

POLITICAL OPINION

on the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence COM(2022) 71 final

① The Senate,

Having regard to Articles 50 (1) and (2) and 114 of the Treaty
on the Functioning of the European Union,

③ Having regard to the Universal Declaration of Human Rights

④ Having regard to the International Covenant on Civil and
Political Rights,

⑤ Having regard to the International Covenant on Economic,
Social and Cultural Rights,

⑥ Having regard to the Convention on the Prevention and
Punishment of the Crime of Genocide,

⑦ Having regard to the Convention on the Rights of the Child,

⑧ Having regard to the Convention on the Rights of Persons with
Disabilities,

⑨ Having regard to the European Convention for the Protection
of Human Rights and Fundamental Freedoms,

⑩ Having regard to the Charter of Fundamental Rights of the
European Union,

⑪ Having regard to the United Nations Guiding Principles on
Business and Human Rights: Implementing the United Nations
"Protect, Respect and Remedy" Framework (2011),

⑫ Having regard to the European Social Charter of the Council
of Europe,

- ⑬ Having regard to the OECD (Organisation for Economic Co-operation and Development) Guidelines for Multinational Enterprises (updated in 2011), the Guidelines for Responsible Business Conduct, Due Diligence Guidance for Responsible Business Conduct (2018) and the sectoral guidance,
- ⑭ Having regard to Conventions nos. 29, 87, 98, 100, 105, 111, 138 and 182 of the International Labour Organisation (ILO),
- ⑮ Having regard to the 1992 Convention on Biological Diversity
- ⑯ Having regard to the Minamata Convention on Mercury (2013)
- ⑰ Having regard to the Stockholm Convention on Persistent Organic Pollutants (2001)
- ⑱ Having regard to the Vienna Convention for the Protection of the Ozone Layer,
- ⑲ Having regard to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal,
- ⑳ Having regard to the Paris Climate Agreement,
- ㉑ Having regard to Directive 2014/95/EU of the European Parliament and of the Council on Non-Financial Reporting (NFRD), currently in the process of being amended by the Proposal for a Directive COM(2021) 189 on corporate sustainability reporting (CSRD),
- ㉒ Having regard to Regulation (EU) No 995/2010 of the European Parliament and of the Council laying down the obligations of operators who place timber and timber products on the market,
- ㉓ Having regard to Regulation (EU) 2017/821 of the European Parliament and of the Council laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas,
- ㉔ Having regard to Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the

framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ("European Climate Law")

- ②⑤ Having regard to Directive (EU) 2019/1937 of the European Parliament and of the Council on the protection of persons who report breaches of Union law ("whistleblowers"),
- ②⑥ Having regard to the Communication of the Commission entitled "The European Green Deal", COM(2019) 640 final,
- ②⑦ Having regard to the European Union action plan on human rights and business,
- ②⑧ Having regard to the twelve legislative proposals in the "Fit for 55" package presented by the European Commission in 2021 to accelerate the fight against climate change, achieve climate neutrality in 2050 and meet the target of reducing greenhouse gas emissions by at least 55% in 2030 compared to 1990,
- ②⑨ Having regard to the European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability,
- ③⑩ Having regard to the Council Conclusions of 1 December 2020 asking the Commission to table a proposal for an EU legal framework on sustainable corporate governance, including cross-sector corporate due diligence obligations along global supply chains;
- ③⑪ Having regard to the Proposal for a Directive COM(2022) 71 final on Corporate Sustainability Due Diligence, amending Directive (EU) 2019/1937,
- ③⑫
 - **A European framework on corporate due diligence is welcome in principle**
- ③⑬ Considering that sustainable development is a major issue worldwide, in particular the objectives linked to human rights and the environment;
- ③⑭ Considering that the Union has made the transition of the European economy towards a green climate-neutral economy one

of its priorities and that it has set itself some demanding targets on sustainability to that effect;

