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# EU Commission' Proposal for Corporate Sustainability Due Diligence

Eurelectric position paper

May 2022

Eurelectric represents the interests of the electricity industry in Europe. Our work covers all major issues affecting our sector. Our members represent the electricity industry in over 30 European countries.

We cover the entire industry from electricity generation and markets to distribution networks and customer issues. We also have affiliates active on several other continents and business associates from a wide variety of sectors with a direct interest in the electricity industry.

## We stand for

The vision of the European power sector is to enable and sustain:
- A vibrant competitive European economy, reliably powered by clean, carbon-neutral energy
- A smart, energy efficient and truly sustainable society for all citizens of Europe

We are committed to lead a cost-effective energy transition by:

**investing** in clean power generation and transition-enabling solutions, to reduce emissions and actively pursue efforts to become carbon-neutral well before mid-century, taking into account different starting points and commercial availability of key transition technologies;

**transforming** the energy system to make it more responsive, resilient and efficient. This includes increased use of renewable energy, digitalisation, demand side response and reinforcement of grids so they can function as platforms and enablers for customers, cities and communities;

**accelerating** the energy transition in other economic sectors by offering competitive electricity as a transformation tool for transport, heating and industry;

**embedding** sustainability in all parts of our value chain and take measures to support the transformation of existing assets towards a zero carbon society;

**innovating** to discover the cutting-edge business models and develop the breakthrough technologies that are indispensable to allow our industry to lead this transition.

Dépôt légal: D/2022/12.105/17

WG Social Sustainability
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# Proposal for Corporate Sustainability Due Diligence

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## KEY MESSAGES

- **Support a level playing field and avoid national fragmentation.** Overall, Eurelectric welcomes the Commission's initiative and perceives it as a much-needed step towards a sustainable corporate governance framework. It is of particular importance that a coherent EU framework is not further delayed, as divergent national initiatives have already emerged. Fragmentation of the EU internal market must be avoided, as this is a regulatory area that needs a common structure not only in the EU but beyond. Companies that integrate sustainability into their operations should not be exposed to unfair competition from companies (EU or third country) which do not take on this responsibility.

- **Ensure legal certainty and a reasonable administrative burden.** Legislation needs to be more explicit than international standards (OECD guidelines, UNGPs) and clearly set out the obligations imposed on companies.

- **Install concrete definitions for successful implementation.** The proposal in its current version still has several ambiguities regarding the obligations and responsibilities of companies and therefore requires further refinement to achieve greater harmonisation.

- **Consider a two-tier model for direct and indirect suppliers, which also includes SMEs.** To ensure feasibility and a realistic possibility of achieving the objectives of the Directive, Eurelectric suggests replacing the "value chain" with "supply chain" and to consider a two-tier model regarding responsibilities, distinguishing between broader and controllable due diligence requirements for direct suppliers and limited requirements for indirect suppliers.

- **Focus on integrity, human rights and environmental due diligence.** Although it is of high importance that the EU moves forward ambitiously in climate policy, the focus of the proposal should be on human rights, good business conduct and environmental due diligence.

- **Avoid the inclusion of civil liability**, as the introduction of extensive civil liability rules would create enormous legal uncertainty and the risk of excessive litigation for companies with complex supply chains. It is therefore important that both liability and sanctions are limited to where the company is directly linked to potentially adverse impacts. The enforcement mechanism should rely only on sanctions and administrative enforcement.

- **Address the unclear functionality regarding directors' duties.** In principle, Eurelectric supports the idea that directors are encouraged to consider the consequences of their decisions regarding human rights, climate and the environment, however, the wording in the Commission's proposal to introduce obligations for directors receives little support from the sector and appears inappropriate.

- **Cohere with other legislation.** Eurelectric supports efforts to establish coherence with other legislation, such as the currently debated Corporate Sustainability Reporting Directive (CSRD) and the EU Taxonomy, as the due diligence proposal is closely related to them.

