



EUROPEAN COMMISSION  
DIRECTORATE-GENERAL FOR INTERNAL MARKET, INDUSTRY, ENTREPRENEURSHIP  
AND SMES  
Ecosystems II: Tourism & Proximity  
G2. Proximity, Social Economy, Creative Industries

Brussels  
GROW.G.2/(2021)8789425

[Redacted]  
European Tech&Industry  
Employers  
[Redacted]

Dear Ms [Redacted],

Thank you for your message of 23 November 2021 sent to Commissioner Breton who asked me to reply as [Redacted] Internal Market, Industry, Entrepreneurship and SMEs Directorate-General responsible for the sustainable corporate governance initiative.

Let me also thank you for outlining Ceemet’s main concerns on the forthcoming legislative proposal on due diligence.

Accompanying the transition towards a more sustainable economy and society is a key priority of this Commission. It is in this context that the 2021 Commission Work Programme announced a future legislative initiative on sustainable corporate governance to foster long-term sustainable and responsible corporate behaviour in companies operating across the EU.

We take note of the observations put forward in your letter concerning the need to ensure a level playing field and on the need of setting common rules to preserve the competitiveness of European business. The legislative proposal is under preparation and we are duly considering the building blocks mentioned in your letter, including scope, liability elements, enforcement mechanisms, reporting and consistency with other legislative initiatives. Our aim is to establish a well-targeted, efficient and effective legal framework.

We thank you once more for your interest and feedback on this important initiative.

Yours faithfully,

[Redacted Signature]

6/a

**From:** [redacted] (GROW)  
**Sent:** 06 December 2021 09:42  
**To:** [redacted]; GROW G2  
**Cc:** [redacted]  
**Subject:** RE: Sustainable Corporate Governance,

**Follow Up Flag:** Follow up  
**Flag Status:** Flagged

Dear [redacted],

Thank you very much for your briefing paper.  
In case we need any clarification we will get back to you.

Kind regards,

[redacted]

Corporate Social Responsibility / Business and Human Rights



**European Commission**  
DG for Internal Market, Industry, Entrepreneurship and SMEs  
**Unit G.2: Proximity, social economy, creative industries**

[redacted]

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**From:** [redacted]  
**Sent:** Friday, December 3, 2021 3:47 PM  
**To:** [redacted]  
[redacted]  
[redacted]  
**Subject:** AW: Sustainable Corporate Governance,

Dear [redacted]

Thanks for reaching out. We highly appreciate your interest in Commerzbank's view. Attached find a briefing paper providing some reflections on the Sustainable Corporate Governance initiative as well as the Due Diligence Directive. You may in particular be interested in the lessons we have learnt from the German Supply Chain Due Diligence Act.

If you have any questions please do not hesitate to get back to us. Our experts will be available to discuss the details in a virtual meeting.

Kind regards,

[REDACTED]

[REDACTED]

Commerzbank AG  
Group Communications  
Liaison Office Brussels

[REDACTED]

**Von:** [REDACTED]  
**Gesendet:** Thursday, November 11, 2021 5:16 PM

**An:** [REDACTED]  
**Betreff:** Sustainable Corporate Governance,

Dear [REDACTED]

As a follow up of our conversation I would like thank you for your interest in the Sustainable Corporate Governance initiative, and mandatory due diligence.

In DG GROW our unit is in charge of this initiative, and very busy preparing the legislative proposal.

We kindly ask you to share in writing any elements you have for our consideration by sending it to Unit GROW G2 secretariat - [REDACTED]

[REDACTED]

Kind regards,



Corporate Social Responsibility / Business and Human Rights



**European Commission**

DG for Internal Market, Industry, Entrepreneurship and SMEs

**Unit G.2: Proximity, social economy, creative industries**





## **Due Diligence Directive:**

1. The intention of the Commission to regulate due diligence obligations in the supply/ value chain is welcome. A harmonized legal framework is preferable as various and possibly conflicting national laws in the EU Member States lead to market fragmentation and ensuing problems.
2. The business of financial institutions is different from the business of entities of the real economy. If financial institutions are to fall within the scope of the Directive and to play a vital role, the particularities of their business need to be considered more carefully.
3. A differentiated and staggered approach is required, also with regard to a sanction regime, as in some countries it is virtually impossible to exercise and prove full control of the supply/ value chain for political reasons.
4. The imbalances of power within business relationships should be reflected in more depth (i) to avoid that duties are factually passed on to commercially weaker business partners within the supply/ value chain, and (ii) to clarify the legal limits of duties of such weaker entities.
5. Key definitions (e.g., business relationship and value chain) need to be phrased as precisely as possible for them to be practicable and provide sufficient clarity.
6. The stakeholder engagement proposed by the EU Parliament is kept impracticably wide and, consequently, offers opportunities for groups to create nuisance rather than adding benefit to the due diligence process.
7. The relation of the future Directive to the social taxonomy (if any) should be reflected. Financial institutions will have to disclose information on both environmental as well as social aspects under the respective taxonomies. A Due Diligence Act should take this into consideration and ensure that it does not duplicate efforts or set diverging obligations.

## **Sustainable Corporate Governance:**

1. Before rushing into even more regulation, it is a justified demand to give the corresponding market forces towards a more sustainable economy and corporate landscape a little more time. In this way, sustainable corporate governance could ultimately be achieved in an organic manner. This demand is supported by a number of positive observations:
  - Numerous companies have already set up their own sustainability departments and in some cases even created dedicated board departments and supervisory board committees for ESG. In some cases, a careful review of the company's own ESG governance has been initiated - and in some cases, the company's own business model has also been put to the test from a sustainability perspective.

- The majority of ESG initiatives adopted at European level so far primarily rely on indirect incentives for sustainable action, e.g., through comprehensive CSR reporting obligations and the (future) requirements for transparent classification based on the Taxonomy Regulation. These initiatives have already had, and continue to have, positive effects on the governance. E.g., the obligation to prepare the management report together with the non-financial statement in accordance with the CSR Directive already requires the management board under current law to put-up a "CSR inventory" to ascertain the extent to which the aspects specified in Section 289c of the German Commercial Code (environmental, employee and social concerns, respect for human rights and the fight against corruption and bribery) play a role in its company and, based on this, to ensure a coherent CSR strategy.
  - Further positive efforts are expected with regard to the German Supply Chain Due Diligence Act (*Lieferkettensorgfaltspflichtengesetz*) which already establishes various due diligence requirements for Germany with regard to suppliers, thereby also entailing concrete consequences for the internal governance of companies. This will be even more the case if this and other national laws on supply chain due diligence are superseded by a harmonized European framework.
  - The capital markets sector, which is key to the financing of the companies, provides ample evidence that market forces, can indeed bring about a sustainability transformation of the economy. Institutional investors are very articulate about their long-term self-interest, and the management is generally responsive to these expectations. Therefore, it should be avoided that a bridge is built between corporate interest and public interest only due to (inconsistent) regulatory requirements without bringing about real changes in the company.
  - Last but not least, sustainability aspects have found their way into a very large number of compensation systems submitted for approval at the annual general meetings of German listed stock corporations in 2021, even if the specific reference figures have not yet been published in some cases. The postulate of pursuing a sustainable corporate strategy is reflected, among other things, in Section 87 (1) Sentence 2 of the German Stock Corporation Act (AktG), according to which the compensation structure must be geared to sustainable corporate development. In view of recommendations from proxy advisors and the high emphasis on sustainable investments, it is to be expected that sustainability-related incentive structures will continue to gain in importance in the coming years, even without additional regulation.
2. By imposing direct requirements for aligning corporate governance with sustainability aspects, possibly coupled with direct rights of action for third parties, the European legislator is interfering in an unjustified way with the central administrative rights of shareholders and is thus calling into question fundamental corporate law and market economy principles.
- The implementation of environmental, social and employee concerns etc. must be ensured in the mandatory specific statutory regulations outside the corporate law (e.g., environmental laws, consumer protection laws, etc.). The management board is obliged to implement these in its own company on the basis of the corporate "principle of legality". By the same token, the management board must organize its company in such

a way that it can fulfill all legal obligations incumbent upon it. In some fields of law, e.g. in environmental law, additional liability regimes have been established which also apply in cases of organizational failure. Thus, there is no need for a specification or CSR-related clarification of the duty of care / management responsibility of the management board.

