

Corporate Sustainability Due Diligence proposal

Input to the Feedback consultation

May 2022

The [European Copper Institute \(ECI\)](#) welcomes the Commission's ambition to set up rules for sustainable corporate due diligence (CSDD). ECI always supports policies and schemes that ensure responsible copper mining and production and contribute to establishing a level playing field across all relevant global supply chains and regions. Metals, such as copper, are enablers of the green transition of the EU, which should occur sustainably. Therefore, the proposal of the new directive by the EU Commission on "*Corporate Sustainability Due Diligence*" – COM(2022) 71 final - has the role of ensuring metals supply and a tangible contribution toward the three dimensions of sustainability.

ECI considers the Commission's proposal an encouraging starting point that needs some changes and integrations to be better equipped to strike a balance between the security of supply and sustainability. In particular, after a first analysis, ECI identified a series of necessary improvements, some of which are briefly summarised here.

1. The 'Guiding Principles on Business and Human Rights' released by United Nations (UNGPs) should be used as the essential reference for the critical definitions of the directive, such as the one on business relationships and others.
2. Adopting a value chain approach, instead of a supply chain one, needs simplification in the definitions and clarification of the boundaries, e.g. where the responsibilities of the involved actors are.
3. The role of industry-led schemes is crucial for ensuring compliance with the legislation and contributing to the global level playing field, with the involvement of international bodies.
4. Clear guidelines for disengagement are necessary to avoid unintended consequences on the ground.

Extensive comments and explanations are reported in the following parts of the paper. The ECI developed them to establish a proactive and constructive approach with the EU Commission and the other policy-makers involved in the following steps of the legislative procedure.

Introduction

The legislative proposal COM(2022) 71 final for an EU Directive **CSDD** aims to establish rules and obligations to be respected by companies to assess, mitigate or prevent social and environmental impacts in their operations and value chains. However, due to the extension and complexity of the global value chains and the variety of risks and hot spots to be checked, due diligence practices need clarity in the definitions of the legal framework, proportionality of the obligations and flexibility in the implementation and application of the rules. The proposed directive tries to define a specific legal framework in this respect. Although being a good starting point, ECI identified some aspects that were not enough developed in the text and others that need to be clarified to make the legislative framework simpler, balanced and effective.

The ECI position encompasses the different parts of the whole copper value chain and the experience of the industry in applying industry-led due diligence schemes. More specifically, our analysis focuses on (1) economic operators and the business relationships across the supply chain that are impacted, (2) the materials which fall under due diligence requirements, and (3) the definitions of different concepts that build the framework.

Supply chain vs value chain due diligence

Article 3(g) of the proposal defines the value chain with the clear intent to remove the possibility of having loopholes. However, the text extends the responsibilities of companies producing goods or services upstream and downstream of the chain, and it is not clear where the duties of each operator end. Still, reading the text, a company's responsibility might extend even to financial actors that finance its operations with the actual text. This broadens the scope of due diligence obligations tremendously for economic operators to identify and mitigate social and environmental risks associated with the production of their raw materials or finished materials. Although the switch from supply to the value chain is understandable, the definition needs to be refined.

The UNGPs might help here give better context because it gives a precise definition of a “business relationship” and helps in having a straightforward approach to what is a “value chain”. In such context, “business relationships” include relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services. The definition is flexible and allows to use of the same concept in different parts of the chain. Moreover, UNGPs definition of “business relationship” is an established concept, globally accepted and based on the severity of the adverse impact, ability to influence and type of relationship which can work up and down the value chain. This definition is flexible enough to be used by companies to determine who in their value chain needs to be subject to a Due Diligence procedure. Moreover, the definition is well established among companies and organisations implementing due diligence, and thus it is considered a very workable concept. However, the definition of the value chain should exempt the companies from any responsibilities on financial actors with which they interact.

ECI asks the EC to replace the definition of “*business relationships*” with the one proposed by the UNGPs on Business and Human rights.

ECI asks to change the definition of the value chain of the legislative proposal following the main elements of the UNGPs definition of the business relationship.