- ③⑤ Considering that, to achieve these objectives, it is indispensable that companies, which are directly or indirectly part of European and global value chains, include these objectives in their strategy and policies, that they define and implement processes to prevent or eliminate risks or at the very least to mitigate the adverse impacts of their activity on human rights and the environment;
- ③⑥ Considering that certain Member States, including France, have enacted wide-ranging or more targeted laws in this area, or are in the process of preparing such legislation;
- ③⑦ Agrees that it is necessary, for the smooth operation of the internal market, to prevent the fragmentation of the rules and to reduce the distortions of competition that would likely result;
- ③⑧ Considering that standardisation and sectoral and geographical specifications for due diligence will allow comparability between procedures and their effects and greater overall effectiveness in terms of achieving sustainability and earmarking funding;
- ③⑨ Emphasises that a shared approach to corporate sustainability due diligence will have snowball effects at global level as well as serving to promote European standards, insofar as European companies or those operating in Europe will have to ensure that measures are implemented to prevent or bring to an end or mitigate the adverse impacts of their global value chains in terms of sustainability;
- ④① Therefore fully approves the principle of defining a harmonised European framework aimed at making companies accountable for these adverse impacts and reinforcing the traceability of their relations with suppliers and distributors, a framework which is, moreover, something not only the Member States but also the European Parliament and the Conference on the Future of Europe wish to see, and which is expected to have positive effects on a number of essential issues;

- ④① Draws attention, however, to the fact that it is indispensable not to insist on a formal approach to corporate sustainability due diligence, and to the need to revise or clarify several points, in particular to take account of companies' unequal capabilities;
- ④②
- **The scope must be adjusted and completed**
- ④③ Considering that a distinction is proposed between four types of undertakings which will be obliged to implement due diligence - three European, the other from third countries -, on the basis of criteria of workforce size and turnover, or type of activity, and considering that the scope of the due diligence obligations differs according to type of undertaking;
- ④④ Recommends clarifying several aspects of this approach and improving its relevance on certain points in order to facilitate the steps that companies have to take;
- ④⑤ - *Give preference to a group-based approach, including for third country undertakings operating in the Union*
- ④⑥ Considering that the approach described in Article 2 does not take account of the organisation and functioning of the groups to which many companies belong, insofar as the turnover used to classify them is not consolidated, which means it is not possible to assess their economic weight correctly, while the company-based approach is not consistent with the way groups are organised, for example centralised purchasing and even distribution arrangements, not to mention the fact that it will lead to redundant and incoherent exercises, even the ignoring of parent companies that do not reach the thresholds for the number of employees;
- ④⑦ Considering, however, that Article 4(2) provides for the sharing of resources and information within groups;
- ④⑧ Recommends that a group-based approach be preferred, at the level most relevant to the assessment and treatment of the risks concerning which due diligence is to be exercised, and that all the consequences be drawn, in particular in terms of reporting obligations for the subsidiaries and sub-subsidiaries;

- ④⑨ Asks that economic weight be defined on the basis of the consolidated turnover and the number of employees of the consolidated subsidiaries;
- ⑤⑩ Calls for an appropriate approach to be taken to defining the relevant scope of third-country companies, in particular by taking account of the portion of the consolidated turnover of the group to which they belong that is generated in the Union;
- ⑤⑪ - *Refine the definition of high-impact activities*
- ⑤⑫ Considering that Article(1)(b) identifies sectors deemed to have a high impact on human rights and the environment;
- ⑤⑬ Advises that this scope be defined with reference to the Statistical Classification of Economic Activities in the European Community (NACE) established by Regulation (EC) 1893/2006, which takes account of the different stages in the production process, so that the limitation of the scope of the obligation to identify adverse impacts provided for in Article 6 to actual and potential adverse impacts, is circumscribed in a more precise, but also more relevant way;
- ⑤⑭ Recommends that care be taken to ensure consistency between the notion of a high-impact sector and that of the "high-risk sector" that could be included in the new Directive on non-financial reporting (CRDS);
- ⑤⑮ - *Align the turnover threshold of high-impact activities with the European threshold applicable to SMEs*
- ⑤⑯ Considering that, as soon as their turnover exceeds 40 million euros, companies carrying on high-impact activities are subject to sustainability due diligence obligations;
- ⑤⑰ Asks that this threshold be raised to 50 million euros, in line with Recommendation no. 2003/361/EC of 6 May 2003, updated, concerning the definition of micro, small and medium-sized enterprises;

