# FIEC / EIC Position on

# Proposed EU Directive on Corporate Sustainability Due Diligence

COM(2022) 71 final

(08 July 2022)

**FIEC and EIC call upon the EU legislator to make compliance with the proposed Directive a precondition for participation in EU-financed tenders and to limit corporate responsibility to companies' own operations and direct business partners**

Through its 32 national member federations in 27 European countries (24 EU & Norway, Switzerland, Ukraine), FIEC represents construction enterprises of all sizes (from one person craftsmen and SMEs through to large international firms), from all building and civil engineering specialties, engaged in all kinds of working methods.

EIC has as its members construction industry trade associations from fifteen European countries and represents the interests of the European construction industry in all questions related to its international construction activities. The total volume of international turnover carried out by European international contractors linked with EIC Member Federations amounted to around US$ 230 billion (ENR Statistics).

## Policy background

The European Commission has adopted on 23 February 2022 a proposal for a Directive on corporate sustainability due diligence which aims at fostering sustainable and responsible corporate behaviour and anchoring human rights and environmental considerations in companies' operations and corporate governance. The new rules shall ensure that businesses address adverse impacts of their actions, including in their value chains inside and outside Europe. The purpose is also to harmonise the legal frameworks on corporate due diligence emerging in Member States, which bring fragmentation and risk undermining legal certainty and a level playing field for companies in the single market.

EIC has signalled already in its submission to the corresponding EU Consultation in February 2021 that European contractors are in favour of a European legal framework for supply chain due diligence to address adverse impacts on human rights and environmental issues if and to the extent that it is confined to promoting an effective and uniform EU-wide application of the UN Guiding Principles on Business and Human Rights (UNGP) and the OECD Guidelines for Multinational Enterprises (MNE). Conversely, FIEC and EIC hold that excessive regulation will only lead to additional cost burden for European businesses at a time where they are still sensing the repercussions of a unique pandemic and are confronted with the impact of a war in Europe on their supply chains.


| | |
|---|---|
| **EIC, European International Contractors e.V.**<br>*EU Transparency Register No. 60857724758-68*<br>Kurfürstenstrasse 129, D-10785 Berlin, Germany<br>Tel +49 (30)-2 12 86-244, Fax +49 (30)-2 12 86-285<br>info@eic-federation.de<br>**Contact: Frank Kehlenbach, Director,**<br>Frank.Kehlenbach@bauindustrie.de | **FIEC, European Construction Industry Federation aisbl**<br>*EU Transparency Register No. 92221016212-42*<br>Avenue des Arts 20, BE-1000 Brussels<br>Tel +32 2 514 55 35<br>info@fiec.eu, www.fiec.eu<br>**Contact: Domenico Campogrande, Director General,**<br>d.campogrande@fiec.eu |

EUROPEAN CONSTRUCTION INDUSTRY FEDERATION

EUROPEAN INTERNATIONAL CONTRACTORS

## General Observations

**Responsible Business Conduct towards employees, business partners, society and the environment are today an integral part of the value system of the European construction industry.** European international contractors in particular carry out due diligence based on the OECD Guidelines for Multinational Enterprises (MNE) and UN Guiding Principles on Business and Human Rights, as well as relevant standards, and report on their actions towards sustainability according to internationally recognised frameworks and applicable law. Against this background, **FIEC and EIC agree** that there is a **need for an EU harmonised legislation** on sustainability due diligence in order to avoid a multiplication of differing national rulesets, which would be impractical for companies having cross-border footprint and operations.

Regrettably, the present proposal leaves a lot of room for Member States to provide for additional requirements and liabilities, which creates **a risk of legal fragmentation, 'gold-plating' and 'forum shopping' despite of the Directive**. Whilst FIEC and EIC acknowledge that the purported legal basis for the intended legislation, Article 50 TFEU [Right of Establishment], empowers the EU legislator to act by means of a Directive only, Article 114 TFEU [Approximation of Laws], which is also invoked as a legal basis by the EU Commission, would provide for the authority to issue a **Regulation to create a level playing field**. We take the view that **Article 114 TFEU** presents a legitimate basis for legal action and a **Regulation would be preferable as it is immediately applicable in its entirety in all Member States, and it overrules national laws**.

Whereas the proposed Directive or Regulation is intended to apply to EU and non-EU companies from all economic sectors, a careful reading of the proposal has led us to the conclusion that its **concepts and wording are modelled on the business model of the manufacturing sector** where companies have established persistence and permanence in their supply chains. Conversely, **the operations of the construction industry** are to a large extent project-based with constantly changing work locations, clients, suppliers, subcontractors and other involved third parties. Therefore, FIEC and EIC observe that certain concepts and certain wording of the proposed Directive or Regulation are **incongruent with the construction business model** and that there is a need for more legal clarity, alternatives, or at least definite orientations about **how to adapt the proposed sustainability due diligence approach to project-based activities**.