- **Eurelectric is ready to contribute knowledge and expertise.**

# A Proposal for Corporate Sustainability Due Diligence

## Support a level playing field and avoid national fragmentation

The proposal for a Directive on Sustainability Corporate Due Diligence will in future require companies, as well as their subsidiaries, to identify the negative impacts of their value chain on human rights, e.g., child labour and exploitation of workers, and on the environment, e.g., pollution and loss of biodiversity, and to take the necessary countermeasures. This is an attempt to better align the interests of companies, their shareholders, managers, stakeholders, and society at large.

Overall, Eurelectric welcomes the Commission's initiative and perceives it as a much-needed step towards a sustainable corporate governance framework. It is of particular importance that a coherent EU framework is not further delayed, as divergent national initiatives have already emerged. Fragmentation of the EU internal market must be avoided, as this is a regulatory area that needs a common structure not only in the EU but beyond.

This is especially true for the supply chains of European energy companies, which take place on a global scale. Companies that integrate sustainability into their operations should not be exposed to unfair competition from companies (EU or third country) which do not take on this responsibility. Eurelectric therefore supports the Commission's efforts to also include key third-country companies in the proposal, thus creating a level playing field.

## Ensure legal certainty and a reasonable administrative burden

Eurelectric calls on policymakers to put in place a reasonable administrative burden and to ensure legal certainty for companies. Coordination with international standards like OECD guidelines and UNGPs is important. However, the wording of these standards is target-oriented and does not contain explicit provisions that could be directly incorporated into legislation. Therefore, there is a need for clarification that provides a clear indication of the obligations imposed on companies. Furthermore, to avoid high administrative and cost burdens, setting a certain limit for the application of the conditions to the supply chain should be considered.

## Install concrete definitions for successful implementation

The proposal in its current version still has a number of ambiguities regarding the obligations and responsibilities of companies and therefore requires further refinement to achieve greater harmonisation. For example, current definitions regarding ***"stakeholders"*** are too vague, as this has an all-encompassing application. Also very broad is the definition of ***"established business relationships"***, which does not specify the duration and intensity of the relationships, nor which levels of indirect partners are affected by the provisions. The definition of ***"company"*** seems to indicate that the requirements of the Directive are not set at the group level, but only at the company level. Nevertheless, Article 5 refers to the possibility for groups to share resources and information within the group. The ability to manage its obligations at group level would be very important for energy companies, for example, as they often consist of several subsidiaries for regulatory reasons (e.g. each wind park often has to be its own legal entity). It would therefore be an unnecessary burden to require companies to address obligations at the subsidiary/entity level.

Further, we would like to avoid that a company with subsidiaries operating in more than one Member State has to follow the decision of a different supervisory. We do favour a group solution for due diligence that can serve to align or go beyond the highest denominator. Regarding the delineation of the main risks, no criteria are provided to enable companies to focus their actions on the most important ones. Furthermore, the definitions of harmful effects on the environment and human rights are not clear, and the reference to the international conventions listed in the annex, which have not been drawn up for companies, poses a particular challenge. In the context of public support and sanctions, we would like to underline that the definitions are not sufficiently explicit and that we see the risk that national authorities could follow different approaches in the application, which could jeopardize a level playing field.

## Consider a two-tier model for direct and indirect suppliers, which also includes SMEs

The current draft of the directive poses the risk of legal uncertainties, as it would be almost impossible for companies to monitor the entire value chain in accordance with the proposed requirements. In this context, Eurelectric suggests replacing the term “value chain” with “supply chain”, as this would provide more clarity. In principle, the responsibility for taking action in the event of serious human rights and environmental impacts, and for remedying them, should lie with the party that caused them. To ensure feasibility and a realistic possibility of achieving the objectives of the Directive, Eurelectric would thus welcome consideration of a two-tier model regarding responsibilities, distinguishing between broader and controllable requirements for direct suppliers and limited requirements for indirect suppliers. SMEs should also be included in the scope, albeit with less stringent requirements. This would both increase legal certainty for large companies and protect SMEs from larger companies covered by the legislation only entering into agreements with companies also subject to the legislation.

