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On 23 February 2022, the European Commission issued the long-awaited proposal Directive on corporate sustainability due diligence (the “Draft Directive”).

The Draft Directive will impose on the largest companies and companies in high-impact sectors a due diligence duty for their own operations, their subsidiaries, as well as their established direct and indirect business relationships throughout their value chains. These value chains include all the activities related to the production of goods or the provision of services by the company.

It means that all actors supporting or related to the company’s activities (manufacturers, investors, retailers...) could be potentially covered at some point.

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## GOAL OF THE DIRECTIVE

The Draft Directive aims to support the transition to sustainability, particularly focusing on increasing commitment to the environment and climate neutrality as well as respect for human rights and diversity. It is in line with the European Green Deal and the UN Sustainable Development Goals.

It will trigger important changes for all companies as they will be either directly covered by the Draft Directive or affected by it through the value chain of those companies.

Almost one year earlier, on 2 April 2021, the Belgian Chamber of Representatives voted in favour of taking into consideration the legislative proposal implementing a mandatory value chain due diligence for all Belgian companies and the set-up of a ‘plan of care’ by large companies and high-impact SMEs. However, this draft seems on hold, probably, among other reasons, to align with the European initiative.

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## WHO IS CONCERNED?

The Draft Directive applies to:

- European companies with more than 500 employees and a turnover of more than EUR 150 million;
- European companies active in “high-impact sectors” (such as textile, wood, agriculture, fisheries or mineral resources sectors) with more than 250 employees and a turnover of more than EUR 40 million;

# WHAT IS IN THE PROPOSAL DIRECTIVE ON CORPORATE SUSTAINABILITY DUE DILIGENCE?



- Non-European companies with a turnover of more than EUR 150 million in the European Union; and

Non-European companies active in “high-impact sectors” with a turnover of more than EUR 40 million, if at least 50% of its net worldwide turnover is generated in one or more of these high-impact sectors.

The Draft Directive explicitly excludes SMEs from its scope of application, but those could nevertheless be impacted if they are linked to the activities of the companies mentioned above.

It presently concerns directly around 1% of Belgian companies. However, the Belgian law which will implement the Draft Directive could extend such scope of application

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## WHAT ARE THE MAIN OBLIGATIONS?

The main obligations are the following:

- Companies shall have a due diligence policy containing the company’s approach to due diligence, a code of conduct including rules to be followed by employees and subsidiaries and a description of the process implementing due diligence.
- Companies shall take appropriate measures to identify actual and potential adverse human rights impacts and adverse environmental impacts arising from their own operations or value chain.
- Companies shall take appropriate measures to prevent or, if not possible, at least adequately mitigate the identified potential adverse human rights impacts and adverse environmental impacts. Companies shall take appropriate measures to bring the identified actual adverse impacts to an end or, if not possible, at least minimise their extent.
- Companies shall provide the possibility for specific persons and organisations to submit complaints on legitimate concerns regarding actual or potential adverse human rights impacts and adverse environmental impacts for their own operations or value chain. Complaints may be submitted by (i) persons who are affected or have reasonable grounds to believe that they might be affected by an adverse impact, (ii) trade unions and other workers’ representatives representing individuals working in the value chain concerned and (iii) civil society organisations active in the areas related to the value chain concerned.
- Companies shall carry out periodic assessments of their own operations and value chain to monitor the effectiveness of how they tackle human rights and adverse environmental impacts. This obligation will most likely further encourage the practice of non-financial auditing.
- Companies shall publish on their website an annual statement on their due diligence policy (whose exact content should be defined through a subsequent implementing act).



This communication requirement does not apply to companies that will be subject to reporting obligations under the proposed [Corporate Sustainability Reporting Directive](#) (the “CSRD”) which will revise the [Non-financial Directive 2014/95/EU](#) (the “NFRD”) that sets an obligation to publish a ‘non-financial statement’ for listed companies and other regulated companies (art. 3:6, §4 BCCA). The CSRD introduces standards for sustainability reporting on themes such as climate, gender equality, human rights and work environment for all large companies (listed or not) and SMEs listed on EU regulated markets. Belgium must implement it by 1 January 2023.

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## WHAT ABOUT THE DIRECTORS’ DUTY OF CARE?

Directors within the meaning of the proposed Directive include members of the board of directors and members of the executive management.

‘Board of directors’ means the administrative or supervisory body responsible for supervising the company’s executive management or, if such a body does not exist, the person or persons performing equivalent functions.

The directors of the covered companies will have to establish a business plan to ensure that the company’s strategy is in line with the 1.5° limit on global warming as set out in the Paris Agreement. This will notably have to be taken into account in the directors’ remuneration.

When fulfilling their duty to act in the company’s best interest, the directors of the covered companies shall take into account the consequences of their decisions for relevant sustainability matters. These sustainability matters include human rights, climate change, and environmental consequences in the short, medium and long term..

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## WHAT ARE THE SANCTIONS?

Member States will provide for the relevant sanctions applicable to infringements of the provisions transposing the Draft Directive. As usual, the sanctions should be effective, proportionate and dissuasive. However, the European Commission specifies that when pecuniary sanctions are imposed, they shall be based on the company’s turnover.

The Draft Directive also provides that Member States shall ensure that companies are liable for damages if they fail to prevent potential adverse impacts and to end actual adverse impacts.

Companies will be able to mitigate liability risks under certain circumstances if they can demonstrate that they have taken the necessary steps and actions to mitigate the identified potential risks and minimise the extent of the identified actual risks.

A company’s liability for damages will be without prejudice to the liability of its subsidiaries or any direct and indirect business partners in the value chain.



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## WHEN WILL IT COME INTO FORCE?

The Draft Directive could be adopted by the end of 2022.

The current text foresees a transposition period of two years and a period of entry into force of the obligations of two or five years.

Given the contemplated timeframe, the Draft Directive's provisions may only become effective in 2028. However, it is essential that companies already become aware of those new important sustainability challenges and obligations and take relevant actions.

**For any questions or assistance please contact the authors.**

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