Hence, we disapprove that the Commission has chosen to create entirely new legal concepts and wording instead of **relying on the well-established concepts and methodology of the OECD MNE Guidelines and the UN Guiding Principles on Business and Human Rights**. Those frameworks resulted from a long and inclusive process, in which all main stakeholders were involved. Building up on their fundamental concepts would allow companies to put their efforts on the improvement of their current sustainability practices. Moreover, the due diligence approach promoted by the proposal, due to its extra-territorial character, will only be successful and manageable if companies in the rest of the world adhere to it. This adhesion would be much easier if the EU based its due diligence requirements on concepts that are well known and accepted beyond its borders. The OECD MNE Guidelines stipulates responsibilities and course of action that are clear, tested, and workable by companies. European contractors strongly encourage the co-legislators to **re-frame the present proposal in the light of these principles**, thereby alleviating many of the shortcomings underlined in this paper and ensuring consistency with other initiatives and the processes put in place by the EIB and other financial institutions, including the export credit agencies.

**By extending the scope of the legal obligations to the whole value chain, and expanding disproportionately civil liability, the proposal sets up a system based on unrealistic expectations on contracting companies specifically, harming their competitiveness and imposing disproportional administrative burdens.** In line with the most ambitious national laws in the EU, **due diligence obligations should not be extended to downstream activities** such as customers and should remain primarily **focused on first-tier direct suppliers**. European contractors operate in a global and extremely competitive playing field, with many different customers often being public entities, governments or State-owned companies operating on behalf of a State.

Having even the slightest leverage over this type of customer is extremely difficult if not impossible, especially in countries that are not signatory to international standards and have local requirements or contractual obligations contractors need to abide to. Being project-driven organisations, meaning having many activities globally within a limited timeframe and local presence, increases the complexity for contractors to comply to an unrealistic level. With a system based on the leverage that may be expected depending on the nature of the relationship and linkage to the potential adverse impact, the OECD MNE Guidelines provide a far more workable and fairer framework than the current proposal.

Whereas FIEC and EIC share many of the concerns expressed by European cross-sectoral business organisations, this Position Paper is meant to **focus on construction-specific issues**, in particular those directly affecting the competitiveness of European contractors towards their international competitors, among which large state-owned enterprises, from non-OECD countries.

FIEC and EIC wish to emphasise that the **provisions relative to climate and directors' duties (Article 15, 25 and 26) are not related to due diligence** but rather concern corporate governance questions which should be dealt with in other existing or proposed dedicated pieces of legislation. **FIEC and EIC recommend that Article 15, 25 and 26 be deleted.** The 'duty of care' of directors has not been harmonised at EU level and Member States have different legal frameworks. The provisions of Article 25 will **deeply interfere with existing company law with possible undesirable consequences**. Moreover, Articles 25 and 26 do not distinguish duties of executive directors (the management) and non-executive directors (members of the administrative / surveillance board).

## Specific Comments and Recommendations

FIEC and EIC call upon the EU Institutions to draft a harmonised European ruleset for a corporate sustainability due diligence approach that is manageable by contractors, risk-based, focused, efficient, and fair, and ensures a level playing field. This initiative should focus on enabling EU business actors and propagating EU legitimate concerns for human right and the protection of the environment in the rest of the world, rather than creating **excessively broad obligations and liabilities for EU companies**.

To that end, we would point to the following elements:

## Value chain / Definition of 'established business relationship' (Articles 1 and 3)

- **The due diligence requirements should be limited to direct ('tier 1') subcontractors and suppliers in the supply chain**, as for instance in the German 'Act on Corporate Due Diligence in Supply Chains'.[1] The construction sector is characterised by a multitude of intervening subcontractors and suppliers, whose composition and combination changes with each project. Contractors can only control their direct suppliers and subcontractors in a meaningful way. Nor do they have much leverage downstream on their clients, even less when it goes over public authorities, which make a sizeable part of the client base of the construction industry.

- **The definition of 'established business relationship' at Article 3 (f) is central in determining the extent of the due diligence process.** It is subject to interpretation and difficult to apply operationally, in particular to project-based activities. **The 'intensity' criterion**, together with the last part of the definition (i.e. *'which does not represent a negligible or merely ancillary part of the value chain'*), could be **clarified by setting a nominal threshold** to be considered. Such threshold could take the form of a **percentage of the contract/investment value** (or essential character of the supply).
- **The current risk-based approach underpinning OECD MNE Guidelines and UNGP ought to be preserved**, to effectively tackle serious negative effects and not drown companies in sterile bureaucracy. In this respect, it should be established that business relationships located **in countries where the protection of the environment and human rights are sufficiently guaranteed by law and effectively enforced**, as in the EU for instance, can benefit from a **presumption of null or minimal risk**.

