take advantage of close and proactive involvement both throughout the process of identifying human rights and environmental violations as well as in the design and implementation of due diligence measures (ETUC, 2022; Wintgens, 2022). Yet the proposal limits their roles to filing internal complaints in case of alleged abuses (Article 9). Moreover, in Article 6§4 of the Commission's proposal, stakeholder consultation is only requested "where relevant", which is found problematic. As Tenwick (2022) indicates, this participation of potentially affected groups and workers as well as advocacy organizations is always relevant. Besides, such consultation should normally be guaranteed by the acquis communautaire on information, consultation and participation (ETUC, 2022).

Finally, particular attention was paid to the ambitions for reforms related to corporate governance, which were ultimately not pursued. In fact, with regard to boards of directors, the EU Commission had envisaged a provision obliging to link the variable remuneration of directors to sustainability criteria or to impose the presence of directors with a certain expertise in the field of sustainability on the boards of companies[24]. But after strong lobbying by business associations, notably from the Nordic industry[25], BusinessEurope[26] or AFEP[27], this was abandoned (Burns, 2022). According to Amnesty International (2022), Tenwick (2022) & ECCJ (2022a) among others, without such an incentive, the Directive in its current form is insufficient to guarantee that directors will make strategic decisions that take into account human rights, the environment and climate protection and go beyond short-term profit.

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[24] Notably supported in the EY study for the European Commission, DG for Justice and Consumers, *Study on directors' duties and sustainable corporate governance: final report*, Publications Office, 2020. https://data.europa.eu/doi/10.2838/472901. Also discussed in the Consultation document preceding the Directive (question 40/41): https://ec.europa.eu/info/consultations/finance-2020-sustainable-finance-strategy_en

[25] Open letter published in the Financial Times by the Nordic Confederations of Industries of Sweden, Denmark, Finland, Norway, Estonia and Iceland: https://www.ft.com/content/a2ab26b3-c9fc-4f33-a4bf-96a6e136f890

[26] BusinessEurope's reply to the Commission consultation https://www.businesseurope.eu/sites/buseur/files/media/position_papers/legal/2021-02-04_sustainable_corporate_governance_and_due_diligence_-_reply_to_consultation.pdf

[27] AFEP's reply to the Commission consultation https://afep.com/wp-content/uploads/2021/02/AFEP-position-on-Sustainable-Corporate-Governance.pdf

3.3.2 Business associations

A characteristic of European policies and legal texts is that they are heavily subject to lobbying, coming from all fronts. As demonstrated in this section, the proposed Directive is no exception. In contrast to the civil society pressure to strengthen the text, many business associations have worked to make it more lenient. It is therefore interesting to present the point of view of the actors who will effectively be subject to these obligations, in order to see if the multiple limitations outlined so far can be explained by their influence.

Many multinationals have indeed expressed concerns about this new legal obligation at the European level. Three elements in particular came up. First, although the Directive is intended to create a level playing field at the European level and also affects some companies outside the EU, the biggest concern for the businesses concerned is the loss of competitiveness that it can entail with respect to firms from the rest of the world. Multinationals therefore fear that they will face unfair competition from third-country companies not subject to such rules, which would obviously affect their profits. The second point is also related to profitability: companies find that the implementation of these due diligence mechanisms will involve significant costs, which they are often not willing to bear and for which they do not see the benefit (Eberhardt & Hoedeman, 2022). Finally, most argue against the possibility of facing increased litigation risks or legal uncertainty, given the additional civil liability imposed by the Directive in case of breach of obligations. To this end, as we will see, many companies are suggesting turning to "positive incentives" rather than to a punitive approach (Momas & Beltz, 2022).

Then, smaller companies have also expressed their doubts about the Commission's proposal. Indeed, although they are excluded from its scope of application, they fear the indirect impact of the requirements imposed on large companies and regret the lack of a specific framework for them. As developed by Barbara Bijelic in the Euractiv conference previously mentioned (2022), one of the risks of directly excluding SMEs is that they will nevertheless be affected by the Directive by being part of the value chain of other firms. They will thus be exposed to cascading obligations, contractual assurances, audits, *etc.*, as presented above. These small businesses could therefore be subject to demanding requests from their buyers (who sometimes have strong economic leverage over them) but with fewer means to comply.

