



EUROPEAN COMMISSION

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Dear President,

The Commission would like to thank the Sénat for its Opinion on the proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 {COM(2022) 71 final}.

The proposal plays a key role for the Commission's objective of a just transition to a sustainable economy and society and in delivering on the United Nations Sustainable Development Goals, including on their objectives related to human rights and the environment. Aimed at fostering long-term sustainable and responsible corporate behaviour, the proposal introduces a mandatory human rights and environmental corporate due diligence duty, requiring companies to identify and address actual or potential human rights and environmental adverse impacts in their own operations, in those of their subsidiaries and in their value chains.

The Commission is pleased that the Sénat shares its view as regards the need to put in place a European harmonised framework as regards corporate sustainability due diligence. In particular, the Commission appreciates that the Sénat supports a framework that aims at making companies accountable with regard to adverse impacts and at reinforcing the traceability of their relations with suppliers and distributors, in keeping with the environmental and social objectives of the European Union, which will also have multiplier effects ('effets d'entraînement') at the global scale and of promoting European Union rules.

The Commission takes note, in particular, of the observations of the Sénat concerning the need not to privilege a formal approach of due diligence and to review or specify several points to take into account, notably the unequal capacities of companies with regard to certain aspects of the proposal.

Specifically, the Commission takes note of the comments and recommendations relating to the definition of the personal scope of application and of the material scope of due diligence, the corporate governance elements and the possibilities to facilitate the putting in place of due diligence measures by companies.

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The Commission is pleased to have this opportunity to provide several clarifications regarding this proposal and trusts that these will allay the Sénat's concerns.

Overall, the Commission would like to underline that the proposal aims at a balanced, targeted, and effective approach, considering the need to have a strong contribution to sustainability, and at the same time to ensure proportionality, adequate implementation as well as legal certainty for companies. It builds on the existing international framework stemming from the United Nations Principles on Business and Human Rights, and the Guidelines on Multinational Enterprises and Due Diligence Guidance for Responsible Business Conduct of the Organisation for Economic Cooperation and Development (OECD), seeking to translate the voluntary framework into binding rules enforced through administrative supervision and civil liability. In line with the principles of subsidiarity and proportionality, and given that the chosen instrument is a Directive, it leaves room for Member States – when transposing the European Union rules into national laws – to take account of the need for consistency and coherence within the national legal systems.

As regards the personal scope, an individual approach has been chosen as opposed to a consolidated approach for the sake of proportionality and as the most efficient option to achieve the goals of the Directive in line with the international framework. However, in complying with the obligations, companies are allowed to share resources and information within their respective groups of companies.

For the identification of high impact sectors, the Commission would like to recall that, besides national and international studies, it has relied on existing sectoral guidance of the Organisation for Economic Cooperation and Development as one of the criteria to identify the sectors with particularly high impact that are more prone to producing human rights or environmental adverse impacts. The Commission takes note of the Sénat's suggestion as to the use of NACE codes to help identifying the activities included under those sectors, as well as the call for consistency with the Corporate Sustainability Reporting Directive.

Overall, the Commission would like to underline that the personal scope has been carefully calibrated so that the proposed due diligence obligations would target companies that have larger operations and economic power, capacity to create leverage, or are smaller in size but operate in sectors where adverse external impacts were identified to be more frequent or significant. Such companies are more likely to contribute to potentially significant adverse impacts, including in their value chains. Particular attention has also been paid to reduce the burden on small and medium-sized enterprises, which are outside the scope of the proposal but indirectly affected through a trickle-down effect.

As regards the material scope of due diligence, the Commission wishes to highlight that the violations and prohibitions listed in the Annex to the proposal refer to the globally recognised conventions included in the Annex, as the proposed rules are tailored to apply in companies' global value chains. The Commission takes note of the Sénat's suggestion to integrate more explicitly the health and security at work related dimension.

As regards the updating of the Annex as referred to by the Sénat, it should be noted that the review clause includes this topic. As regards the Sénat's recommendations on facilitating compliance with the proposed due diligence obligations, the Commission recalls that, in order to support companies and Member States with the implementation of the Directive, and as also recommended by the Sénat, the Commission may issue further guidance, where necessary, including for specific sectors or specific adverse impacts. Particularly, in order to help small and medium-sized enterprises to gradually integrate sustainable considerations in their business operations, specific support such as guidance, information about the obligations, tools and funding would be made available. The Commission will also provide guidance on model contractual clauses, to facilitate companies' compliance and also to limit shifting compliance burden on business partners – in particular small and medium-sized enterprises which are part of the value chain of larger companies falling in the scope of the Directive.