Established business relationships

It is essential to have coherence within the directive and, when possible, as with other EU Regulations dealing with the concept of the due diligence. In this respect, the definition of “business relationship” is already used by the EU Regulation on Conflict Minerals, EU/2017/821, and does not need to define “established business relationships”, similarly to the UNGPs.

The choice of not having the concept of an established business relationship in these two documents is linked to the need to set the right incentives along the value chain for implementing due diligence. For instance, the definition of ‘established business relationship’ refers to a relationship expected to be lasting. However, this might incentivise some companies to use short term contracts for high-risk suppliers. Therefore, ECI sees the need to align the CSDD proposal with UNPGs, removing the definition of ‘established relationships’.

ECI asks the EC to remove the definition of “*established business relationship*” from the proposal.

Secondary raw materials

The traceability of the secondary raw materials is extremely difficult; it might be costly and not conclusive on several occasions. Unlike the materials derived from ores and minerals, a purchaser of secondary raw materials – e.g., copper scrap – can no longer determine the origin of the metal waste once the metal has been melted. Moreover, according to the specificity of the recycling value chain and the infrastructure of the waste management sector, the impossibility of tracing the material back to the point of origin could occur much earlier than the melting point.

Very strict and demanding due diligence requirements for secondary raw materials would risk having manufacturers opting for virgin materials, the tracking of which is much easier and well-established. As a result, the uptake of secondary raw materials would be disincentivised, and the aim to increase the use of recycled sources would be hindered. For this reason, requirements need to be simplified and include clear expectations on the point of origin for recycled materials.

ECI asks the EC to include specific and simple obligations for operators dealing with secondary raw materials

Environmental due diligence

The EU CSDD proposal defines the concepts of ‘adverse environmental impacts’ and ‘severe adverse impacts’, which are linked together, as shown in Articles 3(b) and 3(l). However, the definitions need to be substantially improved.

For instance, the definition of adverse environmental impact is based on the alignment, full or partial, and on the compliance, exact or partial, with along set of international conventions mentioned in Annex II of the directive – i.e., Biological Diversity; Cartagena Protocol; Nagoya protocol; International trade of endangered species; Minamata, Stockholm, Vienna and Basel conventions. However, the request of monitoring all such International agreements on partners working with companies in the value chain is not feasible; it will create a considerable workload whose practical benefits might be unclear or not tangible. Moreover, there are no established practices or tools to assess the environmental impacts in a due diligence process at the global level; OECD is working on an instrument but, for the moment, is

not mature enough to be of any help. Therefore, it seems more practical and effective to refer to these international conventions as guidance for identifying what types of risks to consider in the definition of adverse environmental impacts.

In addition, the definition of 'severe adverse impacts' is based on concepts that are not defined in the proposal itself and that modify the extent and severity of the previously described adverse environmental impacts. The concepts of 'large', 'irreversible' and 'difficult to remedy' need to be clearly defined; otherwise, it will be impractical and complex for a company to assess its value chains correctly. However, it will be more effective, instead of defining all these concepts in the legislative text, to refer to an appropriate framework where the determination of the relevance and the severity of an impact are given with the scope of establishing due diligence. UNGPs are a perfect frame for this because having a proper framework will help in ensuring consistency in all the assessments, using the concepts of severity and relevance. Moreover, this alignment with UNGPs needs also guidance from the EU Commission on how to translate these due diligence concepts to the environmental risks.

ECI asks the EC to consider modifying the 'adverse environmental impact' definition, considering the conventions in Annex II as guidance.

ECI asks EC to align with the UNGPs to use the concepts of severity and of relevance to the environmental risks.

Role of international bodies

In the proposal, the EC is given the power to issue guidelines for specific sectors or adverse impacts, especially when the directive needs to be implemented in the member states, as evident from Articles 13, 17 and 18 of the CSDD proposal. The text suggests consulting international bodies that are experts in due diligence implementation and application only where appropriate. However, it is always essential to involve or at least properly inform international bodies that can support EC and MSs during the implementation of the directive. In addition, their extensive knowledge and global expertise in due diligence might outstanding support EC in drafting guidelines for sectors or specific adverse impacts.