To assert their interests, multinationals and the business associations to which they belong have not hesitated to engage in extensive lobbying towards the European institutions. An interesting report conducted by Corporate Europe Observatory in coalition with Friends of the Earth Europe and the European Coalition for Corporate Justice in 2021 sheds light on a number of their practices, which will be outlined here.

For example, BusinessEurope, which is the leading European business lobby, has strongly opposed the EU draft legislation on due diligence. In particular, BusinessEurope has expressed the view that a large majority of companies were sharing strong concerns about a binding law that "could have negative and undesirable impacts", such as "jeopardizing significant and successful business practices" [28]. Among other things, the lobby argued that the Directive's obligations should be limited to direct suppliers (from tier one) and that it should rather provide for business incentives rather than penalties. Additionally, BusinessEurope actively fought for a point that we previously cited as a restriction of the legislative text: the non-reversal of the burden of proof in favor of the victims. The lobby indeed claimed that the law would open the door to unfounded appeals and "abusive litigation"[29] if this was accepted (Tansey, 2021). The report also illustrates that other interest groups such as AIM (the European Brands Association) or Amfori ("global business association for open and sustainable trade") have argued that civil or criminal liability should not be included in the Directive. Similarly, the European Cocoa Association (ECA) stated in June 2020 in a meeting with the EU Commission that it was crucial that due diligence legislation does not "expose companies to excessive risks" (Tansey, 2021).

CSR Europe, a business network for sustainability and corporate responsibility uses a different strategy. The lobby supports an integrated and coherent approach to due diligence (CSR Europe, 2020) and calls for the consideration of existing sectoral work performed by many companies, stressing the "relevance of developing standards from the bottom up"[30] (i.e., from the experience of companies).

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[28] The report produced by Corporate Europe Observatory in coalition with Friends of the Earth Europe and the European Coalition for Corporate Justice written by Tansey (2021) gives access to numerous lobbying documents targeting DG Justice in particular. The quoted statements come from a letter from BusinessEurope sent to Commissioner Reynders on October 13, 2020.

[29] See for instance the letter from BusinessEurope to the JURI Committee of the European Parliament of January 21, 2021. https://www.businesseurope.eu/sites/buseur/files/media/public_letters/legal/2021-01-21_letter_on_due_diligence.pdf

[30] See the briefing of a meeting between DG Trade and CSR Europe of December 4, 2020 https://www.asktheeu.org/en/request/8882/response/30180/attach/2/MEETING%20REPORT%20TRADE%20CSR%20EUROPE%20Redacted.pdf?cookie_passthrough=1

In their view, “a regulatory framework alone, focusing on individual company behavior, risks overestimating the level of influence and factual leverage of a company” (CSR Europe, 2020, p.6). CSR Europe has even criticized the focus of civil society organizations on regulatory measures[31] (Tansey, 2021). Hence, the lobby insidiously opposes binding legislation. Instead, CSR Europe proposes new social dialogues and partnerships. At a conference organized by Euractiv in May 2022, Jan Noterdaeme, Senior Advisor for CSR Europe, reiterated that the Directive needs strong accompanying measures to support stakeholders’ involvement and collaboration. By positioning itself in favor of a “duty to collaborate”, the association maintains a smokescreen under the guise of supporting a European sectoral alliance for due diligence, so that industry sectors and stakeholders can, according to Noterdaeme, benefit from open-source risk analysis, sectoral guidelines, engage in a broader dialogue on procurement practices, and explore, identify and develop sectoral and cross-sectoral projects on the ground.

Finally, national actors are also to be considered. Indeed, French multinationals are pressuring both Brussels and Paris through their representatives in the Council to undermine the draft European Directive, in order to make it less ambitious than the French law. As an illustration, the French multinationals’ lobby, AFEP[32], claims that a repressive legislation is not appropriate and that the pitfalls of the French law shouldn’t be replicated because they generate numerous, protracted and expensive legal proceedings... On the German side, their national law being much less developed on some points (limited to tier one and not including civil liability), multinationals are also actively trying to avoid the European framework being too strict. For example, BDI (the Federation of German Industries), which already worked to weaken the German law when it was being negotiated, challenged Commissioner Reynders in September 2020, speaking of the “potential burden on business” that such a Directive would represent by going far beyond national obligations (Tansey, 2021).