## Further assistance through guidance documents and examples

Eurelectric appreciates the Commission's proposal to assist companies and Member State authorities in fulfilling their due diligence obligations. Examples and detailed guidance on understanding the provisions could be particularly helpful. In addition, it is positive that companies can rely on industry regulations and multi-stakeholder initiatives to support due diligence implementation. However, voluntary model contractual clauses should be developed in order to help businesses in their daily activities. In addition, more clarity is needed on measures such as websites, portals and joint stakeholder initiatives. All this material should be available prior to the transposition deadline of the directive.

Furthermore, we welcome the creation of national supervisory authorities and an EU authority which would oversee all national supervisory authorities. This seems to us to be essential in order to avoid inconsistencies in decisions and therefore the risk of legal shipping to a more favourable country.

## Focus on integrity, human rights and environmental due diligence

It is of high importance that the EU moves forward ambitiously in climate policy. However, the focus of the proposal should be on human rights, good business conduct, and environmental due diligence, i.e. following the framework for minimum safeguards known from the Sustainable Finance Taxonomy1. In this context, it is important that compatibilities with reference to the Paris Agreement, are not only measured against the 1.5°C target, but the actual wording of the agreement is used: "well below 2°C and continuing efforts to limit to 1.5°C". Furthermore, the current proposal lacks concrete information on how companies can secure and prove that the targets etc. in their business model and strategy are in line with the CSDD.

## Further criteria are needed in regarding substantiated concerns

Eurelectric generally supports the proposals regarding substantiated concerns, but specific criteria (e.g., legitimate interest) should be met at least by legal entities filing complaints. Furthermore, there is a need for specific information on how a company can respond to such an (extensive) complaint procedure. In this context, overlaps with the Whistle-blower Directive must be avoided to prevent legal uncertainties.

## Avoid the inclusion of civil liability

Eurelectric has reservations about the proposal to include civil liability in the directive. The introduction of comprehensive civil liability rules applying to the provisions of the Directive can lead to considerable legal uncertainty and the risk of excessive litigation for companies with complex supply chains. It is therefore important that possible liability provisions and sanctions are limited to where the company causes the potential adverse impacts. Even if civil liability provisions are narrowed by the possibility of using contractual assurances, it remains unclear when a company could be liable and how the compensation of damages should be achieved by different actors in the supply chain. However, in this context, Eurelectric welcomes the concept of "rebuttable presumption", meaning that in case of a claim, the company in question is deemed to be "compliant" unless someone succeeds in proving otherwise.

## Address the unclear functionality regarding directors' duties

In principle, Eurelectric supports the idea that directors are encouraged to consider the consequences of their decisions regarding human rights, climate and the environment in the medium and long term. However, the wording in the Commission's proposal to introduce obligations for directors to comply with corporate due diligence receives little support from the sector and appears inappropriate. On the one hand, there is no clear delineation between corporate governance and due diligence; on the other hand, the provisions' implementation raises questions, such as its relationship to existing company law and the due diligence included therein. To distinguish between corporate governance and due diligence, it would therefore be appropriate to clarify the content, taking into account previous comments from the sector.

[1] I.e. alignment with the OECD Guidelines for Multinational Enterprises and UN Guiding Principles on Business and Human Rights, including the declaration on Fundamental Principles and Rights at Work of the International Labour Organisation (ILO), the eight fundamental conventions of the ILO and the International Bill of Human Rights.

## Cohere with other legislation

Eurelectric supports efforts to establish coherence with other legislation, such as the currently debated Corporate Sustainability Reporting Directive (CSRD) and the EU Taxonomy, as the due diligence proposal is closely related to them. For this reason, it appears problematic that the scope and implementation deadlines of the directives are very different. The dates on which the different directives enter into force should therefore also be coordinated and, if necessary, postponed. This, as well as a phase-in approach, could reduce or avoid implementation difficulties and costs.

## Eurelectric is ready to support

Eurelectric and its members stand ready to contribute knowledge and expertise to improve the provisions of the European Commission's proposal, assist in its adaptation, and contribute to its successful implementation.

Eurelectric pursues in all its activities the application of the following sustainable development values:

Economic Development

- Growth, added-value, efficiency

Environmental Leadership

- Commitment, innovation, pro-activeness

Social Responsibility

- Transparency, ethics, accountability

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EU Transparency Register number: 4271427696-87