

EU Council Amends Commission's Proposal for a EU Directive on Corporate Sustainability Due Diligence

The Council of the European Union (the "Council") has issued its position on the EU Commission's (the "Commission") proposal of February 2022 (please find our summary [here](#)) for a Directive on Corporate Sustainability Due Diligence (the "Draft Directive"). In some aspects, the Council's position differs significantly from the EU Commission's proposal which has equally significant implications on what is to be expected of the member states' national legislations implementing the Draft Directive when it comes into force.

Scope & Effectiveness: Overall, the Council accepted the Commission's principle that the due diligence obligations set out in the Draft Directive only apply to companies that exceed certain thresholds in terms of number of employees and net turnover. However, the Council added a "phase-in clause" that narrows the scope of the Draft Directive for the first three years to (i) large EU companies that have more than 1,000 employees and EUR 300 million in net worldwide turnover, and (ii) to non-EU companies that generated EUR 300 million in net turnover in the EU. After three years this threshold is lowered to 500 employees and EUR 150 million in net worldwide turnover. The thresholds will be lower in high-risk industries (including textiles manufacturing, agriculture and mining).

"Business Partners": According to the Commission's proposal, the due diligence obligations were intended to apply to all "*established business relationships*". This wording was strongly criticized due to its ambiguity. The Council has now taken the view that the due diligence obligations apply towards all "business partners". These are entities with whom the company has a commercial agreement (direct business partners) and entities which perform business operations related to the operations, products or services of the company (indirect business partners).

"Value Chain" vs. "Chain of Activities": The use by the Commission of the term "value chain" to define the reach of the obligations under the Draft Directive was equally criticized as vague. The Council proposes to use the term "chain of activities", which includes upstream and downstream activities of business partners. The Council's position paper includes further defining language on what is part of the "chain of activities". Most notably, the definition now excludes many of the downstream activities such as those related to the disposal of a product and compliance with export control authorizations, which arguably were covered by the Commission's proposal.

Focus on a Risk-Based Approach: The Council has strengthened the risk-based approach by introducing a new Art. 6a, stipulating that companies should allocate their efforts based on the severity and likelihood of identified adverse impacts.

Civil Liability: The Council maintained in revised form the Draft Directive's call for civil liability of companies in case they violate their obligations under the Draft Directive and thereby cause damage. Victims who suffered damages resulting from a violation of the due

diligence obligations "*shall have the right to full compensation in accordance with national law*" (Art. 22). Thus, the Council expressly affirms the much debated concept of civil liability and clarifies its conditions (e.g., by introducing the principle of fault).

The Draft Directive will now proceed further in the legislative process. The next step will be the first reading in the European Parliament