- Apart from this, the corporate “doctrine of the company's best interests” already takes into account the interests of shareholders, employees and other groups associated with the company (stakeholders), without the need for further clarification. This also includes the concept of sustainability, as the actions of the Board of Management and Supervisory Board must be geared to ensuring the sustainable profitability and growth of the company. Finally, the management board will always have to consider the participation conditions of the respective stakeholders in its management of the company in order to secure their future participation for the sustainable good of the company.
- However, the broad discretionary scope in weighing shareholder and non-shareholder interests must be retained. The management must have the freedom to balance and prioritize the interests; it is already a commonly accepted principle of good corporate governance to have the management define processes for balancing the various interests in the best interest of the company. All interests cannot be easily defined and weighted against each other in legally binding and enforceable obligations. An attempt to do so would bring a high risk of unclear definitions and criteria, vague understandings, excessive liability risks and distraction of the management from its focus on the company's core business and strategy.
- Broad management discretion on the part of the Board of Management is a prerequisite for entrepreneurial action and for ensuring a sound economic basis for the company. The protection of entrepreneurial action by the “business judgment rule” (BJR) is essential. Entrepreneurial action based on careful determination of the basis for decision-making should not be subject to legal review. In addition to the conscious assumption of business risks, this also includes the risk of misjudgments, to which every manager is exposed, no matter how responsibly he or she may act. This does not need to be supplemented, as the identification and weighing of risks is also part of the appropriate information basis.

### **Lessons from the German Supply Chain Due Diligence Act:**

1. A supply chain due diligence regulation should carefully consider the complexity of modern supply chains and the differing dynamics between the various stakeholders within a supply chain. Not all supply chains are the same and so are the relationships between companies and their suppliers. Contrary to what seems to be the general legislative understanding, a company may be more dependent on a supplier than vice versa, leaving them with limited influence on the business relationship and often with limited alternatives.

2. In this respect, the German Supply Chain Due Diligence Act (Lieferkettensorgfaltspflichtengesetz; LkSG) could have benefitted from a more thorough approach. As a consequence of not being entirely precise, it causes uncertainty among companies and also gives room to misinterpretation. This is a hindrance for the German LkSG to reach full effect and, simultaneously, imposes unnecessary legal risks to companies if hostilely exploited by certain parties.
3. To provide an example, within the definition of what constitutes the supply chain, the German LkSG introduces the term “ultimate customer” (Endkunde) which shall be the final point of the supply chain. The due diligence obligations of companies under the German LkSG do not extend to their ultimate customers. However, the German LkSG does not provide any further definition of the term “ultimate customer”, thus allowing for differing interpretations. Due to some unclear insinuations within the explanatory memorandum, for instance, it has been questioned that (e.g.) borrowers of credit institutions qualify as their ultimate customers. Considering the dependency of companies on their ultimate customers (both B2B and B2C) and the lack of influence, due diligence obligations should not extend to a company’s ultimate customers, but to ensure this understanding a reliable definition of what constitutes the ultimate customer needs to be introduced.
4. Given that, from a legal perspective, the requirements imposed by a supply chain due legislation constitute somewhat of a novelty in most Member states, legal clarity and precision are of particular importance. Otherwise, implementing national acts may diverge significantly limiting the effects of any European legislation. In addition, to the extent that national authorities are tasked with monitoring compliance, sufficient legal clarity is in any case necessary to fulfil constitutional requirements (nulla poena sine lege, Art. 7 ECHR, Art. 49 CFR).”

**From:** [Redacted]  
**Sent:** 03 December 2021 15:47  
**To:** [Redacted]  
**Subject:** AW: Sustainable Corporate Governance,  
**Attachments:** 2021 12 03 DG GROW Briefing Paper\_final.docx

Dear [Redacted]

Thanks for reaching out. We highly appreciate your interest in Commerzbank's view. Attached find a briefing paper providing some reflections on the Sustainable Corporate Governance initiative as well as the Due Diligence Directive. You may in particular be interested in the lessons we have learnt from the German Supply Chain Due Diligence Act.

If you have any questions please do not hesitate to get back to us. Our experts will be available to discuss the details in a virtual meeting.

Kind regards,

[Redacted]

[Redacted]

Commerzbank AG  
Group Communications  
Liaison Office Brussels

[Redacted]

---

**Von:** [Redacted]  
**Gesendet:** Thursday, November 11, 2021 5:16 PM  
**An:** [Redacted]  
**Betreff:** Sustainable Corporate Governance,

Dear [Redacted],

As a follow up of our conversation I would like thank you for your interest in the Sustainable Corporate Governance initiative, and mandatory due diligence.

In DG GROW our unit is in charge of this initiative, and very busy preparing the legislative proposal.

We kindly ask you to share in writing any elements you have for our consideration by sending it to Unit GROW G2 secretariat [REDACTED]

Kind regards,

[REDACTED]

Corporate Social Responsibility / Business and Human Rights



**European Commission**

DG for Internal Market, Industry, Entrepreneurship and SMEs

**Unit G.2: Proximity, social economy, creative industries**

[REDACTED]

**From:** [redacted]  
**Sent:** 02 December 2021 12:07  
**To:** [redacted]  
**Subject:** RE: French banking federation meeting proposition

Dear [redacted]

Thank you for your answer. We would be happy to answer your questions on our positions, if you need it.

Best regards,

[redacted]



[Site internet FBF](#) | [Site extranet FBF](#) | [Site d'information grand public](#) | [Suivez-nous sur Twitter](#)

 Avant d'imprimer ce courriel, réfléchissez à l'impact sur l'environnement, merci.

---

**De :** [redacted]  
**Envoyé :** jeudi 2 décembre 2021 11:59

[redacted]

**Objet :** RE: French banking federation meeting proposition

Dear [redacted]

Thank you for sharing your position paper and interest in our work on sustainable corporate governance initiative.

Unfortunately, given the very high workload, we are unable to hold any meetings on the subject. We will go through your position paper and reach out to you in case we have any particular questions.

Best regards,

[redacted]

**European Commission**

DG for Internal Market, Industry, Entrepreneurship and SMEs  
Unit G.2 –Proximity, social economy and creative industries



---

**From:** [Redacted]

**Sent:** Thursday, December 2, 2021 9:32 AM



**Subject:** RE: French banking federation meeting proposition

Dear [Redacted]

I hope this e mail finds you well.

I simply wanted to remind you that the French banking federation is looking forward to sharing its position regarding the future sustainable corporate governance proposal. To this extent I enclose the document summarizing our position.

We hope to meet you soon, in person or via teams.

Best regards,



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Avant d'imprimer ce courriel, réfléchissez à l'impact sur l'environnement, merci.

---

**De :** [Redacted]

**Envoyé :** mardi 30 novembre 2021 09:41

**À :** [Redacted]



**Objet :** French banking federation meeting proposition

Dear [REDACTED]

We take the liberty to write this email because we would like to share with you the French Banking federation's position about the future sustainable corporate governance directive. We know that you are currently working on this legislation that banks are closely following. We would be really happy to discuss with you about this paper in a team meeting, with our members.

Please let us know if you are interested by such meeting !

Best regards,

[REDACTED]



[Site internet FBF](#) | [Site extranet FBF](#) | [Site d'information grand public](#) |  [Suivez-nous sur Twitter](#)

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9/a

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**To:** [redacted]  
**Subject:** RE: French banking federation meeting proposition

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[redacted]

 **FÉDÉRATION  
BANCAIRE  
FRANÇAISE** [redacted]  
[redacted] 

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**Envoyé :** jeudi 2 décembre 2021 11:59  
**À :** [redacted]  
**Cc :** [redacted]  
**Objet :** RE: French banking federation meeting proposition

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**European Commission**

DG for Internal Market, Industry, Entrepreneurship and SMEs  
Unit G.2 -Proximity, social economy and creative industries



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**Sent:** Thursday, December 2, 2021 9:32 AM  
**To:** [Redacted]  
**Cc:** [Redacted]  
**Subject:** RE: French banking federation meeting proposition

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**De :** [Redacted]  
**Envoyé :** mardi 30 novembre 2021 09:41



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Best regards,

[REDACTED]



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 Avant d'imprimer ce courriel, réfléchissez à l'impact sur l'environnement, merci.

## French Banking Federation (FBF) position on the sustainable corporate governance proposal

### Context:

Following the recent own initiative reports of the European Parliament (Wolters report of February 2021 on due diligence and corporate responsibility; and Durand report, of December 2020, on sustainable corporate governance), following also the results of the consultation conducted by the Commission and published last May, the European Commission is going to issue two proposals on due diligence and on duty of care for managers. The duty of care is part of the Durand report on sustainable corporate governance.

The FBF answered to the consultation about the proposal for an "Initiative on Sustainable Corporate Governance" in February 2021.

