

ETUC initial analysis of the Commission's proposal for a Directive on Corporate Sustainability Due Diligence and updated roadmap for ETUC actions in 2022- 2023

Adopted at the virtual Executive Committee meeting of 16-17 March 2022

European Commission finally proposed a Directive on Corporate Sustainability Due Diligence

With 238 days' delay, the Commission finally presented on 23 February 2022 a [proposal for a Directive on Corporate Sustainability Due Diligence](#) ('CSDD').

A strong directive on mandatory Human Rights Due Diligence was desperately expected and needed at a time of [rising human rights violations](#) including abuse of labour and trade union rights by both governments and major European companies. It is thus high time to ensure that trade unions, workers' representatives and workers are able to hold these companies accountable for human rights and environmental abuses in all their operations and throughout their whole supply chains.

However, what has been put now on the table is a missed opportunity. The Commission misses the key call of trade unions and civil society for strong rules on Sustainable Corporate Due Diligence to move away from unilateral business initiatives. It seems to have opted for the lowest common denominator, as a baseline. The Commission's proposal even largely ignores the strong and ambitious European Parliament proposals¹ which echoed much better and with vision what the European Union should deliver to hold business and suppliers accountable for the adverse impacts of their operation on human rights, people and the planet.

Compared to the ETUC main demands as adopted by the Executive Committee in December 2019 in the ETUC Position calling for a European Directive on mandatory Human Rights Due Diligence and responsible business conduct², and the ETUC position 'Towards an EU law on mandatory Human Rights Due Diligence: indicative roadmap for ETUC actions in 2021-2022'³, and which have been circulated and presented to a large range of stakeholders and institutions and relayed in different public debates and consultation mechanisms of the European institutions, the Commission proposal falls very far short on many aspects on what is actually needed to ensure that violations of human rights, including trade union and workers' rights, and environmental standards are prevented and ceased. As a reminder, our main trade union demands in regard to an EU law on mandatory Human Rights Due Diligence are as follows:

¹ In particular the [European Parliament Report with recommendations to the Commission on corporate due diligence and corporate accountability](#), adopted 11 February 2021; see also [European Parliament Report on Sustainable Corporate Governance](#), adopted 2 December 2020.

² [ETUC Position for a European directive on mandatory Human Rights due diligence and responsible business conduct](#), as adopted by the ETUC Executive Committee in December 2019.

³ Towards an EU law on mandatory Human Rights Due Diligence: indicative roadmap for ETUC actions in 2021-2022, as discussed and agreed at the ETUC Executive Committee of 8-9 December 2021.

- Need for a European directive on mandatory human rights due diligence and responsible business conduct because the existing international and European voluntary guidelines, codes and charters did not deliver,
- This mandatory and effective due diligence mechanisms should cover all companies' activities and their business relationships, including their supply and subcontracting chains,
- As trade union and workers' rights are human rights, they should be equally protected by these mechanisms, as an important step forward to ensure the respect and enforcement of Human Rights. Human Rights should include trade unions' and workers' rights as main components,
- The Directive should provide for effective remedies and access to justice for victims/workers, including trade unions,
- Liability must be introduced for cases where companies fail to respect their due diligence obligations, without prejudice to joint and several liability frameworks,
- and last but not least, the Directive should ensure the full involvement of trade unions and workers' representatives, including EWCs throughout the whole due diligence process.

ETUC initial analysis of the Commission's proposal: "a first important step but bare minimum"

The proposal sets for the first time a long-awaited EU framework on Corporate Sustainability Due Diligence, taking national law and initiative as examples. However, it delivers much too little to bring about the necessary behavioural changes in business to effectively address and prevent violations of human rights and damage to the environment.

For ETUC, the major loopholes and deficiencies of the Commission proposal bearing in mind the ETUC main demands (see above) can be summarised as follows:

- **The Directive misses the human rights, people and governance focus**

The ETUC regrets that the proposal is mainly construed as a "framework" focusing on the role of companies to ensure the "sustainability" dimension of their operations but pays no serious attention to the "human rights" dimension nor to the position of affected people and victims. In addition, the focus of the Directive lies on obligations of means (i.e. establishing plans, code of conducts) not an obligation of results (i.e. to require companies to guarantee stopping adverse impacts, in all circumstances, that adverse impacts will never occur or that they will be stopped).

The proposal overlooks business governance aspects, as Corporate Sustainability Due Diligence is reduced to unilateral business initiatives (e.g. code of conducts, prevention and corrective action plans, transition plans) and enhances businesses to play judge and jury over their own practices. It even provides for (financial) support for companies/SMEs which are excluded from the scope (i.e. support without any obligations attached to it). However, little to no support is provided for the affected people/victims/communities, nor for trade unions (and CSOs) to ensure their full engagement in the whole due diligence process.