The Commission takes note of the Sénat's recommendations to reinforce and differentiate the role of stakeholders in view of their full engagement in the definition and application of due diligence processes and stresses the importance of stakeholder participation in this proposal. In this vein, the proposal already contains several rules that envisage the involvement of the affected stakeholders in different steps of the due diligence measures. Companies would also provide the possibility to submit complaints directly to them in case of legitimate concerns regarding adverse impacts.

Referring to the Sénat's remarks on the powers of the supervisory authorities and the possibility to have recourse to court proceedings, the Commission would like to clarify that the administrative proceedings do not prevent the victims or affected persons from filing lawsuits or having recourse to alternative dispute settlement mechanisms as envisaged by national laws. The Commission takes note of the Sénat's suggestions to extend the powers of the supervisory authorities to provide counsel or support to companies for better compliance with the due diligence obligations, and to set up a mediation procedure to address the complaints. As regards the Sénat's concern about the difficulties with the attribution of competence, the Commission wishes to recall that the proposal already includes provisions to determine the competent authorities. It also envisages that the information on which that attribution is based would be shared with the European Network of Supervisory Authorities, which may coordinate efforts to find a solution.

As regards the Sénat's recommendation to facilitate the victims' access to justice by allowing them to be represented by a trade union, association or civil society organisation, the Commission wishes to clarify that the proposal does not harmonise procedural rules related to civil liability claims. The issues referred to by the Sénat are therefore left to national laws.

Referring to the Sénat's comments as regards corporate governance, the Commission wishes to underline that the corporate governance elements retained in the proposal focus on the directors' duties to the extent necessary to underpin the due diligence obligations. Moreover, the directors' general duty of care for the company, which is present in the company law of all Member States, is also being clarified to ensure

complementarity and coherence. The Treaty on the Functioning of the European Union provides in its Article 50(2)(g) for a legal basis for the European Union legislator to act on corporate governance. This legal basis has already been previously used, for instance for the Shareholder Rights' Directive. It should also be noted that the proposed Article 25 has been informed by the relevant provisions of the French Loi PACTE.

As regards the Sénat's request to introduce a mechanism to incentivise due diligence in public procurement, the Commission acknowledges the importance of public procurement as an important incentive for companies, while wishing to clarify that it did not appear necessary to include amendments to the current rules in the proposal. The European Union Directives on public procurement already contain a provision ensuring that Member States shall take appropriate measures to ensure that, in the performance of public contracts, economic operators comply with applicable obligations in the fields of environmental, social and labour law.

As regards the Sénat's concerns about the need for coherence and consistency with other European Union legal instruments or initiatives in order to avoid unnecessary burden on companies, the Commission would like to stress the complementarity of the Corporate Sustainability Due Diligence proposal with the Corporate Sustainability Reporting Directive and the Deforestation initiative, among others.

As regards the articulation of the due diligence with combating climate change, while due diligence obligations cover human rights and environmental adverse impacts, the proposal includes a separate provision for combating climate change. Companies covered by this rule would be required to adopt a sustainability plan that takes into account climate change and limiting of global warming in line with the 1.5° C target of the Paris Agreement. The Commission would evaluate, five years after the Directive starts to apply, whether the rules on due diligence should be extended to adverse climate impacts.

Finally, as regards the Sénat's request to promote sustainable due diligence in the trade agreements and at World Trade Organization level, the Commission can assure the Sénat that, with this objective, it will continue working within international fora such as the Organisation for Economic Cooperation and Development and the United Nations, as well as with third countries through its trade policy when implementing existing Free Trade Agreements and especially their Trade and Sustainable Development chapters and also the Generalised Scheme of Preferences.

The points made above are based on the initial proposal presented by the Commission, which is currently in the legislative process. The Sénat's Opinion has been made available to the Commission's representatives in the ongoing negotiations of the co-legislators, the European Parliament and the Council, and will be taken into consideration in these discussions.

The Commission hopes that the clarifications provided in this reply address the issues raised by the Sénat and looks forward to continuing the political dialogue in the future.

Yours faithfully,

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Vice-Président*

*Didier Reynders
Membre de la Commission*