FuelsEurope position paper on the "European Commission proposal on the Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937"

FuelsEurope, which represents the interest of 38 companies manufacturing and distributing liquid fuels and products for mobility, energy & feedstocks for industrial value chains in the EU, supports the goals of the Paris Agreement and the EU's ambition to reach climate neutrality by 2050. We are committed to provide input and expert advice to the EU Institutions, Member State Governments and the wider community, to contribute in a constructive and pro-active way to the development and implementation of EU policies and regulations.

Introduction

FuelsEurope is convinced that corporate social responsibility contributes to a sustainable, long-term economic and social development. The refining sector is committed to respecting human rights and its business practices reflect elements of instruments such as the UN Guiding Principles on Business and Human Rights and the OECD Due Diligence Guidance for Responsible Businesses. In this context, we recognise the potential of due diligence in order to help support respecting human rights and preserve the environment.

We acknowledge the Corporate Sustainability Due Diligence Directive (CSDDD) Proposal's ambition to create a harmonised legislative framework for due diligence on human rights and environment.

FuelsEurope appreciates the careful approach taken by the European Commission with this innovative proposal.

In order to guarantee an effective EU-harmonised mandatory due diligence, the Directive should seek to ensure both legal certainty and proportionality in view of avoiding excessive administrative burdens for the companies and unintended consequences for the EU economy. To achieve these objectives, we would like to contribute with the following suggestions.

Legal certainty: clarification of definitions and obligations for companies

Legal certainty and predictability on the liabilities set forth in the proposal are essential to enable companies to effectively embed a corporate social responsibility approach in their corporate governance and business models.

(I) Clarification of the definitions:

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FuelsEurope believes that some of definitions included in art. 3 are essential in defining the scope and need to be further clarified to enable an effective implementation of the due diligence plans. In particular, FuelsEurope believes that:

(a) The definition of "established business relationship", while an important element to limit the scope of the operations governed by the Directive, should be better defined. Expressions such as "*business relationship whether direct or indirect […] which is **expected to be lasting**, in view of its intensity or duration*" and "*which does not represent **a negligible or merely ancillary part** of the value chain*" may result in risky subjective and ex ante determinations that are open to discretionary evaluations, thereby introducing great uncertainty and undermining the harmonisation objective of the proposal.
We therefore suggest to further clarify the above-mentioned definition establishing objective/quantitative criteria to define what is a "negligible or merely ancillary part" (e.g. specific period of time; percentage of participation in production) and to determine when a relationship can be "expected to be lasting". Moreover, the definition should be limited to the direct business relationship according to what suggested below in point (b).

(b) The definition of "value chain" is very broad covering both the upstream and the downstream established business relationships. The reference to "and related activities" also makes this definition unclear and open-ended. It should be recognized that in the context of long and complex value chains it is practically difficult to influence and control the behaviour of the outer edge part of the supply chain and even more of the value chain. Indeed, due to these difficulties most of the national proposal on sustainability due diligence, such as the French one, are limited to first tier level of suppliers, taking into consideration that companies do not realistically have possible leverage on and basis for auditing companies operating beyond tier one. Moreover, a too broad definition of value chain would increase the burdens on the companies and may hamper the well-functioning of the trade flows because it would be too risky for companies to develop business relationships with remotely located undertakings. And, with regard to downstream, in practice, due diligence is generally not reasonably implementable on customers
We therefore suggest to limit company's obligations to the upstream first tier level.

(c) Clarifications about the terms "appropriate" and "adequate": the first is indeed defined in the proposal directive at art.3 (q) with regard to the "appropriate measures", yet the term "appropriate" it is used also with regard to "due diligence" and "leverage" and it is not clear if the same definition applies to those two concepts as well.
Secondly, the term "adequate": this term is mentioned in the directive proposal with regard to the appropriateness of the prevention, mitigation, minimise impacts. Yet, the term "adequate" it is not defined, resulting in a lack of clarity on what can be considered "adequately mitigated" as for art. 7 (3).

(d) Limitation of the definition of "director" set forth in article 3 (o).

(II) Clarification of the liabilities

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FuelsEurope supports the EC willingness to create a coherent and harmonised liability legal framework in order to ensure the enforcement of the proposal. However, we believe that the liability rules, especially the civil ones, should be better clarified to:

i) guarantee an EU harmonised approach, avoiding unintended diversified application of the rules amongst the different Member States and the risk of forum shopping as well as of unfair competition in the internal market that would be in opposition of the legal basis on which the proposal is grounded (i.e. art. 50 and 114 of the TFEU);
ii) avoid that national Courts would be burdened by lawsuits seeking to use the provisions set forth in the proposal without a direct link to the implementation of the due diligence plan.