Finally, the proposal provides for an insufficient link to existing EU acquis, in particular when it comes to EU acquis on workers' rights of information/consultation/participation and collective bargaining as well as on the EU public procurement acquis which is in particular important for (financial) remedies (exclusion of EU funding, etc.). In addition, the proposal heavily relies on

the forthcoming [Corporate Sustainability Reporting Directive \(CSRD\)](#) (revising the Non-Financial Reporting Directive (NFRD) but the content of which is still under discussion and unsure. A limited CSRD will very likely (negatively) impact this CSDD proposal. Furthermore there is an unclear link to existing EU sectoral acquis in particular in relation to joint and several liability schemes. On the positive side there is a reference to the Whistle-blower Directive, although it will need to be seen how its weaknesses might also influence this CSDD proposal.

- **A too limited scope of businesses covered seriously undermines the proposals' added value and impact**

With the complete exclusion of SMEs for mainly reasons of avoiding administrative burden or other (financial) costs, the proposal is far away from the ETUC demand, as well as from most stakeholders, to cover all companies irrespective of their size and sector and all companies' activities and their business relationships, including their supply and subcontracting chains.

Even the number of companies potentially covered by the CSDD proposal are further restricted amongst other reasons because of 1) the embedded thresholds in relation to "world" turnover and/or number of employees, for both EU and non-EU companies, 2) the inclusion of certain third-country based companies within the scope of the Directive does not apply to those companies that do not meet the thresholds as they operate within the EU through different business structures such as subsidiaries, contract management and franchise, 3) the list of high risk sector companies is reduced to 3 sectors with limited due diligence obligations, 4) the exhaustive list of companies covered by Article 3, which *de facto* excludes other businesses on the basis of their legal form and 5) not covering the public sector.

Similarly, a set of definitions such as the ones on "severe adverse impact", "value chain", "(established) business relationships" might allow for considerable further limitations and/or shifting due diligence obligations down to other layers of the supply chain.

- **Human rights include trade union, workers' and labour rights, but....**

The Human Rights covered by this proposal include trade union, workers' and labour rights, although there are not explicitly recognised in the hard core provisions of the proposal but shifted to annex to the Directive. In addition, the list of potential Human Rights instruments embedded in this annex is very limited, selective and random. For example, only the 8 core fundamental ILO Conventions are referenced, whereas other very important (technical/governance) Conventions (protection of wages, labour inspection, workers' representation, harassment and violence, etc.) are missing. It would be key to ensure that the Directive/list covers all relevant ILO Conventions. Furthermore, there is no reference to important ILO Declarations like the 2019 Centenary Declaration, which intends to prepare the world of work for the for the digital era and towards the recognition of OHS rights as fundamental rights. Finally there is no reference to fundamental European Human Rights instruments like the Council of Europe European Convention of Human Rights and European Social Charter, let alone to the own Charter of Fundamental Rights of the European Union.

- **Trade union and workers' representatives are ignored and by-passed**

Despite the strong call of the European trade union movement, reiterated by the European Parliament to ensure trade unions strong and proactive involvement throughout the whole process of identification, prevention, remedying and enforcing Human rights risks/violations and in the design, monitoring and enforcing of the envisaged due diligence tools and

instruments, the proposal limits the role of trade unions to filing internal complaints about violations.

The proposal provides for a restricted consultation with a selection of stakeholders concerning for example the elaboration of code of conducts or prevention and corrective action plans. Such consultation is only provided for “where relevant” and with “stakeholders” and/or (certain) civil society organisations, whereby the definition of stakeholders does not refer to trade union and workers’ representatives.

Construed as it is for the moment, the proposal thus not only ignores but risks also by-passing and run contrary to the rights and prerogatives which trade union and workers’ representatives have under international and European human rights instruments as well as the EU acquis on information, consultation and participation, as well as collective bargaining and collective agreements .

- **Confusion of (alternative) grievance proceedings, little to no support for victims to access to justice, little to no effective remedies and sanctions**

The proposal provides for a plethora of alternative proceedings and structures to filling a complaint to court, such as internal grievance and complaints mechanisms, ‘a substantiated concerns” procedure, national supervisory authorities (incl. European Network), possible use of contractual clauses between companies and suppliers. These are similar to international alternative dispute resolution mechanisms developed amongst other in the field of international labour dispute settlement, yet not adaptable and operable in the EU nor at the level of member states. Such procedures require clear guidance and clarification, in particular when the mandates and powers of the respective actors / authorities involved are similar to the one of (labour) tribunal. The role of trade unions in all these procedures should be clarified and guaranteed.

Furthermore such procedures can only be used in a complementary way and should in no way hamper affected people, organisations and/or victims to seek justice before courts and/or other quasi-judicial authorities. The sequencing of the different procedures is unclear and may well lead to a considerable confusion and generate conflict and obstacle to remediation.

In that regard, the proposal does not provide for support and tools for victims to overcome the manifold hurdles to seek access to justice. Proposals such as the shift of burden of proof, collective redress, representation of victims by trade unions, civil society organisations or other bodies are not provided for despite the fact such mechanisms exist in the EU acquis in the area of non-discrimination, consumer protection, to name but a few. This particular approach to victims contrasts with the extensive support provided to SMEs to comply with their obligations. Such a perspective does not reflect the spirit of the different member states legislation on business due diligence nor the practical situations on the ground, where the victims cannot access to justice in comparison to business delaying or denying access to remedy.