[31] See the briefing of a meeting between DG GROW and CSR Europe of October 9, 2020 https://www.asktheeu.org/en/request/8880/response/29768/attach/2/ARES%202021%20396609%20Flash%20report%20meeting%20GROW%20CSR%20EUROPE.pdf?cookie_passthrough=1

[32] See AFEP’s Position paper on Sustainable Corporate Governance and Due Diligence https://afep.com/wp-content/uploads/2021/02/AFEP-position-on-Sustainable-Corporate-Governance.pdf

Conclusion

The realization of the future European Directive on Corporate Sustainability Due Diligence will be key to the protection of human rights and the environment. Its main purpose will be to ensure the systematic implementation of processes mitigating the negative effects that the activities of companies and those of their entire value chain may cause. However, to achieve this objective, it is essential for the legal act to be sufficiently ambitious and binding…

Through this thesis, we have thoroughly examined the recent proposal made by the European Commission to erect a legal framework governing the practice of due diligence for companies, which until now has only been voluntary. As a reminder, the research question of this work entailed reviewing the proposed text in order to define whether it was adequate to achieve its objectives. To this end, we have striven to critically expose the shortcomings of this legal act, as well as their potential origins and possibilities for improvement.

The present work is therefore positioned with a triple intention. The primary one is *scientific*: indeed, it was first necessary to contextualize the subject of study and to consider the existing literature. In order to carry out our analysis of the Directive, it was important to understand the concept of due diligence itself, its origins and its evolution, as well as the current voluntary frameworks surrounding the practice and the motivations for seeking stricter regulation in the field. The global growing awareness of the current ecological crisis, but also the numerous scandals related to working conditions and human rights violations caused by European companies in recent years are among the elements that have increased the activism of stakeholders in favor of legally ensuring the accountability of companies that fail to meet their due diligence commitments throughout their supply chain. As such, the idea of identifying, mitigating and being responsible for actual or potential negative environmental and human rights impacts caused by firms therefore reflects a concrete implementation of Corporate Social Responsibility.

In the second chapter, after having explored the extra-legal landscape surrounding due diligence in Europe, we have analyzed the content of the Commission's proposal. It marks a turning point in the practice of due diligence: its mandatory nature is unprecedented at the EU level. In addition to imposing broad requirements on companies falling within its scope, it requires the establishment of national supervisory authorities that can investigate and sanctions in case of non-compliance, and introduces a duty of care for directors. At first glance, this Directive therefore seems fairly far-reaching, often going further on various points than the two national laws already existing. Indeed, in addition to applying to many more companies, it covers the entire value chain and provides for a civil liability regime, unlike Germany, and establishes financial penalties, unlike France, among others.

The second intention of the paper is rather *political*. The analysis of the proposed Directive and the resulting observations are intended to question the key players in the field and to point out the various blocking points that remain. We have therefore started our third chapter with a comparative assessment of the two national laws mentioned above with the European proposal. This allowed for a better understanding of its reach as well as the potential legal contradictions for countries where due diligence is already regulated. We have then taken a closer critical look at the substance of the obligations and have outlined five major issues. First, if the Directive is adopted in its current form, it will not even apply to 1% of European companies. Even if this represents the largest firms, it seems very narrow. It would therefore be appropriate for the scope to be widened, as would the definition of the "second group" of companies covered, which only includes three high-risk sectors. Moreover, only "established business relationships" will be regarded as part of a company's value chain, which also constitutes an important gap in the text and leaves the door open to corporate manipulation. A second area of concern relates to the wide discrepancies that the choice of minimal harmonization for the Directive may cause. Indeed, by leaving some leeway to Member States in implementing certain provisions, the EU is putting its desired level playing field at risk. Thirdly, the possibility left by the proposal of relying massively on contractual assurances in order to avoid civil liability is questionable. This amounts to allowing companies to sign cascading contracts that guarantee them the possibility of being discharged from the core duty of the Directive, which seems a bit counterintuitive. Next, in order for the future act to have full effect, we advocated for a reversal of the burden of proof when complaints are made following corporate breaches of human rights or environmental adverse impacts. It should be the responsibility of companies to prove their good faith. The role of victims, given their limited resources and access to information, should not be to gather evidence against industrial giants. Finally, the binding nature of the Directive has been debated. In view of the persistent violations of well-established laws all over Europe on similar subjects, the question arises whether this Directive will really make the difference without dedicated resources in line with the controls it will require. Without genuine involvement of companies and proper verification by public authorities, it can be feared that the EU proposal will be a missed opportunity.