ECI asks the EC always to consider the involvement of the international bodies

Role of industry schemes

The provision of Article 14(4) acknowledges industry schemes' and multi-stakeholder initiatives' role in supporting companies in conducting due diligence. However, there are still certain aspects that need to be clarified. In particular, the text mentions that these schemes can help companies fulfil the obligations of the EU CSDD proposal. Still, the wording is not precise on how to and who will concretely assess the fitness of such schemes and initiatives.

The guidance on assessing the fitness of these industry schemes for compliance with the EU CSDD should be given by the EU Commission and, preferably, should be the Commission itself responsible for assessing the fitness of industry-led schemes. The member states should receive guidance from the EU Commission on evaluating companies' compliance with the directive in their respective jurisdictions.

ECI asks the EC to clarify the process and fitness check of industry-led schemes for complying with the EU CSDD directive.

EC should be responsible for the fitness check process and for giving guidance to the member states.

Disengagement

There is no clear definition of the conditions upon which a company must disengage or interrupt a contract in Articles 7 and 8. However, it is known that by removing one element of risk via disengagement, additional adverse impacts are caused, especially on the ground to local populations or companies involved, for instance, in extractive operations or ores beneficiation. The EU Commission recognises that the disengagement must be a 'last-resort action', but the text does not realise that disengaging will not eliminate the problem on the ground and create issues for the company that stops contracts.

The classic example is child labour. The disengagement will not remove the child from work but risks further worsening the conditions after the disengagement because the problem will not be perceived as still going on. The disengagement allows companies to 'walk away'; however, it will be more effective to incentivise and help companies apply remediation strategies when possible. There is definitively the need for the EU Commission, and maybe international bodies experts on the matter, to give guidance to companies and the member states about disengagement and remediation. The recommendations should cover the following aspects:

- how to implement termination provisions in contracts and how to modify national laws to allow this in contracts;
- to support companies on how to identify 'red flags' situations that cannot be remediated and thus leaving the disengagement as the only option;
- to refer to the UNGPs approach to disengagement and remediation;
- how to mitigate the adverse impacts of disengagement, and how member states can support this process.

ECI asks the EC to develop guidance for companies and member states about disengagement, during contract termination, with a specific focus on mitigating the adverse effects of the disengagement.

Substantiated concerns and presumption of innocence

The CSDD proposal considers the possibility of stopping contracts in Articles 7 and 8. Moreover, it entitles natural and legal persons, in Article 19, to submit substantiated concerns when they have reasons to believe, based on objective circumstances, that a company is failing to comply with CSDD. These two provisions may generate risks of public statements and echo in the media when a company disengages or after submitting substantiated concerns. However, any economic operator should profit from the principles of the burden of proof and the presumption of innocence, which is a norm of international customary law.

The proposal's text lacks to specify how these substantiated concerns should be verified and how to avoid reputation damage from false claims. Moreover, effective redress mechanisms shall be provided in case of false claims.

ECI asks the EC to have a clear definition of substantiating concerns and a procedure to check their legitimacy.

ECI remains available for any additional information or clarification the EU Commission might require. ECI expertise can provide helpful insight in developing the guidelines about sustainability due diligence, for the copper sector, via the interactions of ECI with international copper colleagues in the International Copper Association (ICA) – <https://copperalliance.org/> - and with the experts in due diligence of the Copper Mark – <https://coppermark.org/> - an independent third-party verified assurance framework set up to promote the responsible production of copper.

About the European Copper Institute

Based in Brussels, the European Copper Institute (ECI) is the leading advocate for the copper industry in Europe and is the EU Regional HUB of the International Copper Association (ICA). Through a team of policy, industry and scientific experts, ECI acts to support copper's role in achieving the EU's policy goals. Our members mine, smelt, refine and recycle copper for use across the economy, in the electricity system, buildings, transport and industry.

Contact

Aurelio Braconi, Director (EU) Material Stewardship
Email: aurelio.braconi@copperalliance.org
Tel: 0032490410623

Symeon Christofyllidis, Regulatory Affairs Specialist (EU), Material Stewardship
Email: symeon.christofyllidis@copperalliance.org
Tel: 0032484979493

Transparency register: 04134171823-87
Find us on copperalliance.eu / [LinkedIn](#) / [Twitter](#)