

23 May 2022

Japanese Business Council in Europe (JBCE): Position Paper on Corporate Sustainability Due Diligence Directive

JBCE welcomes the opportunity to share our position on the Corporate Sustainability Due Diligence Directive, following the proposal published by the European Commission on 23 February, 2022. JBCE support the Commission’s ambition to enhance due diligence in corporate management processes and hence prevent adverse impacts related to environmental and human rights factors. JBCE recognises that such a legislative framework is important to encourage a corporate ‘culture of no harm’.

For the new due diligence obligations to truly make an impact, **the proposed measures need to be implementable and bring a high level of legal certainty for companies.** JBCE urges for more clarity in the Commission’s proposal regarding key concepts and definitions – especially with regards to the definition of an ‘established business relationship’, and its implication for the definition of ‘value chain’. It is important to ensure that the EU framework is **aligned with international standards** – including the UN Guiding Principles for Business and Human Rights (UNGPs) and the OECD Guidelines for Multinational Enterprises (OECD MNE Guidelines). International harmonisation is of paramount importance, as our Members’ operations and value chains are not limited to within the EU, but also deeply rooted in third countries.

Companies will need sufficient preparation and time to be equipped and resourced to comply with the new requirements in a meaningful way. This is especially true for companies that will simultaneously need to perform non-financial reporting under the Corporate Sustainable Reporting Directive (CSRD) for the first time. Therefore, JBCE believes that it would be more realistic if the application of such new requirements are gradually phased in, with regular review to ensure the effectiveness of the new requirements.

JBCE underlines that due diligence should not simply become an administrative box-ticking exercise, and in pursuit of this, we would like to share our main points of concern and offer our recommendations for the co-legislators to bring out the potential of the Commission’s proposal.

1) Ensure clarity and consistency of concepts and definitions

Since the EU obligations will apply to the entire value chain of the companies in the scope, it is of utmost importance to clarify the definitions that govern the scope and requirements of the proposal. JBCE calls on the co-legislators to further clarify notions such as ‘established business relationship’, ‘value chain’, and ‘stakeholder’, and to **ensure that the EU framework aligns with international standards in relying on a risk-based approach.** JBCE suggests to adhere to already established definitions.

To **avoid legal fragmentation at Member State level**, we must ensure that the EU framework for Sustainable Corporate Due Diligence is aligned with international standards – including the UNGPs and the OECD MNE Guidelines. Due diligence obligations must be streamlined with existing standards to overcome national differences and regulatory hurdles, and hence to ensure true harmonisation. Most companies will have to comply with different schemes in different regions, which is burdensome, costly, and also not meaningful.

It is also important to clarify how companies should relate to the list of standards outlined in the Annex, as most of these standards are government-to-government standards, rather than company standards, and hence unfit for direct application.

Our recommendations are the following:

Page	Article No.	Subject	Proposed amendment	Justification
51	Article 3 (f) - definitions	Established business relationship	‘established business relationship’ means a business relationship, whether direct or indirect , which is, or which is reasonably expected to be lasting, in	JBCE would like to underlined that beyond tier 1, most companies loose

			<p>view of its intensity or duration, and which does not represent a negligible or merely ancillary part of the value chain and which includes a contractual agreement among any of the business parties involved in the supply chain, and can be controlled from the perspective of the company in the scope.</p>	<p>elements of control of business relationships.</p> <p>For example, in the case of secondary materials/recycled content, it is very difficult to trace the origins of the original material.</p> <p>In the case of monopolistic upstream suppliers, a downstream company may not have control over the relationships with those upstream suppliers (and therefore their actions), as they might hold more market power.</p>
52	Article 3 (n) - definitions	Stakeholders	<p>'affected stakeholders' means the company's employees, the employees of its subsidiaries, and other individuals, groups, communities or entities whose rights or interests are or could be affected by the products, services and operations of that company, its subsidiaries and its established business relationships</p>	<p>JBCE believes that better aligning the definition with international standards will lead to more meaningful implementation.</p>
53	Article 3 (q) - definitions	Appropriate measures	<p>'appropriate measure' means a measure that is capable of achieving the objectives of risk based due diligence, commensurate with the degree of severity and the likelihood of the adverse impact, and reasonably available to the company, taking into account the circumstances of the specific case including characteristics of the economic sector and of the specific business relationship and the company's influence thereof, and the need to ensure prioritisation of action.</p>	<p>JBCE suggests to add the notion of a risk based approach, in order to better align the definition with existing international standards, and hence make it more enforceable.</p>