### FBF positions:

#### **On Sustainable Corporate Governance**

- The FBF supports a European legislation to avoid fragmentation within the common market. This legislation should make companies more aware of their possible negative impacts on social issues, human rights, and on the environment and try to improve them. Such legislation should also allow for a level playing field at European level, and if possible, beyond.

- The FBF supports a "principle based" approach, a flexible approach, taking into account environmental and social criteria. The flexible approach seems to us to be more appropriate than a set of rules that are too strict, in particular because it is extremely complicated for the decision-making bodies to identify, and then to take into account the interests of all the stakeholders. Moreover, stakeholders are not the same depending on the sector, the type of activity, the geographical area and their interests may vary. It is important to underline that interests of the stakeholders are sometimes opposed and can evolve over time.

- Therefore, the FBF defends a proportionate proposal which should not impose obligations of results, as in France, in order to give flexibility to companies and allow them to dialogue with their stakeholders to identify their interests. It also seems necessary to us that the question of SMEs be treated separately, to take into account their specificities

- It also seems important to us to underline that the role of the Board of Directors is not the same everywhere in Europe. Its competences are sometimes limited and in some countries, such as France, the Board of Directors does not have an executive role, but rather a supervisory and strategic orientation role. It is also important to stress that we remain attached to the French principle of collegiality of the Board of Directors, which allows for a holistic approach and is incompatible with the individual responsibility of its members.

- Similarly, it is important to avoid a high degree of specialization of board members; their general competence and their ability to learn and adapt must remain essential criteria for their appointment.

- With regard to executive compensation, the FBF recalls that the banking sector is already subject to a significant number of obligations (for example with the CRDIV/CRDV). Thus, the introduction of additional obligations for companies regarding directors' remuneration should take into account the

existing regimes for credit institutions in order to ensure consistency and not to make the existing regimes more complex.

- The subject of limiting dividend payments should be approached with caution. The expectation of a return on investment is an essential part of what makes financial markets attractive, especially equity markets. It is therefore necessary to ensure that these measures are consistent with the capital markets union, which seeks to attract investors, including retail investors, towards financial markets.

### **Concerning the corporate due diligence**

- The FBF supports a reasonable approach, based on principles and a precise definition of what is the corporate due diligence. This approach should include the identification and assessment of direct risks in the supply chain and actions to mitigate risks and negative impacts on human rights, social and environmental issues.

- We are concerned about the definitions given by the Commission in its consultation, particularly because, for example, companies cannot mitigate certain risks alone, such as those related to climate change.

- Similarly, the definition of "supply chains" envisaged by the Commission in its consultation seems to us too broad. In practice, it is impossible to manage all the risks associated with a company's "business relationships" along the supply chain, especially for a bank. Companies' efforts should be limited to first tier suppliers/subcontractors (direct relationships). The companies involved should be limited to non-EU companies.

- Not all SMEs should be included, depending on their size and sectors of activity, to avoid too much "red tape".

- In addition, due diligence should only apply to companies covered by the NFRD and future CSRD

- Cooperative banks should be excluded, in accordance with the principle of proportionality, as with the French law, and given their long-term orientation to the benefit of their members.

- On the notion of extraterritoriality (application of European regulations to non-EU entities under certain conditions), we believe that non-EU companies operating within the EU should be concerned by this legislation, from a certain level of consolidated turnover. Indeed, the willingness to apply the highest European values and the desire to avoid unfair competition are at stake. Nevertheless, it will be necessary to consider the availability of information to ensure that it is possible to determine which foreign companies will be affected.

- For such extraterritoriality to be possible, the sanctions must remain reasonable. The reputational effect should be sufficient. In any case, only civil liability can be envisaged

**We are generally in favor of European legislation that would be inspired by French regulations, and in particular the 2017 law, on the duty of vigilance.**

Under French law, the board of directors must determine the orientations of the company's activity and ensure their implementation, in accordance with its corporate interest, considering the environmental and social issues of its activity (the PACTE law).

The due diligence is formalized by a "vigilance plan" which identifies risks and must prevent serious violations of human rights, fundamental freedoms, while preserving the safety of people and the environment.

The vigilance plan puts in place:

- Procedures to regularly assess the situation of subsidiaries, subcontractors and suppliers;
  - Appropriate actions to mitigate risks or prevent serious damage;
  - An alert mechanism;
  - An evaluation mechanism, to monitor the measures implemented and assess their effectiveness.
- It applies to companies and groups with more than 5,000 employees in France or more than 10,000 employees in France and abroad for two consecutive years. Cooperative banks are excluded.
  - The company is liable, not the (individual) members of the board of directors
  - An exemption is made for cooperative banks
  - With this approach, companies are held responsible but have sufficient liberty to implement measures appropriate to their situation and the risks they face.

**From:** [REDACTED]  
[REDACTED] 11 November 2021 17:16  
**To:** [REDACTED]  
**Subject:** Sustainable Corporate Governance,

Dear [REDACTED]

As a follow up of our conversation I would like thank you for your interest in the Sustainable Corporate Governance initiative, and mandatory due diligence.

In DG GROW our unit is in charge of this initiative, and very busy preparing the legislative proposal.

We kindly ask you to share in writing any elements you have for our consideration by sending it to Unit GROW G2 secretariat [REDACTED]  
[REDACTED]

Kind regards,

[REDACTED]

Corporate Social Responsibility / Business and Human Rights



**European Commission**  
DG for Internal Market, Industry, Entrepreneurship and SMEs  
**Unit G.2: Proximity, social economy, creative industries**

[REDACTED]

Dear [REDACTED],

Thank you for your email of June 11 addressed to [REDACTED] who asked the relevant DG GROW service to follow up on your request for a meeting concerning the draft law on sustainable corporate governance, including measures relating to the due diligence of supply chains.

The transition of companies to sustainable operability, not only economic but also environmental and social, remains our top priority. The future initiative on Sustainable Corporate Governance is an important element in this transition.

We need to ensure that the future legislation on Sustainable Corporate Governance, when adopted, will be practically implementable and proportionate, take into account the current situation of EU industry and its global competitiveness.

It is our responsibility that this initiative is designed in a way that encourages businesses, and in particular SMEs, on their path to sustainability and avoids fragmentation in the single market.

We would be delighted to arrange a meeting with you to discuss the various elements of the proposal, and to identify the right supporting measures companies will need for a proper implementation.

You may liaise with my Unit secretariat: [grow-g2@ec.europa.eu](mailto:grow-g2@ec.europa.eu), to find a suitable date.

Best regards,

[REDACTED]

Sehr geehrter [REDACTED]

Vielen Dank für Ihre E-Mail vom 11. Juni an [REDACTED] die die zuständige Dienststelle der GD GROW bat, Ihre Anfrage bezüglich eines virtuellen Austausches zum Entwurf des Gesetzes über eine nachhaltige Unternehmensführung, einschließlich Maßnahmen im Zusammenhang mit der Sorgfaltspflicht in Lieferketten, zu beantworten.

Der Übergang von Unternehmen zu nachhaltiger Betriebsfähigkeit, nicht nur in wirtschaftlicher, sondern auch in ökologischer und sozialer Hinsicht, bleibt unsere oberste Priorität. Die künftige Initiative für eine nachhaltige Unternehmensführung ist ein wichtiges Element dieses Übergangs.

Wir müssen jedoch auch dafür sorgen, dass die künftigen Rechtsvorschriften über eine nachhaltige Unternehmensführung, sobald sie angenommen sind, praktisch umsetzbar und verhältnismäßig sind, der derzeitigen Lage der EU-Industrie Rechnung tragen und deren globale Wettbewerbsfähigkeit nicht beeinträchtigen.

Es liegt in unserer Verantwortung diese Initiative so zu gestalten, dass sie Unternehmen, insbesondere KMU, nicht aufgrund hoher Kosten und Belastungen, denen diese möglicherweise ausgesetzt sind, auf ihrem Weg zur Nachhaltigkeit behindert. Dies ist unter den derzeitigen schwierigen wirtschaftlichen Bedingungen besonders wichtig.

Wir würden uns daher sehr freuen, ein virtuelles Treffen mit Ihnen zu organisieren, um die verschiedenen Elemente des Legislativvorschlags zu besprechen und geeignete Unterstützungsmaßnahmen zu erörtern, die die Unternehmen für eine sinnvolle Umsetzung benötigen.

Gerne können Sie sich mit meinem Referatssekretariat in Verbindung setzen, um einen geeigneten Termin festzulegen (Email: [Grow-g2@ec.europa.eu](mailto:Grow-g2@ec.europa.eu)).