The third and final perspective of this thesis is *societal*. The aim of our critical review was to show to the different stakeholders, whether firms themselves, legislators or consumers, the level of requirement and protection expected when talking about due diligence, while highlighting the real impact that the activities of companies can have on society as a whole. Today's citizens have growing expectations from companies to be fully committed to sustainable development, to respect human rights throughout their supply chain and to promote well-being at all levels. In this context, it goes without saying that due diligence along value chains is becoming increasingly important. As discussed in the last section of this thesis, for NGOs and civil society organizations, the relevance of this requirement no longer needs to be proven. However, we must keep in mind that companies do not always share the same vision. Many multinational lobbies have tried and are still trying to weaken the proposed legislation according to their own interests. Indeed, at this stage, the European co-legislators still have a role to play since the current version is just a Commission proposal. During their readings, the European Parliament and the Council have the possibility to suggest amendments to the text. It is therefore within their power to make the changes the Directive needs in order to truly end environmental and human rights abuses and hold companies accountable for these violations.

Limits and future researches

Several limitations must be mentioned in relation to the development of this thesis. First of all, the research subject is very recent. Indeed, the publication of the analyzed Directive proposal dates back to February 2022, i.e., only six months before the publication of this document. The available literature is therefore not very extensive, although it is currently under development. It should thus be noted that this paper was written on the basis of the information available at the time of the research.

Moreover, the studied topic is constantly evolving. While this suggests a growing interest for future research, it also induces some limitations to the writing of the present work. Indeed, as the legislation has not yet been adopted and still has to be reviewed by the European co-legislators, numerous surveys, consultations and evaluation works of the Directive by various European actors have emerged during the writing of this thesis. For the majority of them, we have only preliminary information and therefore their in-depth analysis is impossible.

Consequently, it would be interesting, in a later work, to analyze to what extent the legal framework that will finally be adopted actually meets the expectations of the various stakeholders.

Also, it is also important to stress that the analysis proposed by the author is obviously subjective. The decision to criticize the Directive was taken in awareness of the challenges it represents for the world of tomorrow, and therefore pushes in the direction of stricter regulation of corporate wrongdoings. However, the interpretation of a sensitive topic such as this one can be biased. Indeed, some information is not communicated in a clear and transparent way or conveys hidden interests under the cover of neutrality. This is particularly the case for the positions of the advocacy groups that have been analyzed: for instance, lobbying on such a topic is quite diffuse and hard to formally identify through reliable sources.

One way of improvement for future research would be to conduct a qualitative study based on meetings with the stakeholders mentioned in this paper, whether the European initiators of this legislation, or interest groups. For example, through interviews and questionnaires. Then, other axes of analysis could of course be envisaged. Among other things, once the Directive is in force, we could imagine carrying out comparative case studies evaluating the concrete implementation by certain companies of their due diligence obligations.

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In recent years, the development of Corporate Social Responsibility has progressively become a central element of the European Union's strategy, notably through its famous Green Deal. On the 23rd of February 2022, after numerous calls and following recommendations made by several European actors, the European Commission published its long-awaited proposal for a Directive on Corporate Sustainability Due Diligence.

Until now, due diligence frameworks have been followed by some firms on a purely voluntary basis. However, if adopted in its current form, the text will this time oblige certain large European and non-European companies to implement due diligence processes to identify, prevent, mitigate, and above all cease the negative impacts of their activities and those of their entire supply chain on human rights and the environment.

This future obligation could therefore represent a major step forward in reducing corporate abuses on workers, on communities and on the planet. However, as will be discussed in this thesis, the proposal also gives rise to various concerns and presents some limitations. Indeed, for this legal framework to be relevant and useful, it must above all be sufficiently ambitious and binding...

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