2) Legal certainty must be guaranteed by proportionality, clarity and preciseness of civil liability provisions

In addition to the importance of providing more clear definitions in order to establish the scope of the Directive, JBCE asks for **more precise provisions when it comes to civil liability**. JBCE suggests to more clearly divide liability and responsibility. The level of responsibility should be in line with the UNGPs and the OECD MNE Guidelines, allowing for a risk-based

approach, where liability should only be applied to a limited scope of a more clearly defined ‘established business relationship’ (see above). Liability should be clearly based on whether the harmful impacts are directly caused by the activities of the company (i.e., their explicit failure to comply with due diligence obligations).

Value chain overview is especially tricky when it comes to the downstream obligations. For many companies, it is not possible to follow nor control transactions beyond the first level of the value chain (be it a client or a supplier). JBCE would like to see that **the ‘appropriate measures’ must be based on a risk-based approach**, hence make the EU Directive more aligned with existing international frameworks. Additionally, JBCE would like to see the content of recital 15 reflected in the legal text, to ensure that the specificities of a company’s value chain is taken into account.

The proposal sets out significant powers for the **national supervisory authorities**. The provisions on sanctions leaves unclarity regarding the measures to be implemented in the different Member States, which again leads to legal uncertainty for the companies in the scope. Affected stakeholders should have the right to file substantiated complaints, but the Directive should avoid the possibility of parallel litigation processes, related to the same complaint, in different Member States.

Our recommendations are the following:

Page	Article No.	Subject	Proposed amendment	Justification
62	Article 18 paragraphs 1, 2 and 3	Powers of supervisory authorities	(1) Member States shall ensure that the supervisory authorities have adequate powers and resources to carry out the tasks assigned to them under this Directive, including the power to request information and carry out investigations related to compliance with the obligations set out in this Directive. (2) A supervisory authority may initiate an investigation on its own motion or as a result of substantiated concerns communicated to it pursuant to Article 19, where it considers that it has sufficient information indicating a possible breach by a company of the obligations provided for in the national provisions adopted pursuant to this Directive. (3) Inspections shall be conducted in compliance with the national law of the Member State in which the inspection is carried out and with prior warning to the company, except where prior notification hinders the	JBCE believes that there must be a greater level of insight and transparency for affected companies when it comes to the exercise of the powers of the national supervisory authorities.

			effectiveness of the inspection. Where, as part of its investigation, a supervisory authority wishes to carry out an inspection on the territory of a Member State other than its own, it shall seek assistance from the supervisory authority in that Member State pursuant to Article 21(2). <i>The supervisory authorities should disclose the criteria that triggers an investigation. The results of the investigation and the evidence triggering the investigation should be communicated transparently to the affected parties.</i>	
63	Article 20 paragraph 3	Sanctions	When pecuniary sanctions are imposed, they shall be based on the company's turnover <i>in the respective Member State.</i>	It is not proportionate that sanctions might be based on worldwide turnover as the economical scales of each members states are different. Therefore, JBCE suggests to set the sanction by taking into account each member state' situation.
65	Article 22 paragraph2	Civil liability	Notwithstanding paragraph 1, Member States shall ensure that where a company has taken the actions referred to in Article 7(2), point (b) and Article 7(4), or Article 8(3), point (c), and Article 8(5), it shall not be liable for damages caused by an adverse impact arising as a result of the activities of an indirect partner with whom it has an established business relationship, unless it was unreasonable, in the circumstances of the case, to expect that the action actually taken, including as regards verifying compliance, would be adequate to prevent, mitigate, bring to an	JBCE underlines the importance of making making the civil liability provisions in line with international standards by introducing the concepts clarified in the OECD MNE guidelines (2.11 and 2.12).