Mit freundlichem Grüßen,

[REDACTED]

[REDACTED]

---

**From:** [REDACTED]  
08 July 2021 15:58  
**To:** [REDACTED]  
**Subject:** RE - Unternehmens-Roundtable zum EU-Lieferkettengesetz

Sehr geehrter [REDACTED],  
Vielen Dank für Ihre E-Mail vom 11. Juni an [REDACTED],  
[REDACTED], die die zuständige Dienststelle der GD GROW bat, Ihre Anfrage bezüglich eines virtuellen Austausches zum Entwurf des Gesetzes über eine nachhaltige Unternehmensführung, einschließlich Maßnahmen im Zusammenhang mit der Sorgfaltspflicht in Lieferketten, zu beantworten.  
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Wir müssen jedoch auch dafür sorgen, dass die künftigen Rechtsvorschriften über eine nachhaltige Unternehmensführung, sobald sie angenommen sind, praktisch umsetzbar und verhältnismäßig sind, der derzeitigen Lage der EU-Industrie Rechnung tragen und deren globale Wettbewerbsfähigkeit nicht beeinträchtigen.  
Es liegt in unserer Verantwortung diese Initiative so zu gestalten, dass sie Unternehmen, insbesondere KMU, nicht aufgrund hoher Kosten und Belastungen, denen diese möglicherweise ausgesetzt sind, auf ihrem Weg zur Nachhaltigkeit behindert. Dies ist unter den derzeitigen schwierigen wirtschaftlichen Bedingungen besonders wichtig.  
Wir würden uns daher sehr freuen, ein virtuelles Treffen mit Ihnen zu organisieren, um die verschiedenen Elemente des Legislativvorschlags zu besprechen und geeignete Unterstützungsmaßnahmen zu erörtern, die die Unternehmen für eine sinnvolle Umsetzung benötigen.  
Gerne können Sie sich mit meinem Referatssekretariat in Verbindung setzen, um einen geeigneten Termin festzulegen (Email: [Grow-g2@ec.europa.eu](mailto:Grow-g2@ec.europa.eu)).  
Mit freundlichem Grüßen,



DG Internal Market, Industry, Entrepreneurship and SMEs

[REDACTED]



EUROPEAN COMMISSION  
DIRECTORATE-GENERAL FOR INTERNAL MARKET, INDUSTRY, ENTREPRENEURSHIP  
AND SMES  
Ecosystems II: Tourism & Proximity  
G2. Proximity, Social Economy, Creative Industries

Brussels  
GROW.G.2(2021)7834718N

Dear [REDACTED],

Thank you for your email of 18 October addressed to Commissioners Breton and Reynders regarding the forthcoming Sustainable Corporate Governance initiative.

We were asked, as the responsible service in the Directorate General for Internal Market, Industry, Entrepreneurship and SMEs (DG GROW), to reply on behalf of both Commissioners Breton and Reynders and follow up on your message with regard to issues related to smallholder farmers.

We also thank you for sharing your joint paper and we take note of your recommendations bringing the attention to the needs of smallholder farmers.

The Commission is committed to addressing the problems provoked by unsustainable business supply chains, including those inflicted on different communities such as smallholder farmers that you represent.

We are currently working on the legislative proposal that should be put forward later this year. In this regard, your inputs are most valuable for our work. We will duly consider them to inform the legislative proposal.

We are looking forward to further cooperation on the subject.

Yours faithfully,

[REDACTED]

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**From:** [REDACTED]  
10 June 2021 10:35  
**To:** [REDACTED]  
**Subject:** RE/ Sustainable Corporate Governance

Dear [REDACTED]

Thank you for your email of 11 May addressed to Commissioner Breton who has asked us to follow up on message related to the upcoming proposals on sustainable corporate governance, including measures relating to the due diligence of supply chains.

The transition of companies to sustainable operability, not only economic but also environmental and social, remains our top priority. The future initiative on sustainable corporate governance is an important element in this transition.

However, we also need to ensure that the future legislation on Sustainable Corporate Governance, when adopted, will be practically implementable and proportionate, take into account the current situation of EU industry, and do not harm its global competitiveness.

We take note of your call for redirection, and are carefully assessing it during our internal work on the proposal.

Unit GROW G2 secretariat – [grow-g2@ec.europa.eu](mailto:grow-g2@ec.europa.eu) – is at your disposal to arrange a call if you wish to discuss this subject further.

Kind regards,



**European Commission**  
DG for Internal Market, Industry, Entrepreneurship and SMEs  
[REDACTED]  
**G2 - Proximity, Social Economy, Creative Industries**  
B-1049 Brussels/Belgium

[REDACTED]

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**From:** [REDACTED]  
**Sent:** 10 June 2021 10:20  
**To:** [REDACTED]  
**Subject:** RE: Erwägungen der deutschen Wirtschaft an eine etwaige EU-Regulierung zu

Dear [REDACTED]

Thank you for your email of 30 April addressed to Mr Gambs who has asked us to follow up on your non-paper related to the draft law on sustainable corporate governance, including measures relating to the due diligence of supply chains.

The transition of companies to sustainable operability, not only economic but also environmental and social, remains our top priority. The future initiative on sustainable corporate governance is an important element in this transition.

However, we also need to ensure that the future legislation on Sustainable Corporate Governance, when adopted, will be practically implementable and proportionate, take into account the current situation of EU industry, and do not harm its global competitiveness.

It is our responsibility that it has to be designed in such a way that it does not discourage businesses, and in particular SMEs on their path to sustainability due to the high costs and burden that they might face. This is particularly important in this difficult economic context.

We would be delighted to arrange a meeting with you to discuss further the topic.

Unit GROW G2 secretariat – [grow-g2@ec.europa.eu](mailto:grow-g2@ec.europa.eu) – is at your disposal to find a suitable date.

Kind regards,

[REDACTED]



**European Commission**  
DG for Internal Market, Industry, Entrepreneurship and SMEs

[REDACTED]  
**G2 - Proximity, Social Economy, Creative Industries**  
B-1049 Brussels/Belgium

**From:** [REDACTED]  
**Sent:** vendredi 30 avril 2021 12:12  
**To:** [REDACTED] (GROW)  
**Cc:** [REDACTED]  
**Subject:** Erwägungen der deutschen Wirtschaft an eine etwaige EU-Regulierung zu globalen Lieferketten  
**Attachments:** BDA\_Non-Paper\_Erwartungen an Lieferkettenregulierung.pdf

Sehr geehrter [REDACTED],

angefügt erhalten Sie ein Non-Paper der Bundesvereinigung der Deutschen Arbeitgeberverbände (BDA) mit den Erwartungen der deutschen Wirtschaft an eine mögliche EU-Regulierung zu globalen Lieferketten.

Sehr gerne würden wir diese Erwartungen noch konkreter diskutieren und stehen für mögliche Gespräche gerne zu Ihrer Verfügung.

Mit freundlichen Grüßen

[REDACTED]

[REDACTED]

BDA | DIE ARBEITGEBER | GERMAN EMPLOYERS  
Bundesvereinigung der Deutschen Arbeitgeberverbände  
Confederation of German Employers' Associations  
BDI/BDA THE GERMAN BUSINESS REPRESENTATION  
EU-Transparenzregisternr. 7749519702-29  
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Arbeit beschäftigt uns. Die BDA. – Zu unserer Social-Media-Kampagne

## Erwägungen zu einer etwaigen EU-Regulierung zu globalen Lieferketten

Die Achtung von Menschenrechten ist für europäische Unternehmen eine Selbstverständlichkeit. Viele Unternehmen sind bereits seit Jahren sehr aktiv bei der Wahrnehmung ihrer unternehmerischen Verantwortung und tragen mit ihrem außenwirtschaftlichen Engagement in Entwicklungs- und Schwellenländern zu höheren Sozial- und Umweltstandards, besserer Bildung und damit zu einer nachhaltigeren Entwicklung bei.

Bei einer etwaigen EU-weiten Regulierung zu globalen Lieferketten müssen realistische und praxistaugliche Erwartungen zum Prozess menschenrechtlicher Sorgfalt gestellt werden. Das gilt insbesondere vor dem Hintergrund, dass nationale Regierungen ihrer staatlichen Schutzpflicht häufig nicht ausreichend nachkommen. Fast zwei von drei Arbeitnehmern weltweit sind im informellen Sektor tätig und 41 Staaten haben nicht einmal die acht ILO-Kernarbeitsnormen ratifiziert. Eine EU-Lieferkettenregulierung darf nicht dazu führen, dass Unternehmen gezwungen werden, sich aus solchen Regionen mit erhöhten menschenrechtlichen Risiken zurückzuziehen und Akteure aus diesen Kontexten pauschal aus Lieferketten auszuschließen.