To prevent the above-mentioned unintended consequences, we propose:

- **to clarify which party would have the burden of the proof in case of damages related to the due diligence obligations. In particular, it is suggested that any liability deriving from the directive must follow the existing principles of tort law (i.e. burden of the proof on the subject claiming for the damage);**
- **that the damages covered by the proposal should be only those directly linked to the violation of the obligations set forth in the Directive (e.g. lack of implementation of the due diligence plans);**
- **that the attenuating circumstances currently established in art. 22(2) for the indirect partners should be set forth for the direct partners according to the above-mentioned recommendations (see par. (I) (a)).**

Finally, Article 19 should be revised to expressly exclude from its scope possible complaints of third parties for a potential breach of non-due diligence obligations and the latter complaints should be regulated differently. In this regard, the legislator should identify and narrow down the concepts of legitimate interest of the claimants, to ensure that these complaints may not be equal to any political or lobbying stance, but be actually specific and worthy of protection, also in order to avoid unnecessary and vexatious litigation to the detriment of the business continuity. Finally, it will be crucial to establish a clear repartition of competences between the Supervisory Authorities and the civil courts in order to avoid potential duplications of complaints and ultimately ensure a cost-efficient, balanced and clear system of remedies.

Disengagement

The disengagement option as a "last resort action" defined at Recital 32) should be reviewed to leave the final decision to the discretion of the company that will evaluate on a case-by-case basis, in line with the UN Guiding Principles on Business and Human Rights. Disengagement could in some circumstances worsen the negative impact, while in others do not disengaging from the relationship may expose the company to legal and reputational risks.

Art. 15 - "Climate Plans"

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Article 15 seems to establish the obligation for the companies covered by the Directive to adopt a plan to "*ensure that the business model and strategy of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C in line with the Paris Agreement*". The language of this provision mirrors the one included in the new art. 19a (iii) of the draft Corporate Sustainability Reporting Directive (CSRD).

The possible overlaps with the CSRD and other climate legislation risks creating legal and practical obstacles such as lack of procedural coordination and inconsistent enforcement regimes which would increase the red tape for companies that, on the contrary, need an enabling legislative framework to support their emissions reduction ambitions which can help society achieve its climate objectives.

Any form of duplication, inconsistency and the creation of uncertainties should be avoided.

In addition to the above, we would like to point out that there is no consensus on which parameters can be used to assess the adequacy of the climate plan with a trajectory of 1.5 degrees. In this regard, companies define their emissions reduction plans in light of supportive policies and available technology. Standards of result that cannot reasonably be expected from companies and should be avoided.

It is suggested to avoid overlaps with the CSRD and with other legislations addressing emissions reductions.

Corporate Groups – possibility to comply at a consolidated level

Corporate groups may have multiple companies meeting the thresholds established in art. 2. According to the text it is not clear if there would be the possibility to comply with the due diligence obligations at a consolidated level. Article 1 of the Directive seems to offer the possibility for the groups while the articles on the specific requirements seems to be limited to the individual undertakings. FuelsEurope believes that this aspect should be better defined.

The possibility to comply at a consolidated level would guarantee multiple benefits. First of all, mother companies could offer a more comprehensive view of the risks of the group operations. Moreover, it would reduce the administrative burdens for companies avoiding that the same group would have to deal with different National Authorities for the monitoring of the due diligence plans. This would also avoid that in the same group different monitoring standards would be used and would help to achieve the harmonisation objective of the proposal.

We suggest to clearly establish the possibility for groups of companies to comply with the due diligence requirements at a consolidated level.

Administrative burdens – support to SMEs (Small and Medium Enterprises)

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FuelsEurope acknowledges the objective of the EC to mitigate the administrative burdens for the SMEs and to support them. However, articles 7(4), 8(2)(e) and 8(5) seem to set forth an additional and broad obligation for large undertakings meeting the thresholds of article 2 to support SMEs to establish prevention plans, comply with the code of conduct and include contractual assurance in their business relationships. In many cases this could amount to support for compliance with laws relating, for example, to working conditions or protection of the environment already applicable to the SME.

FuelsEurope would like to emphasise that it would be unfeasible for large undertakings that usually work with a huge number of SMEs to adequately support them.

Thus, the necessary support and flexibility should be provided to the SMEs by the Member States in order to comply with the obligations set forth in the above-mentioned articles.