As for sanctions, the Commission proposal heavily relies on administrative sanctions, which could include pecuniary sanctions. Although the sanctions have to be ‘effective, proportionate and dissuasive’, their impact could be undermined by the fact that in deciding whether to impose sanctions and, if so, in determining their nature and appropriate level, due account shall amongst others be taken of the company’s efforts to comply with any remedial action required of them by a supervisory authority, any investments made and any targeted support provided. For ensuring that the sanctions will indeed be effective, ETUC would highly recommend the implementation of minimum standards for sanctions to avoid unfair

competition. Furthermore, eventual pecuniary sanctions shall be based on the turnover of the company, not the actual damage caused.

The ETUC will further assess more in-depth additional key aspects related to the liability regime proposed by the Commission excluding criminal liability, but also on directors' duties which is a very minimalistic approach of what directors could do, as well as the implementation of the directive in the member states, as the competent ministry and the timing will influence the process and content of the transposition law, to name but a few.

What is next?

In line with the discussion paper "[Towards an EU law on mandatory Human Rights Due Diligence: indicative roadmap for ETUC actions in 2021-2022](#)", as agreed upon at the ETUC Executive Committee of 8-9 December 2021, the ETUC has started intensifying and diversifying its mobilisation and advocacy work to remedy the loopholes and lacunae of the draft proposal and to ensure an ambitious and future proof Directive that can effectively prevent and remedy human rights violations and environmental damage.

This advocacy and mobilisation work will be concentrating around the following:

- Elaboration of a detailed – article by article – legal analysis of the Commission proposal (including proposals for concrete amendments and/or adding text proposals on missing priorities/issues) to be used in the further legislative process and advocacy work towards Council/Member States, European Parliament and Commission; the priorities will thereby lie on:
 - Ensuring a human rights, people-centred and proper governance dimension in the Directive and creating an effective link with relevant existing EU acquis;
 - Ensuring full trade union/workers representatives role in the whole due diligence process;
 - Ensuring that all relevant human, trade union, workers' and labour rights are duly covered by the Directive with a focus on enabling trade union rights;
 - Ensuring a broader personal scope by bringing more companies and business relationships under the coverage of the Directive;
 - Ensuring effective and easy access to justice for affected people and victims (including representation by trade unions), broader liability, proper remedies and dissuasive sanctions (beyond mere financial ones);
 - Ensuring that liability is introduced for cases where companies fail to respect their due diligence obligations, without prejudice to joint and several liability frameworks, where appropriate (sectoral) agreements on responsible business conduct resulting from collective bargaining/social dialogue could benefit from adapted monitoring/supervisory mechanisms; as well as ensuring a strong non-regression clause which in particular guarantees that existing collective bargaining agreements are not undermined by the Directive..
- Continuing and enhancing the advocacy work in the ongoing legislative process on the Corporate Sustainability Reporting Directive ('CSRD') and the ongoing related standard-setting work within the [European Financial Reporting Advisory Group](#) (EFRAG) and where ETUC is represented in the management board as well in different project task forces and expert working groups;

- Continuing and enhancing the advocacy work on announced (legislative) initiatives like a [ban on forced labour products](#) and the abolition of forced and child labour in general conditioning at the same time these initiatives with our demand on the protection of the enabling trade union rights;
- Continuing and enhancing the advocacy work in order to reinforce due diligence measures/mechanisms in existing EU acquis/policies, e.g. public procurement directives/policy, sectoral EU acquis (Timber, etc.), or other mechanisms provided in e.g. instruments for investment support in the EU and abroad (loans, financial guarantees, etc.);
- Continuing and enhancing advocacies for stronger clauses and safeguards in the EU Trade and Investment policy, with more effective complaint and sanction mechanism in case of violation of ILO standards by governments;
- Intensifying a communication strategy using thereby all available internal tools (ETUC website, ETUC Democracy at work campaign website ([More democracy at work | ETUC](#)), ETUCLEX website ([ETUCLEX | ETUC-Lex](#)), Megaphone, when available, social media in general,...), organisation of own webinars and/or active participation in external events and conferences, as well as via the new forthcoming joint public campaign on the Commission proposal together with the INGOs European Coalition for Corporate Justice (ECCJ), European Center for Constitutional and Human Rights (ECCHR) and Friends of Earth Europe (FoEE).

For both the mobilisation and advocacy work, cooperation with the affiliates has started to be intensified via in particular the organisation of regular meetings (+/- every two weeks) of the ETUC ad hoc Working Group on mandatory Human Rights Due Diligence and Sustainable Corporate Governance (mHRDD/SCG) and regular information exchange to the Executive Committee and relevant ETUC permanent committees (e.g. the Labour and Internal Market Legislation Committee and the Workers' Participation and Company Policy Committee) or other ETUC (support) structures like the ETUC Fundamental Rights and Litigation Advisory Group (FRLIT AG) and ETUCLEX.