⑤⑧ - *Employee number thresholds to be raised*

⑤⑨ Considering that the Commission has raised the threshold initially envisaged to 500 employees, except for companies carrying on high-impact activities, for which it proposes to set the threshold at 250 employees;

⑥⑩ Notes that these employee number thresholds are higher than those provided for by the French and German legislation;

⑥⑪ Considers that European companies should not be overburdened, as in any case they will be indirectly affected by the due diligence of the companies concerned with whom they have established business relationships;

⑥⑫ Consequently requests that the group 1 companies concerned have a consolidated workforce of at least 1,000 employees;

⑥⑬ - *Clarify the scope of the value chain*

⑥⑭ Considering that the definition of the value chain is a central element in the scope of the due diligence, which includes activities upstream and downstream of the activities linked to the production of goods or the provision of services ;

⑥⑮ Considering that beyond relationships of ownership or control, business relationships must be taken into account in the definition of the scope; that the nature of those relationships, the criteria for the assessment of which are specified Article 3, is further specified by the undefined requirement to be "*bien établies*" (*well established*);

⑥⑯ Considering that the United Nations Guiding Principles on Business and Human Rights of 2011 and the ILO Tripartite Declaration on multinationals use the notion of "business relationships";

⑥⑰ Recommends the removal of this imprecise qualifier, which does not feature in the English version of the text ("established" not "*well established*" in the English);

⑥⑱ Considering, furthermore, that the scope of the value chain is restricted, for regulated financial undertakings, to the activities of the clients receiving such loan, credit, and other financial services; and considering that financial services for SMEs are not concerned;

- ⑥9 Draws attention to the need for a relevant, consistent approach based on precise and documented identification of the activities concerned, in conjunction with the company that is the client of these services;
- ⑦0 Questions whether this restriction is justified while sustainability has become a major consideration in matters relating to investments;
- ⑦1
 - **A due diligence scope to be completed and clarified**
- ⑦2 Considering that the actual or potential adverse impacts on the environment or human rights that the companies concerned must identify, prevent, reduce or bring to an end, whenever possible, result from the violation of prohibitions or obligations contained in certain international conventions listed in the Annex to the Proposal for a Directive;
- ⑦3 Considering that this approach, which involves specific obligations for the companies concerned, thereby renders enforceable upon them international conventions, which, under international law, are only binding on the States that have ratified them;
- ⑦4 Approves this process in principle, but deplores the fact that it is incomplete given that certain conventions are not concerned, even though they are particularly important, most notably the fundamental European instruments on human rights such as the European Convention on Human Rights, the Council of Europe's European Social Charter or the Charter of Fundamental Rights of the European Union; observes that the same applies to the fundamental texts on the environment, such as the Convention on Wetlands of International Importance, for example;
- ⑦5 Asks that the occupational health and safety dimension be explicitly mentioned, which would be consistent with its inclusion in the fundamental principles and rights at work that the International Labour Conference has recently adopted;
- ⑦6 Recommends that a mechanism be provided for updating the Annex in order to take account of new international conventions in the future;

- ⑦⑦ Considering, furthermore, that point 21 of the Annex specifies that violations of a prohibition or a right not covered by the Annex but included in the human rights agreements listed in Section 2 are also included, provided that these violations meet two conditions: that they directly impair a legal interest protected in those agreements and that the company concerned could have reasonably established the risk of such impairment and any appropriate measures to be taken;
- ⑦⑧ Emphasises the complexity, in the absence of any indicators, of controlling the reasonable nature of such a process of identifying risk by the company;
- ⑦⑨ **• Define the proportionate nature of the scope of the obligations of means, in particular for SMEs**
- ⑧⑦ Considering that the framework envisaged in the Proposal for a Directive requires companies to identify the actual or potential adverse sustainability impacts attached to their value chain, to implement due diligence measures commensurate with the degree of severity of those impacts and their capacity, and to organise the monitoring of those measures;
- ⑧① Considering that international standards on responsible business conduct have progressively been adopted and completed over the last few years, but that they are only applied by companies on a voluntary basis, in connection with their social and environmental responsibility (SER);
- ⑧② Observes that these initiatives alone are not enough to meet the challenges, and that it is therefore necessary, in order to guarantee the effectiveness of corporate sustainability due diligence, to strengthen and apply them more widely, in particular to high-impact activities;

