

20 May 2022

CORPORATE SUSTAINABILITY DUE DILIGENCE DIRECTIVE - FORTUM COMMENTS

Key messages of Fortum, one of the leading energy companies in Europe:

- Fortum welcomes the EU initiative and the aim to create a level playing field for companies and avoid a fragmentation of due diligence obligations
- Legal certainty for companies and reasonable administrative burden must be ensured
- Clear definitions and obligations are needed
- Regarding the obligations, a clear distinction between direct and indirect business partners must be made
- Preferable to talk about the supply chain instead of the value chain
- SMEs should be included in the scope of the directive
- Civil liability rules should be avoided
- Supervision of due diligence obligations by Member State authorities and coordination at EU level is welcomed
- Further criteria for the complaints procedure is needed
- Directors' duties provisions are unclear and inappropriate

Fortum welcomes the EU initiative and the aim to create a level playing field for companies and avoid a fragmentation of due diligence obligations. EU level due diligence obligations should be prioritized over national due diligence initiatives. A level playing field is needed also on a global level, therefore Fortum strongly supports the proposal to include third-country companies operating in the Union market in the scope. It's important that adverse human rights and environmental impacts in the supply chains of companies are addressed and mitigated. However, much work needs to be done to get a directive that works in practice. Coherence with other legislation, such as the EU Taxonomy and sustainability reporting is also essential.

Legal certainty for companies and reasonable administrative burden must be ensured. These aspects should be cross-cutting principles when assessing the different provisions of the directive. The obligations should be well-defined, manageable and controllable. Due diligence should be risk-based and proportionate. The proposal shows how challenging it is to turn the content of voluntary sustainability standards into workable legal obligations. The legislation needs to be much more unambiguous than the international standards (OECD guidelines, UNGPs) and clearly set out the obligations imposed on companies.

Clear definitions and obligations are needed. For the obligations to be clear and the directive to be successful, there is a need to clarify many of the definitions in the proposal. For example, the concept of "established business relationships" including both direct and indirect partners, is too broad and not clear. The vague definition of stakeholders, the definition of companies and the role of subsidiaries also need clarification. The obligations should be set at group level. It should also be avoided that a group with subsidiaries operating in more than one Member State have to follow the decision of different supervisory authorities. Furthermore, the definitions

20 May 2022

on adverse environmental and human rights impacts are not clear and leave much room for different interpretations. Referring to international conventions listed in the Annex, which have not been drawn up for companies and not always ratified by different countries, is challenging. Also the obligation of article 15 to adopt a plan to ensure that the business model and strategy of the company are in line with the Paris Agreement raises questions on how this will be assessed.

Regarding the obligations, a clear distinction between direct and indirect business partners must be made. The responsibility for taking action on severe consequences for human rights and the environment must lie with the party that caused the consequences. Broader, but controllable requirements can be set for direct suppliers, but for indirect suppliers, only a limited requirement for conducting due diligence is possible. It would also be more appropriate and **preferable to talk about the supply chain instead of the value chain**. The proposed concept of contractual assurance is in principle welcomed for tier 1 suppliers, but “contractual cascading” would be challenging for companies to ensure in practice. Fortum supports the proposal that for the purposes of verifying compliance, the company may refer to suitable industry initiatives or independent third-party verification.

SMEs should be included in the scope of the directive. An exclusion of SMEs, but “transferring the responsibilities” of SMEs in the supply chain to large companies is not acceptable. The obligations for SMEs can be less strict, but an exclusion of SMEs from the scope would undermine the legal certainty of larger companies. The impacts of excluding SMEs from the scope could also be negative for the SMEs, if larger companies covered by the legislation, which have to ensure their legal compliance, were to enter into agreements only with companies covered by the legislation.

Civil liability rules should be avoided. An introduction of extensive civil liability rules would create enormous legal uncertainty for companies with complex supply chains. Fortum doesn’t see civil liability as feasible, especially when it goes beyond the direct influence of the company. The enforcement mechanism should rely only on sanctions and administrative enforcement. Sanctions should be limited to where the company is causing the potential adverse impacts. Possible pecuniary sanctions should be based on other criteria than a company’s turnover. If civil liability would still be included in the directive, the burden of proof must lie with the one seeking justice.

Supervision of due diligence obligations by Member State authorities and coordination at EU level is welcomed. Fortum supports setting up a European Network of Supervisory Authorities in order to avoid inconsistencies in decisions. Since the proposal leaves a great deal of room for interpretation and also a great deal of responsibility for the Member States, to avoid a patchwork of national interpretations, coordination is needed, even if the provisions are clarified. It is also essential that guidelines and accompanying measures are available for companies.

Further criteria for the complaints procedure is needed. Fortum supports in general the possibility to submit substantiated concerns or complaints, but it remains unclear how a company would be able to respond to such an extensive complaints

20 May 2022

procedure. More specific criteria should be added to the complaints procedure article. Overlaps with the Whistleblowers Directive must also be avoided.

Directors' duties provisions are unclear and inappropriate. The functionality of the proposed provisions remains very unclear and their relationship to existing company law and the duty of care included therein raises questions. Fortum doesn't see added value in including directors' duties in the CSDD directive.