Aus diesem Grund hat die deutsche Wirtschaft betriebspraktische Erwartungen an einen nun diskutierten europaweiten Rechtsrahmen: Dieser muss handhabbar, angemessen und rechtssicher ausgestaltet und in der täglichen Praxis für jedes betroffene Unternehmen umsetzbar sein.

### 1. Handhabbare Vorgaben zum Prozess menschenrechtlicher Sorgfalt (Human Rights Due Diligence):

Für einen ordnungsrechtlichen Rahmen zu komplexen globalen Lieferketten bedarf es einer klaren Beschreibung von Vorgaben, deren Einhaltung die Unternehmen sicherstellen sollen. Der Maßstab hierfür sollte der international anerkannte Standard der UN-Leitprinzipien für Wirtschaft und Menschenrechte (UN-Leitprinzipien) sein und die Vorgaben sich auf die dort anerkannten Menschenrechtsstandards beschränken. Dies ist erforderlich, um das geforderte „level playing field“ für Unternehmen zu schaffen – auch im Hinblick auf den globalen Kontext. Über die UN-Leitprinzipien hinausgehende Anforderungen wie z.B. zu den Themen Umwelt sowie Soziales würden einerseits nicht mit den UN-Leitprinzipien übereinstimmen, andererseits aber auch Handlungsvorgaben schaffen, die zu weitreichend und unbestimmt, schwer handhabbar und daher letztlich nicht umsetzbar sind.

### 2. Anwendungsbereich rechtssicher ausgestalten und begrenzen:

Der Anwendungsbereich muss rechtssicher ausgestaltet und begrenzt werden: Nur so kann sichergestellt werden, dass der ordnungsrechtliche Rahmen der tatsächlichen Einflussnahme der Unternehmen Rechnung trägt. Gerade im Hinblick auf die Komplexität von globalen Lieferketten (große Unternehmen können über 100.000 direkte Zulieferer haben, die davorliegenden Stufen können Millionen von Unternehmen umfassen) darf von Unternehmen nur verlangt werden, was mit Blick auf ihre Möglichkeiten der Einflussnahme angemessen ist. Rechtsverbindliche Sorgfaltspflichten sollten deshalb praxisnah auf die direkten Zulieferer („tier 1“) beschränkt sein. Eine rechtsverpflichtende Einbeziehung tieferer Ebenen oder gar der gesamten Wertschöpfungskette in den Anwendungsbereich ist aus Erwägungen der mangelnden Einflussnahmemöglichkeit von vielen Unternehmen abzulehnen. Wenn Erwartungen aufgestellt werden, die Unternehmen nicht tragen können, dann droht der Rückzug aus Regionen mit problematischer Menschenrechtslage. In diese Lücke würden im Zweifelsfall ausländische Wettbewerber mit niedrigeren Standards springen. Im Ergebnis kann dies dazu führen, dass eine Verschlechterung des Menschenrechtsschutzes vor Ort eintritt.

### 3. Ausschluss von mittelständischen Unternehmen und KMU:

Der Anwendungsbereich einer möglichen Lieferkettenregulierung sollte begrenzt sein: Ausgehend vom allgemein anerkannten „think small first“-Prinzip sollten alle Unternehmen unter einer Größe von 5.000 Mitarbeitern – wie im französischen Loi de Vigilance – oder gemäß der bestehenden CSR-Berichterstattungsrichtlinie vom Anwendungsbereich einer Regulierung ausgenommen werden. Insbesondere kleine und mittlere Unternehmen müssen von neuen Rechtspflichten ausgenommen werden, um ihnen eine außenwirtschaftliche Marktteilnahme zu ermöglichen, statt sich aus der globalen Wertschöpfung zurückziehen zu müssen.

### 4. Keine zivilrechtliche Lieferkettenhaftung oder unangemessene Sanktionen einführen:

Eine zivilrechtliche Haftung für globale Lieferketten ist ebenso wie unangemessene Sanktionen im Bereich der öffentlichen Auftragsvergabe auszuschließen. Die Einführung einer zivilrechtlichen Haftung von Unternehmen für das Verhalten von unabhängigen Geschäftspartnern und Dritten ist der europäischen Rechtsordnung fremd und steht auch nicht in Übereinstimmung mit den UN-Leitprinzipien für Wirtschaft und Menschenrechte sowie den OECD-Leitsätzen für multinationale Unternehmen. Diese legen ausdrücklich fest, dass es keine Haftung nur aufgrund einer Geschäftsbeziehung geben darf. Im Falle der Einführung einer Lieferkettenhaftung könnten sich Unternehmen gezwungen sehen, Lieferketten zu verkürzen, sich aus Regionen mit problematischer Menschenrechtssituation zurückziehen und Geschäftstätigkeiten einzustellen („cut and run“ statt des erforderlichen „stay and improve“). Ein vorschneller Ausschluss von öffentlichen Aufträgen wäre insbesondere bei geringfügigen oder einmaligen Verstößen und für Branchen, die stark von öffentlichen Aufträgen geprägt sind, wie beispielsweise der Bausektor, unverhältnismäßig.

### 5. „Whitelist“ schaffen:

Zur Vermeidung ausufernder Bürokratie und um die Integrität des EU-Binnenmarktes zu schützen, sollte eine „Whitelist“ eingeführt werden, zum Beispiel mit Staaten und Regionen, bei denen ein hohes Niveau an gesetzlichen Standards besteht und die Rechtsdurchsetzung garantiert ist. Neben einer generellen Ausnahme für Unternehmen aus dem Europäischen Wirtschaftsraum, USA, Kanada und UK wäre ein Ansatz für Befreiungstatbestände im Rahmen einer „Whitelist“ das Bestehen von Freihandelsverträgen mit der EU.

### 6. Staatliche Verantwortung wahrnehmen:

Genau wie die europäische Wirtschaft ihrer menschenrechtlichen Verantwortung nachkommt, erwarten wir von der Europäischen Union und ihren Mitgliedstaaten ein Eintreten auf internationaler Ebene für die Menschenrechte. Es kann nicht sein, dass von den europäischen Unternehmen die Durchsetzung menschenrechtlicher Standards gefordert wird, die EU und die Mitgliedstaaten aber ihre Verantwortung und ihren Einfluss nicht mindestens in angemessener Weise wahrnehmen. Nach wie vor gilt der Grundsatz, dass Staaten für die Wahrung und Durchsetzung von Menschenrechten zuständig sind. Diese originären staatlichen Schutzpflichten für Menschenrechte dürfen nicht einfach auf Unternehmen delegiert werden. Vielmehr sollten Staaten auch etwa im Wege der Außenpolitik und des bilateralen Austausches durch die EU und Mitgliedstaaten gegenüber Drittstaaten ihre Werte vertreten.

[Redacted]

**From:** [Redacted]  
**Sent:** 17 August 2021 10:42  
**To:** [Redacted]  
**Subject:** RE: Request for a call on sustainable corporate governance

Dear [Redacted]

Thank you for your message and for the position papers you shared with [Redacted] from cabinet of Mr Breton.

She has asked our unit to follow up on your request to set up a meeting, as we are covering work on the sustainable corporate governance file within DG GROW.

We would be happy to set up a meeting with you after the summer period. My colleague [Redacted] will contact you to identify a suitable slot for the meeting with.

Thank you for your understanding.

Kind regards,

[Redacted]

**European Commission**  
DG for Internal Market, Industry, Entrepreneurship and SMEs  
Unit G.2 –Proximity, social economy and creative industries

[Redacted]

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**From:** [Redacted]  
**Sent:** Tuesday, July 13, 2021 2:17 PM  
**To:** [Redacted]  
**Subject:** Request for a call on sustainable corporate governance

Dear [Redacted],

I am contacting you regarding the sustainable corporate governance (and due diligence) initiative on which the Commission is currently working on.

I understand that this is under your competences in Mr Breton's cabinet (co-responsible in this file) which is why I would be delighted to have the opportunity for a short exchange with you. One of the reasons is to see the possibilities for a meeting between our President and Mr Breton after the summer period.

You will find at annex our short position papers summarising the main messages we adopted on the occasion of the public consultation in the beginning of the year.

I am available the end of this week, mostly throughout next week or in the second half of August, whatever is most convenient for you.

Looking forward to your feedback.