- ⑧③ Considers that the choice of obligations of means, disregard for which is liable to lead to the liability of the company (Article 1(1)(a)), is a way of giving a concrete and binding scope to the objectives identified, without burdening the companies concerned with performance obligations which may well be rendered unachievable by the specific nature of the goods produced or services provided or the local context;
- ⑧④ Draws attention to the fact that, to be "appropriate" within the meaning of Article 3, a measure must take account not only of the degree of severity of the adverse sustainability impacts on the value chains of the company concerned and the circumstances of the specific case, but also of the economic weight of the company, including the means available to it in view of its size;
- ⑧⑤ Considering the absence, in the impact assessments carried out by the Commission, of any evaluation of the burden induced by due diligence for SMEs, in particular those carrying on activities in high-impact sectors, a burden that will be added to their sectoral obligations and risks being very high in view of their means;
- ⑧⑥ Considering that most SMEs are not directly concerned by the Proposal, but whenever they have relationships with companies that are concerned, they are liable to be considered as belonging to their value chains and must therefore take measures to deal with the adverse impacts of their activity;
- ⑧⑦ Asks that the sustainability obligations of these companies be proportionate to their resources and primarily focused on the actual adverse impacts of their activities;
- ⑧⑧ Emphasises that the contractual assurances to which Articles 7 and 8 give a central place, must take account of the capacity of these companies and not impose obligations on them that they are not able to implement;

- ⑧⑨ • **Facilitate the introduction of due diligence measures**
- ⑨⑩ - *Guide the assessment of potential or actual adverse impacts*
- ⑨① Considering that Article 6 provides that companies must identify the actual or potential adverse impacts in order to identify and rank the risks attached to their activities and prioritise the prevention and treatment of the adverse impacts;
- ⑨② Considering that it is stated that this exercise must be carried out based on quantitative and qualitative information, including independent reports drawn up by professionals accredited to this effect, as for non-financial reporting;
- ⑨③ Recommends, in order to facilitate the assessment of the adverse impacts and their monitoring, that provision be made for the publication of indicative and sectoral guidelines, including indicators;
- ⑨④ - *Ensure the contractual prevention framework is balanced*
- ⑨⑤ Considering that it is stated in Article 7 that companies will be required to develop a prevention action plan "as necessary", along with timelines for action and indicators for measuring improvements, and to take measures, "where relevant";
- ⑨⑥ Considers that indicative criteria should facilitate the company's assessment of the need to develop an action plan and to take measures;
- ⑨⑦ Considering that these measures include contractual assurances provided by business partners that they will ensure compliance with the code of conduct of the company concerned and that the Commission plans to adopt "guidance about voluntary model contract clauses";
- ⑨⑧ Considers that these codes of conduct should focus on the key issues related to the protection of human rights and the environment;
- ⑨⑨ Emphasises that the contractual assurances must be negotiated within a balanced framework in order to ensure that small companies do not have to bear a disproportionate burden, imposed

by concerned companies, including if the clauses are not respected, where this has not generated any adverse impacts;

⑩⑩ Considering that it is provided that in the event of a potential or actual adverse impact considered as serious, the business relationship, may or even must be suspended or broken off;

⑩⑪ Considering that the law applicable to said relationships may prohibit such measures which it considers as not being justified by a legitimate interest, or involving very high direct or indirect costs, or even preventing the company concerned or its business partner from continuing their activities;

⑩⑫ Considers that it must be specified that, in such cases, the company concerned has an obligation to document precisely for what reasons it has not been able to take these measures, in particular the consequences that would have resulted from its doing so for it or its business partner;

⑩⑬ **• Reinforce and differentiate the role of the stakeholders**

⑩⑭ Considering that the stakeholders must accompany and oversee the implementation of the corporate due diligence obligations due to the consequences for them, including potential consequences, of the activities of the company concerned and its value chain;

⑩⑮ Considering that Article 2(n), only defines as stakeholders for the application of due diligence actions "the company's employees, the employees of its subsidiaries, and other individuals, groups, communities or entities whose rights or interests are or could be affected by the products, services and operations of that company, its subsidiaries and its business relationships";