			<p>end or minimise the extent of the adverse impact.</p> <p>Additionally, account should be taken of the specificities of the company's value chain, sector or geographical area in which its value chain partners operate, the company's power to influence its direct and indirect business relationships, and whether the company could increase its power of influence.</p>	
66	Article 24	Public support	<p>Member States shall ensure that companies applying for public support can confirm certify that no severe sanctions have been imposed on them for a failure to comply with the obligations of this Directive.</p>	<p>JBCE believes that measures should be proportionate to the severity of the sanctions. Further, we suggest a self-confirmation exercise rather than a certification procedure, as the latter applies additional burden on companies.</p>

3) Ensure meaningful due diligence processes

JBCE believes that a company's due diligence policy should be part of a comprehensive and long-term corporate strategy. We support the provision to evaluate such policy on an annual basis. But the provision to also update the due diligence policy annually could result in less meaningful implementation of the obligations, as corporate policies are designed for the long term. Hence, JBCE believes that **updating the due diligence policy should depend on the result of the annual policy assessment**. This is a more realistic approach, and will lead to more comprehensive due diligence policies.

JBCE proposes to **delete Article 15** ('Combating climate change'), as the obligation to adopt a climate plan is out of place in the context of the overall objectives of the proposal. To ensure meaningful implementation, the Directive should not diverge from its original focus on due diligence when it comes to environmental and human rights adverse impacts.

The draft proposal leaves **too much unclarity for non-EU companies, especially with regards to how they should comply with the due diligence obligations for their subsidiaries and joint ventures**. JBCE would like to see clearer commitments as to when – and on which topics – the Commission will provide further guidance. JBCE appreciates that the proposed directive will respect industry schemes and multi-stakeholder initiatives and, in order to facilitate those schemes more effectively, JBCE asks for better guidance and clarification on how Member States should encourage such initiatives. When guidelines are developed with regards to due diligence obligations and industry schemes, relevant international bodies should be consulted. We urge the Commission to put forward such guidelines as soon as possible.

Our recommendations are the following:

Page	Article No.	Subject	Proposed amendment	Justification
54	Article 5 paragraph 2	Annual update of companies' due diligence policy	Member States shall ensure that the companies evaluate update their due diligence policy annually, and update it if necessary to respond to findings during the evaluation.	JBCE believes that the due diligence policy should be updated when necessary, following an annual evaluation. This approach is more feasible and realistic for companies, and will lead to more comprehensive and meaningful implementation in the context of the broader long-term corporate strategy
60	Article 15 paragraph 1-3	Combatting climate change	JBCE proposes to delete entire Article 15	JBCE believes that Article 15 is out of place in this Directive, and hence suggests to delete it to ensure focus on the due diligence obligations.

JBCE urges the European Commission and co-legislators to take into account the views of companies operating globally with headquarters outside of the EU, underlining the need for more guidance and information on how to implement the provisions set out in the proposed Directive. Due diligence must remain a risk management tool that enables a 'culture of no harm'. The European Commission must play a role in guiding companies to proactively practice due diligence and provide companies with reliable information on value chains which can be utilised when conducting due diligence.

To ensure meaningful fulfillment of obligations, the Directive must be aligned with international frameworks in addition to other relevant EU legislations, such as the Regulation on deforestation-free products and the Corporate Sustainability Reporting Directive.

JBCE remains available for further input and invites the co-legislators to stay in touch as the legislative process advances.

About JBCE

Founded in 1999, the Japan Business Council in Europe (JBCE) is a leading European organization representing the interests of about 90 multinational companies of Japanese parentage active in Europe. Our members operate across a wide range of sectors, including information and communication technology, electronics, chemicals, automotive, machinery, wholesale trade, precision instruments, pharmaceutical, textiles and glass products.

For more information: <https://www.jbce.org> / E-mail: info@jbce.org

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