Best regards,

[Redacted signature]

[Redacted signature]

**BUSINESSEUROPE**

[Redacted line]

[Redacted signature]



[Redacted signature]

*Please read our [privacy policy](#). Should you have any question, you can contact us at [privacy@businessseurope.eu](mailto:privacy@businessseurope.eu).*

[Redacted]

**From:** CAB BRETON ARCHIVES  
**Sent:** 13 July 2021 14:42  
**To:** [Redacted]  
**Subject:** FW: Request for a call on sustainable corporate governance Ares(2021)4538258  
**Attachments:** 2021-06 BusinessEurope messages on due diligence.pdf; 2021-06 BusinessEurope messages on sustainable corporate governance.pdf

We confirm receipt of your message

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**From:** [Redacted]  
**Sent:** Tuesday, July 13, 2021 2:31 PM  
**To:** [Redacted]  
**Subject:** FW: Request for a call on sustainable corporate governance Ares(2021)4538258

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**From:** [Redacted]  
**Sent:** Tuesday, July 13, 2021 2:17 PM  
**To:** [Redacted]  
**Subject:** Request for a call on sustainable corporate governance

Dear [Redacted]

[Redacted] contacting you regarding the sustainable corporate governance (and due diligence) initiative on which the Commission is currently working on.

I understand that this is under your competences in Mr Breton's cabinet (co-responsible in this file) which is why I would be delighted to have the opportunity for a short exchange with you. One of the reasons is to see the possibilities for a meeting between our President and Mr Breton after the summer period.

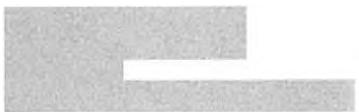
You will find at annex our short position papers summarising the main messages we adopted on the occasion of the public consultation in the beginning of the year.

I am available the end of this week, mostly throughout next week or in the second half of August, whatever is most convenient for you.

Looking forward to your feedback.

Best regards,

[Redacted]





*Please read our [privacy policy](#). Should you have any question, you can contact us at [privacy@businessseurope.eu](mailto:privacy@businessseurope.eu).*

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**From:** [REDACTED]  
**Sent:** 27 July 2021 16:31  
**To:** [REDACTED]  
**Subject:** Ares(2021)4538258 - Request for a call on sustainable corporate governance  
**Attachments:** 2021-06 BusinessEurope messages on due diligence.pdf; 2021-06 BusinessEurope messages on sustainable corporate governance.pdf

Dear [REDACTED]

On behalf of [REDACTED] I would like to thank you for your email.

Unfortunately her agenda will not allow to organise a meeting.

We will pass your message to our colleagues in DG GROW and suggest to follow up with them for the time being.

Best regards,

[REDACTED]  
Cabinet of Commissioner Thierry Breton



European Commission  
Rue de la Loi 200 [REDACTED]

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**From:** [REDACTED]  
**Sent:** Tuesday, July 13, 2021 2:17 PM  
**To:** [REDACTED]  
**Subject:** Request for a call on sustainable corporate governance

Dear [REDACTED]

I am contacting you regarding the sustainable corporate governance (and due diligence) initiative on which the Commission is currently working on.

I understand that this is under your competences in Mr Breton's cabinet (co-responsible in this file) which is why I would be delighted to have the opportunity for a short exchange with you. One of the reasons is to see the possibilities for a meeting between our President and Mr Breton after the summer period.

You will find at annex our short position papers summarising the main messages we adopted on the occasion of the public consultation in the beginning of the year.

I am available the end of this week, mostly throughout next week or in the second half of August, whatever is most convenient for you.

Looking forward to your feedback.

Best regards,

[Redacted]

[Redacted]

**BUSINESSEUROPE**

[Redacted]

[Redacted]

[Redacted] 

Please read our [privacy policy](#). Should you have any question, you can contact us at [privacy@businessseurope.eu](mailto:privacy@businessseurope.eu).

# BUSINESSEUROPE



POSITION PAPER

9 June 2021

## BUSINESSEUROPE main messages on Due Diligence

### Introduction

As the leading advocate for growth and competitiveness at European level, BUSINESSEUROPE is happy to contribute to this debate that will have an impact on the way companies' function and operate in their supply chains.

A large majority of EU companies, from all sectors and sizes, expect a potential future Due Diligence legal framework to be workable, proportionate and effective. It should not be a way to simply transfer state responsibilities on to companies as they are not able nor have the mandate to solve all the problems on their own. Without a good balance there is a risk that European companies simply disengage from markets and leave the field to global competitors.

The messages below are based on a more detailed BUSINESSEUROPE position as a reply to the recent Commission public consultation on sustainable corporate governance.

### Conditions for a workable and balanced EU framework

The EU future legislative measure needs to meet the following fundamental considerations:

- ✚ A realistic scope and legal certainty
  - The focus should be on the area of direct impact, i.e., companies' own operations, and **tier 1** suppliers in the supply chain according to the severity of the risk, as mentioned in the OECD guidelines.
  - The **level of detail** required should be **proportionate** to provide clarity for business and legal certainty, but without being prescriptive to a point that encourages an inflexible tick-box approach.
  - Regulatory requirements also need to be **sufficiently clear** so that business can implement with confidence of compliance. In particular, it is essential that **key terms** are clearly defined, i.e. due diligence requirements, severe impacts and human rights covered (the definition of which should be in line with definitions in internationally recognised standards such as, UNGPs, Universal declaration of Human Rights, OECD guidelines and the 8 fundamental ILO conventions).
- ✚ The needs of **Small and medium-sized companies (SMEs)**
  - The EU measure needs to **take account of the needs of SMEs considering** several options, from exemptions to softer requirements.



- **Support for SMEs** will be required whether they are in or out of the scope of a binding framework.

### ✚ Preserving the level playing field

- One of the benefits of EU action could be to ensure the same rules apply in all member states. In any further implementation process any **gold plating should be avoided** as it will counteract this aim.
- When they are active in the internal market, **third country private or publicly held companies** should also be covered by the future EU framework.
- Consideration should be made to the impact on EU companies' overall **competitiveness** vis-à-vis companies from other parts of the world.

### ✚ Accountability and remedy

- Due diligence is a process, therefore, any framework should be based on an **obligation of means** rather than an obligation of results.
- On accountability, it is inappropriate to hold only European companies accountable for damages **when it is impossible to control all the components of the chain and many other actors involved**.
- **Civil liability** should only apply if (i) due diligence has not been carried out and (ii) usual rules of civil liability are satisfied (damages occurred and a causal link between the two is established). There should be **no vicarious liability** whereby companies become responsible for actions of other autonomous entities.
- **Rules on burden of proof** should be proportionate, meaning no reversal of the burden, giving rise to prejudice in companies.

### ✚ Creating an enabling environment to apply effective due diligence

- The **EU and member states need to take their responsibility** and share of the burden when it comes to due diligence and create an enabling environment for companies to be able to perform their duties in an effective, workable and legally certain way.
- The task of gathering information on the global human rights situation must not be placed solely on companies. As a supplementing measure to the upcoming proposals the EU should consider the idea to develop a **“European contact point/observatory”** (name to be defined), where European companies could obtain reliable information (informed and authoritative opinion) on regional human rights situations that would enable them to take/justify decisions in relation to their value chains, get guidance and support. The European External Action Service and the European Commission delegations in third countries could be used to collect and pass

on such information to the contact point. The latter could then, on the basis of the information received, comprehensibly categorize the risk of violations in order to provide companies with the necessary information for fulfilling their due diligence obligations.

## ↓ Stakeholder engagement

- Engagement of stakeholders is **important** to be able to conduct proper due diligence, but **flexibility** must be given to companies to determine which stakeholders should be involved and how.
- **Workers are important stakeholders, however of a different nature to other stakeholders, as they are part of the company.** Whilst it is important that they also have the possibility to be involved in discussions on company strategy (including due diligence), this must occur in full respect of national industrial relations systems. There is **no need for further EU legal requirements** to ensure this involvement, as there is already a well-developed and well implemented framework. This includes general obligations in the EU directive on information and consultation, as well as obligations in the EU framework directive on health and safety at work, the directives on transfer of undertakings and redundancies, the European Works Councils directive, and obligations within EU company law. These already provide for employee involvement on the issues of concern to them and set out how this should take place.

## ↓ Current and future requirements need to work together

- **Coherence** must be the goal of all legislation so overlap must be avoided with other EU requirements (e.g. taxonomy and non-financial reporting). The same should apply in the case of targeted due diligence rules such as in the area of responsible sourcing of minerals and other ongoing initiatives (deforestation and batteries).

## ↓ Alignment with international standards

- **Any EU measure** should be aligned with international frameworks like the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for multinational enterprises. Companies and authorities are already familiar with these principles and refer to them to ensure a responsible business conduct.