⑩⑯ Considers that employee representatives and trade unions as well as civil society organisations engaged in the defence of human rights and the environment should be added to this list, since they are liable to enlighten companies on the risks of adverse impacts of their activities and to facilitate the implementation of the vigilance plans;

- ⑩⑦ Recommends that a distinction be made between internal stakeholders and third party stakeholders in order to involve them in differentiated and relevant ways in the implementation of due diligence;
- ⑩⑧ Asks that it be provided for internal stakeholders to be systematically involved in the identification of the actual and potential adverse impacts (Article 6), in the development and monitoring of the adverse impact prevention action plan, including codes of conduct (Article 7), and in monitoring the bringing to an end of actual adverse impacts (Article 8), as their effective participation would also improve the effectiveness of the implementation of the measures to reduce and bring these impacts to an end;
- ⑩⑨ Considers that in addition to the individuals, groups, communities or entities mentioned in the Proposal for a Directive whose rights or interests are or could be affected, the local or international civil society organisations engaged in the defence of human rights and the environment must also be consulted, insofar as they have knowledge of the environmental, social and human production or distribution context of all or part of the value chain concerned;
- ⑩⑩ Considers that it is important that the stakeholders should also be consulted on the procedure for receiving and dealing with complaints that must be established by the company concerned, so that this complaints procedure is easily accessible and adapted to different types of complainants;
- ⑩⑪ Considers that the complainant must not only be entitled to request follow-up on their complaint, but also to be informed by the company of the action it has taken to deal with it;
- ⑩⑫ • **Extend the remit of the national supervisory authorities to include a role of advice and mediation**
- ⑩⑬ Considering that national supervisory authorities, which have powers of investigation and inspection and the possibility of asking the company concerned to take corrective measures, to issue it with injunctions and to adopt interim measures and impose financial

sanctions, would be given the power to oversee the compliance of companies with their obligations;

⑪④ Considers that it should be specified that it remains possible, where the national legislation so provides, to seise a court in preventive urgent proceedings in the event of manifestly illegal activities;

⑪⑤ Asks that provision be made for these national supervisory authorities to be able to enlighten companies on their sustainability due diligence obligations and answer their questions on their practical implementation, although without the conduct of a compliance analysis being able to prevent the opening of an investigation in the future;

⑪⑥ Recommends the introduction of an optional mediation procedure under the aegis of the competent supervisory authority, when such a procedure is liable to enable the company to define measures to prevent or deal with impacts in consultation with the complainants and the stakeholders;

⑪⑦ Considering that it is proposed that a European Network of Supervisory Authorities should be set up to facilitate cooperation, including exchanges of information, between them as well as to ensure coordination and the consistent application of control practices and the division of competences between them;

⑪⑧ Recommends that this network should also centralise and publish information to keep the map of risks of adverse impacts up to date;

⑪⑨ Recommends, where several national supervisory authorities are liable to be competent, that a mechanism be put in place to designate the competent authority, or where it is preferable, a lead authority;

⑪⑩ • **Facilitate victims' access to justice**

⑪⑪ Considering that the company will only be liable for damages if it failed to comply with the obligations to prevent potential adverse impacts or to bring the actual impacts defined in the text to an end, and as a result of this failure an adverse impact that should

have been identified, prevented, mitigated, brought to an end or its extent minimised occurred;

⑫② Considering however that it is provided that the company will not be liable for damage caused by an indirect partner with whom it has a business relationship, unless it was unreasonable, in the circumstances of the case, to expect that the action actually taken by that partner would be adequate to prevent, mitigate, bring to an end to or minimise the extent of the adverse impact;

⑫③ Considering that the victims of such damage are often unable to access useful information or to base themselves on it usefully to seise the competent court;

⑫④ Reiterates the provisions of Article 47 of the Charter of Fundamental Rights of the European Union on the right to an effective remedy;

⑫⑤ Considers it indispensable that victims should have the possibility to be represented in litigation by a trade union, an association or a civil society organisation, subject to its representativeness, its purpose and its non-profit, public interest nature being verified by the judge;