Director's duties – liability

Article 25 may be interpreted as establishing for directors of companies a general duty of care regarding the sustainability matters covered by the proposal as well as the liability in case of breaches according to Member States laws, regulations and administrative provisions.

FuelsEurope understands the spirit of the article aiming at ensuring that the sustainability matters would contribute to the decision on the short and long-term company strategies. However, most of the Member States already foresee corporate liability for the commission of crimes and these legislations usually already include liabilities for crimes against the workers and the environment. Moreover, when a company has a board of directors often national legislations establish their criminal liability in case of active or omission behaviour that materialise an illegal act.

Therefore, it seems that the additional duty of care set forth by article 25 (if to be interpreted as such) could be against the principle of *ne bis in idem*.

We suggest to delete the above-mentioned provision or to add explicit language to avoid that:

- **Member States transposition would create new liabilities or enforcement regime against directors;**
- **The same violation would be punished twice.**

Sanctions – proportionality

FuelsEurope acknowledges the system of penalties and sanctions, naturally embedded in a law, foreseen in the CSDDD proposal. We recommend for such penalties and sanctions to be reasonable and proportionate.

In particular, regarding the administrative pecuniary sanctions set forth in article 20 we appreciate that the EC would limit the possibility to impose a sanction only after it would be given the

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possibility to the undertaking the possibility to comply (article 18), however it should be avoided that in case of adverse impacts undertakings actively adopting remedial actions would be sanctioned.

Moreover, leaving to Member States the possibility to establish the administrative sanctions based on companies' turnover would not ensure the right harmonisation amongst the Member States. It would be therefore appropriate to establish other dissuasive sanctions before to impose a pecuniary sanction as well as it should be set forth at EU-level a minimum and maximum cap for the pecuniary sanctions.

Finally, penalties and sanctions should be in alignment with other regimes.

We suggest to:

- **exclude the possibility to impose pecuniary sanctions where active remedial actions would be or are being taken by the company to avoid or mitigate adverse impacts;**
- **introduce at EU-level alternative dissuasive sanctions before to impose pecuniary ones;**
- **establish at EU-level a maximum cap for pecuniary sanctions.**
- **clarify the conditions and limits in which a company has to certify that no sanctions have been imposed on them for not complying with the obligations of the Directive (art. 24).**

Annex

We appreciate the effort of the EC to cover with the proposal a wide-range of human rights and environmental obligations contained in the international conventions. However, it should be recognised that several of the international conventions mentioned in the annex are imposed on Member States and not on private actors, and this may create legal uncertainties. Indeed, it is not clear how – in order to attribute legal liability to undertakings for violations of international conventions – the "violation" is ascertained, especially in case those conventions have not been implemented in national laws.

Moreover, the list included in the annex is very broad and refers to generic and large concepts. In particular, point 21 of the Annex-part 1 make the list open-ended and uncertain. It should be observed that in France the *Conseil Constitutionnel* declared the civil sanctions in the French due diligence national law unconstitutional because the sanctions would be based on violation of large and vague concepts. In order to ensure consistency in the enforcement of the proposal the annexes should be better targeted.

Therefore, obligations for companies from international law requirements needs closer adjustment as:

- Some of the "obligations" set out in Annex Part I are not obligations contained in the mentioned international conventions but rather extensive interpretations of existing international requirements.
- The enumeration of many norms/principles/treaties in the annex risks mixing the role of states and companies.

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We suggest to reconsider the lists of the international conventions mentioned in the annex establishing a more targeted list and to amend the definition of "adverse environmental impacts" and "adverse human rights impacts" by adding in the end language such as "*and, in violation of the national provisions implementing one of those prohibitions and obligations*".

Importance of the alignment with existing legislation

The European Commission should ensure coherence and alignment between different EU legislation and international standards in order to protect the competitiveness of the EU companies and avoid a change in the trade flows from non-EU trading partners to avoid the burden of the due diligence compliance.

Firstly, several regulations are currently being implemented (e.g. the Taxonomy Regulation, the Sustainable Finance Disclosure Regulation and the CSRD), and it is important to avoid any overlap of reporting obligations (with potentially slightly varying requirements) stemming from these different pieces of legislation.

Secondly, simplification of the existing regulatory framework in terms of coherence between the different pieces of legislation (Taxonomy Regulation, Sustainable Finance Disclosure Regulation, and CSRD) is needed.

Thirdly, synergy with future initiatives is essential.

Finally, overlapping/contradicting complementary legislation must be avoided.

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