## ↓ Potential of sector/company-led initiatives

- Whether complying with mandatory requirements or in their own actions, companies should be able to devise solutions which fit their size, sector, operating markets and business model and allow them to identify where the material risk of adverse impacts. The EU should ensure that **best practices taken by sectors are respected and can be as considered** as means of compliance with any future framework.

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# BUSINESSEUROPE



POSITION PAPER

9 June 2021

## BUSINESSEUROPE main messages on Sustainable Corporate Governance

### Introduction

The business community fully supports the global sustainability agenda and companies are committed to integrating sustainability in the core of their business strategies and models, in a way which fits their specific situation and the needs of their stakeholders. We are also in favour of actions to drive investment into sustainable activities and to support companies in the transition towards more sustainability. The development of appropriate, proportionate and workable tools, taking account of the needs of the real economy, can facilitate this.

As the leading advocate for growth and competitiveness at European level, BUSINESSEUROPE is ready to discuss on how corporate governance can serve as a lever to integrate sustainability into the core of companies' business and strategies.

The messages below are based on a more detailed BUSINESSEUROPE position as a reply to the recent Commission public consultation on sustainable corporate governance.

### Main messages

- The **EU corporate governance framework has proven throughout the last two decades that it is still able to adapt to the new challenges** thanks to a framework of well-balanced, targeted rules (some very recent such as Shareholders Rights Directive II and Non-Financial Reporting Directive), complemented by corporate governance codes (frequently updated) and company practices. These remain fit for purpose.
- BUSINESSEUROPE **shares the objectives** of the sustainable corporate governance agenda, for example in terms of sustainable transitions and more resilient value chains but has **strong concerns on the way** the Commission intends to meet them.
- **Corporate governance and due diligence need to be distinguished in the future initiative.** Although these areas are interrelated to some extent, it is not appropriate that they are treated in the same way as seems to be the case so far. There is an attempt to artificially extrapolate the issues and problems from one area to another, disregarding the essence of each of them. This will only lead to inadequate solutions.
- The Commission Roadmap and the public consultation point to a **radical rather than an evolutionary approach** (as it was the case so far) to European corporate governance. Call for action is mainly based on a widely criticised Commission study, which is based on false assumptions and a flawed



methodology leading to a negative and **misleading (short-termism) picture of European companies that is not supported by facts**<sup>1</sup>.

- The affirmation that European companies produce high levels of pay-outs at the expense of low investment intensity is not a realistic depiction of how companies function<sup>2</sup>. Pay-outs are a crucial part of one of the cornerstones of economic policy in most EU countries, namely the mechanism requiring capital to be allocated from companies without profitable investment alternatives to companies with profitable projects, thereby supporting an efficient capital allocation in society. **The levels of R&D of smaller companies across the EU, the expenditure in R&D rate has actually increased** over the time period considered in the Commission study.
- **European companies do take account of the long-term and diverse stakeholders' interests alongside the financial interests of their shareholders**, as well as stakeholders concerns, for example through reporting, committees or regular meetings. This is not only because this is an expectation placed on them, but because they see value in it for the performance of the

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<sup>1</sup> Response from Professors Bassen, Lopatta and Ringe, University of Hamburg: "*First, and unfortunately, the Initiative is based on a study by consultancy firm EY that **does not take the basic academic norms of empirical research into account.** It randomly collects empirical findings without filtering by qualitative criteria.*"

Response from ECLE (European Company Law Experts): it "*proceeds by **unsupported assertions** – managers and investors are short-termist and corporate law is responsible for it – rather than rigorous demonstration.*"

Center for Corporate Governance, CBS: "*Our main research areas are stewardship (responsible, long-term ownership), board work, and compliance. We find that the EY Study has **serious and systematic flaws in all three areas.***"

Response from Professor Edmans, London Business School: "*I personally benefit from evidence claiming that the current system is short-termist and needs to be radically reformed. However, **I believe even more strongly in the importance of following the most rigorous evidence, regardless of what it finds.***"

Response from 21 Nordic law professors: "*the [...] Study is so biased in its approach and so **openly and excessively political in furthering a specific regulatory outcome**, that we find ourselves compelled to address these shortcomings*".

Also **John G. Ruggie**, one of the leading international voices on Business and Human rights has criticised the Commission study and approach by affirming that "*company directors are not the main drivers of short-termism*". [https://media.business-](https://media.business-humanrights.org/media/documents/EU_mHRDD_paper_John_Ruggie.pdf)

[humanrights.org/media/documents/EU\\_mHRDD\\_paper\\_John\\_Ruggie.pdf](https://media.business-humanrights.org/media/documents/EU_mHRDD_paper_John_Ruggie.pdf)

<sup>2</sup> The Stockholm School of Economics, has recently published a study ([Corporate Governance and Short-Termism: An in-depth Analysis of Swedish data \(hhs.se\)](#)) that contradicts the Commission Study. Data for 786 companies listed at Nasdaq Stockholm 2000-2019 were analyzed demonstrating that:

- 44 % of the companies did not pay out a dividend.
- the payout ratio of the companies depends on their life cycle.
- the companies with the highest dividend payout are also the companies with the highest profitability while at the same time performing well in terms of sustainability reporting and sustainability ratings.



company as well as for their 'license to operate'. This is often action through company CSR and sustainability commitments.

- Companies need to preserve their **flexibility to determine not only the relevance of specific stakeholder groups to their activity and how they interact with them, but also to assess whether different interests are material** to the company over the short, medium and long-term. This should be done on a case-by-case basis. It is impossible to identify stakeholders as an *ex ante* category, because they represent different and potentially contradictory interests. This also makes the task of defining and assessing the different stakeholder interests/needs a complicated process for companies.
- **Stakeholders** cannot be given, as such, rights to challenge **boards decisions** because they do not have the legitimacy or representativeness to do so.
- **Directors only owe fiduciary duties to the company itself and not to third parties. Directors' duties cannot be transformed into a checklist.** On the contrary, they need the flexibility to identify which stakeholder interests should be considered in accordance with the activity, structure, nature and size of the company.
- An unbalanced legislative intervention would be disproportionate and counterproductive as it would:
  - have a negative impact on several **fundamental principles of our market economy model** such as the freedom of enterprise and property (ownership) rights
  - **disrupt a long-standing and fine-tuned balance** in national corporate governance systems.
  - **lead to deadlocks in the decision-making processes** of companies leading to less risk-taking and less entrepreneurial behaviour.

\*\*\*

[REDACTED]

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**Sent:** 25 June 2021 14:57  
**To:** [REDACTED]  
**Subject:** Phone call with VDMA on due diligence

Dear [REDACTED]

Thank you for your email of May 10th addressed to [REDACTED] who asked to follow up on your request for a virtual meeting related to the upcoming initiative of the Commission on sustainable corporate governance and due diligence.

The transition of companies to sustainable operability, not only economic but also environmental and social, remains our top priority. The future initiative on sustainable corporate governance is an important element in this transition.

However, we also need to ensure that the future legislation on Sustainable Corporate Governance, when adopted, will be practically implementable and proportionate, take into account the current situation of EU industry, and do not harm its global competitiveness.

It is our responsibility that it has to be designed in such a way that it does not discourage businesses, and in particular SMEs on their path to sustainability due to the high costs and burden that they might face. This is particularly important in this difficult economic context.

Our Unit (Unit GROW G2 secretariat – [grow-g2@ec.europa.eu](mailto:grow-g2@ec.europa.eu)) remains at your disposal to continue our fruitful discussion and are looking forward to our further collaboration on this topic.

Best Regards,



**European Commission**  
DG for Internal Market, Industry, Entrepreneurship and SMEs  
[REDACTED]  
**G2 - Proximity, Social Economy, Creative Industries**  
B-1049 Brussels/Belgium

European Office



## Position paper on due diligence



Registration number  
in the register of representative bodies:  
976536291-45

April 2021

## **Introduction**

VDMA represents over 3.300 mechanical engineering companies in Germany and Europe. The industry stands for innovation, export orientation, medium-sized businesses and employs around four million people in Europe, of which more than 1 million are employed in Germany alone. With around 90.000 companies, the mechanical engineering is one of the largest industries in the EU economy. With an estimated 36% share of the world market, Europe is the largest producer and exporter of machinery and equipment.

The basis for the international success of the mechanical engineering industry is a strong global connection with efficient and innovative suppliers and customers all over the world. Our companies are export champions. They export almost 80% of their production, of which about 55% is sold to third countries. But they also create significant welfare and growth in third countries by cooperating with businesses in almost all regions of the world. Global value chains are an important factor for the success of the European mechanical engineering industry.