⑫⑥ Asks that it be specified that affected communities should be able to receive financial compensation where the damage has a general scope;

⑫⑦ **• Take account of the organisation of the company's governance**

⑫⑧ Considering that due diligence must be integrated into companies' policies, as described in Article 5, and that it is therefore a key element of their strategy;

⑫⑨ Considers that the definition of obligations of the different actors in governance must take account of their respective roles, making a distinction in particular between executive directors, who are in charge of adapting and implementing the company's due diligence, and the collective bodies which define the company's main strategic orientations in this matter;

⑬⑩ Questions the scope of Article 25, which seems to interfere in the internal workings of companies without any apparent legal basis;

⑬⑪ • **Introduce an incentive mechanism in public procurement**

⑬⑫ Considering that public entities do not fall within the scope of the due diligence defined by the Proposal, although it is necessary for public funds to be directed, as a priority, towards economic actors that are effective in sustainability matters;

⑬⑬ Recommends that, as in matters relating to environmental and social clauses, contracting authorities should have the possibility of inserting clauses on the existence of a vigilance plan into public procurement contracts;

⑬⑭ • **Provide for early, but progressive application**

⑬⑮ Considering that the implementation of due diligence is a complex process which requires time and resources, especially for the identification of partners in value chains, which may include in particular, in some groups, a very large number of suppliers and subcontractors all over the world, as well as a very large number of distributors;

⑬⑯ Recommends allowing companies to implement the assessment of the potential or actual adverse impacts of their activities in the value chain and the measures they require in stages, whilst providing for immediate application at least to easily identifiable direct suppliers and customers and then progressively to the next tiers, if the company is unable to do this immediately;

⑬⑰ • **Ensure the measures are linked in and consistent with other legislation**

⑬⑱ Considering that the due diligence is a cross-cutting issue and must be linked in with other European legislation;

- ⑬⑨ Considering that the Proposal for a Directive on corporate sustainability reporting (CSRD) includes the annual vigilance declaration in the Statement of Non-Financial Performance;
- ⑭⑩ Points to the fact that this should not lead to an approach to due diligence that is primarily focused on the shareholders whereas it concerns, first and foremost, the protection of internal and third party stakeholders, and must be constructed with this in mind;
- ⑭⑪ Considering that certain companies are subject to sectoral legislation on sustainability, in particular in high-risk sectors;
- ⑭⑫ Considers that the introduction of general due diligence must not lead to overlaying procedures and needlessly increasing the burden on companies, for example in areas such as the treatment of timber, the mining of conflict materials, or dual-use goods;
- ⑭⑬ Consequently recommends that in-depth examination be carried out on how general due diligence links in with such other sectoral standards in order to ensure they are consistent and, where appropriate, make any necessary changes to these standards so as to exempt companies from having to apply the general regime;
- ⑭⑭ Considering that the Commission European indicated that certain important aspects of due diligence would be dealt with in specific texts, in particular matters relating to corruption, even though clear links can be seen between these practices and the failure to carry out due diligence;
- ⑭⑮ Asks that the texts concerned be updated quickly;
- ⑭⑯ Considering that Article 15 requires companies whose activities have a high impact on human rights and the environment to adopt a plan aimed at guaranteeing that their business model and strategy are compatible with the transition to a sustainable economy and with the limiting of global warming, in accordance with the Paris Agreement;
- ⑭⑰ Considering that paragraph 2 of this article refers to the inclusion of objectives in this plan and provides for them to be included in the corporate sustainability due diligence scope;
- ⑭⑱ Considering that the fight against climate change, however, is not mentioned in the Annexe and is therefore not included in the

due diligence scope, even though certain activities undeniably have adverse climate impacts;

①49 Hopes that a more precise link will be made between due diligence and the fight against climate change;

①50 • **Promote due diligence in trade negotiations**

①51 Considering that sustainability is a global issue and that the European Union must ensure that it does not import products that do not meet the requirements it imposes on its own companies;

①52 Asks that the compliance with sustainability due diligence requirements be systematically included in trade agreements currently being negotiated;

①53 Recommends that the issue also be raised at the level of the World Trade Organisation (WTO).