Due to the SME structure of the industry (about 86% of the member companies of VDMA have fewer than 250 employees and around two third even employ fewer than 100 persons), the export orientation and the strong integration into global value chains, the mechanical engineering industry will be particularly affected by the upcoming proposal on mandatory due diligence requirements for value chains.

## **Mechanical engineering industry promotes human rights**

Respecting and protecting human rights along supply chains are a mandate and an obligation for the mechanical engineering industry. Human rights are non-negotiable and our member companies pay close attention to avoid any human rights violations in their supply chains. Therefore, many of our companies already have codes of conduct and supplier contracts to commit themselves and their partners to respecting human rights. Furthermore, VDMA itself will be active in preparing an industry dialog of the Federal Ministry for Labour and Social Affairs of Germany.

## **European approach is better than patchwork of national rules**

For our export-oriented industry the functioning of the Internal Market is an imperative. Therefore, we strongly believe that a patchwork of national rules on due diligence requirements for value chains should be avoided. An EU framework for due diligence requirements is preferable, provided it is designed in a SME-friendly and manageable way, as this will establish a level playing field for our companies and this will maintain their competitiveness. Furthermore, it must also apply to companies from third countries that are active in the Internal Market.

## **No one-fits all approach – Differentiation is needed**

A legislation on a mandatory due diligence will only achieve its objective to prevent adversary effects on human rights in the supply chains of European companies, if the due diligence requirements are manageable and implementable also for globally active SMEs.

Based on the ongoing public debate but also in the European Parliament, we have the impression that the upcoming proposal will be predominantly designed with a view to horrible and unjustifiable situations in value chains of specific sectors. There is no doubt that human rights violations must be remedied, but we also believe that a one-fits all approach, which is

applied in the same way to all sectors and businesses no matter of company sizes or the risk attached to the business activity, is counterproductive.

For our companies it will be extremely challenging to fulfil the due diligence requirements, because of their size, activities and available resources. Due to the great variety of products, machine builders typically have many suppliers - from hundreds to many thousands (depends on their size and products) - from all over the world, a complete and exhaustive monitoring of such global value chains is almost impossible, especially for small and medium-sized companies in the machinery sector where risks of human rights violations are rather limited. Therefore, mandatory due diligence of global value chains will hit the mechanical sector particularly hard.

Possible solutions are:

- Legislation on mandatory due diligence should, like the CSR Directive, only apply to capital market-oriented large companies. SMEs and larger companies, which are not capital market-oriented, should be excluded from the scope of an EU framework on due diligence. Alternatively, if one does not want to tie the scope of application to the legal form of a company, one can take the French legislation as an example and apply the legislation to companies that have more than 5.000 employees.
- Legislation on mandatory due diligence should only be extended to the part of the value chain which the company can effectively control, i.e. the tier 1 suppliers of the upstream supply chain with whom there is an established contractual relationship. Companies may still have opportunities to exert influence here, whereas this is not the case deeper in the supply chain towards indirect suppliers or vis-à-vis the customer. VDMA is strongly opposed to mandatory due diligence requirements for the downstream supply chain.
- Companies with low risk of human rights violations in the supply chains or without direct access to and a lack of influence on the risk potential should have less stringent due diligence obligations.

### **Limiting the scope to internationally recognized standards of human rights violations**

The initial objective of the planned legislation was to develop a framework, which prevents human rights violations by obliging companies to identify and eliminate risks in their value chains. In the meantime, the debate is much broader, and legislation will most probably also address other areas, such as environmental pollution, negative effects on biodiversity, etc. The broader the scope, the more difficulties for our member companies.

To make the requirements manageable for businesses, an EU-wide framework on due diligence must be limited to the prevention of serious human rights violations. One can, for example, think here of internationally recognised standards such as the United Nations' Guiding Principles on Businesses and Human Rights.

### **No civil liability**

The need for a special civil liability regulation, as proposed by the European Parliament, should be carefully considered and weighed against existing national liability laws and additional extensive sanctions, e.g. as proposed by the draft Supply Chain Act in Germany. The general concept of civil liability is based on personal wrongdoing, the prerequisites of which must be defined with legal certainty, and should also consider practical manageability. The civil liability regulation proposed by the European Parliament does not adequately reflect such considerations, in particular, as it provides that even fulfilling the company's duties does not automatically exempt and relieve such company of any liability for damages along the value chain. This provision exposes companies to unmanageable challenges.

## **Role of Governments and State authorities**

Even though we do not deny that companies have a responsibility in the fight against human rights violations, it should be emphasized that Governments and State authorities are primarily responsible for upholding human rights. This responsibility must not be passed on to the companies. We see the responsibility of the State in particular also in the downstream value chain. Governments and State authorities are in a much better position than businesses to reveal violations and enforce human rights. This applies in particular to SMEs, whose information base is very often limited. We require here the support of the EU and the EU Member States. They should, wherever possible, provide for example data regarding human rights country risks, white-lists of countries, checklists, etc.

## **Conclusions**

VDMA stresses that the planned legislation for mandatory due diligence for value chains will strongly affect the mechanical engineering industry, in particular the export-oriented SMEs. In order to avoid overly bureaucratic and cumbersome processes which do not achieve the intended objective, an EU-wide framework with clear criteria, definitions, standards, manageability of processes and possibilities of influence is needed. Moreover, the legislation should differentiate with respect to the size of the companies, to which level of the supply chains due diligence obligations apply and the risk related to a specific supply chain. We also believe that an EU framework should only enter into force after the end of the current Covid-19 pandemic.

## **Contacts at VDMA**

[Redacted contact information]

[REDACTED]

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**From:** [REDACTED] September 2021 17:35  
**To:** [REDACTED]  
**Cc:** GROW G2  
**Subject:** Ares(2021)5771778 - meeting request on mandatory due diligence on behalf of Anglo American and Rio Tinto

Dear [REDACTED]

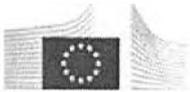
On behalf of [REDACTED] member in charge of this initiative in our cabinet I would like to thank you for your meeting request.

I regret to inform you that her agenda will unfortunately not allow the organisation of a meeting for the moment.

We suggest you could contact our colleagues in DG GROW (contact address in cc).

Best regards,

[REDACTED]  
 Commissioner Thierry Breton



European Commission

B-1049 Bruxelles  
 [REDACTED]

---

**From:** [REDACTED]  
**Sent:** Wednesday, September 1, 2021 2:20 PM  
**To:** [REDACTED]  
**Subject:** meeting request on mandatory due diligence on behalf of Anglo American and Rio Tinto

Dear

I am writing to you on behalf of the two international mining companies [Anglo American](#) and [Rio Tinto](#).

Both companies follow the discussions about business and human rights and mandatory due diligence very closely. They welcome the EU's efforts towards a mandatory due diligence mechanism as this will help to set uniform high standards.

I understand that the file also falls within your responsibility and hence representatives of Anglo American and Rio Tinto would be very interested to meeting you to share the perspectives of international mining companies about human rights and environmental due diligence. Specifically they would like to discuss ongoing efforts and challenges to ensure that raw materials destined for the European market are free of human rights and environmental infringements. Both companies would also like to understand your views and expectations on business in this context.

Representatives from both companies include

- [redacted] Anglo American
- [redacted] Anglo American
- [redacted] Rio Tinto and
- [redacted] Rio Tinto

We would welcome very much if a virtual meeting could be arranged over the next weeks. Should you not be the expert dealing with the file we would welcome very much if you could refer us to the right colleague.

Please do not hesitate to contact us should you require any additional information.

Kind regards,

[redacted]

[redacted]

[redacted]

[redacted]



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Ecosystems II: Tourism & Proximity  
G2. Proximity, Social Economy, Creative Industries

Brussels  
grow.g.2(2021)7198741 IN

Dear [REDACTED],

Thank you for your email of 1 September addressed to [REDACTED] in Cabinet Breton related to the upcoming initiative on sustainable corporate governance. She has asked our unit that is in charge of the initiative in DG GROW to follow up on your request for a meeting.

We welcome that Anglo American and Rio Tinto support our work towards a mandatory due diligence mechanism that could help to set uniform high standards.

We are currently extremely busy with the final stages of the preparation of the proposal on sustainable corporate governance and we are, unfortunately, unable to commit to any meetings in the coming weeks.

We will kindly ask you to share in writing any new elements you have for our consideration by sending it to Unit GROW G2 secretariat – [grow-g2@ec.europa.eu](mailto:grow-g2@ec.europa.eu)  
We will read them with due attention to take into account in our preparatory work.

Kind regards,

[REDACTED]