## Personal scope (Article 2)

- **The scope criterion for non-EU companies, considering only their turnover within the EU, at the level of the company, may allow them to escape due diligence obligations in the EU.** The third-country company won't be considered until the second year after they have directly generated a net turnover of more than €150 million in the EU. If it operates in the EU Internal Market with one or more **EU subsidiaries** (special purpose companies for instance), they **will not fall under the scope of the Directive or Regulation**, if each subsidiary does not reach more than 500 employees and a net turnover of more than EUR 150 million. Therefore, in order to establish a genuine level playing field, the **criteria for non-EU companies should be assessed at the group level (parent company plus controlled subsidiaries).**
- **Threshold calculations for EU and non-EU companies should be aligned**. The turnover threshold for non-EU companies is considered at EU-level only, whereas it is considered worldwide for EU companies. It entails that smaller EU companies will be subject to sustainability due diligence obligations. This asymmetry of treatment is not justified. The thresholds set for EU companies are clearly meant as a proxy for the size of the company. To claim jurisdiction over third-country companies, the EU needs to establish a substantial link. Considering a minimal level of activity in the EU is a way to do it, but it

[1] 'Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten' dated 16 July 2021

does not justify the asymmetry regarding the size of the companies. **Companies of comparable size having a substantial activity within the EU should be subject to the same obligations.**

- **European contractors question the admissibility to include independent subsidiaries of EU companies in third countries, whose activities have no material link with the EU Internal Market, except for the nationality of shareholders, in the scope and subject them to the full set of requirements.** Such subsidiaries, which are considered as local enterprises in the third country where they operate, would face considerable difficulties finding suppliers and/or subcontractors willing to comply with the required due diligence process.
- The low thresholds and cascading effects of the due diligence and liability scheme are likely to put a disproportionately **heavy administrative burden on the numerous SMEs active in the construction industry**. The employment threshold in this Directive or Regulation should be aligned on those stipulated by existing national legislations on the same subject-matter. Again the German 'Act on Corporate Due Diligence in Supply Chains' is a good reference, providing for **a threshold of 1,000 workers from 2024 onwards**.

## Public Procurement

- Given that **Article 2**, as currently drafted, **does not provide for a level playing field** between European construction companies and third-country contractors, respectively their EU subsidiaries, and bearing in mind the obligation of Member States and the EU to prevent human rights and environmental adverse impacts, **the Directive or Regulation should require from all companies bidding in the EU Internal Market for public tenders, whether from the EU or from third countries, to comply with the sustainability due diligence obligations laid out in the proposal**. Such compliance must be mandatory for each **tender, inside or outside the EU, that is financed or co-financed with EU taxpayers' money, whether under direct, shared, or indirect management**.

## Civil liability (Article 22)

- **The proposed regime of civil liability raises fundamental concerns about proportionality, legal certainty, and interference with international private law**. Creating a civil liability of companies for the negligence or misconduct of independent third parties disregard the limits of companies' legal and practical means to exercise control over others.
- **The practicability of the waiver provided for in Article 22 (2) for the activities of indirect partners is doubtful**, considering that, such exculpation would fail when *'it was unreasonable, in the circumstances of the case, to expect that the action actually taken, including as regards verifying compliance, would be adequate'*. In other terms, appropriate diligence measures related to indirect relationships could still lead to civil liability if not assorted by piecemeal adequacy verification for each indirect business relation. As it is formulated, **this exception to the exception** will most probably be the source of complex and excessive litigations and **should be deleted**.

- The proposed civil liability, with its problematic aspects, will **influence the risk appetite of insurance companies** as contractors are seeking insurance cover for potential civil liability, either through each company's general civil liability insurance or by a project (objective) insurance. The insurability of the due diligence civil liability is a necessary condition for the system to be manageable by companies and must be ascertained.
- Due to the potentially large and unpredictable character of the proposed civil liability, there is a risk that participating to construction projects overseas in some circumstances will **become too risky for European contractors, or even impossible to finance**. This would not improve the prevention of adverse impacts but simply **leave an open field to competitors not subject to the same liabilities**.

## Substantiated concerns (Article 19)

- **The current wording of Article 19 needs further clarification** as its paragraph 1 basically allows any person to bring a case before a supervisory authority about all possible breaches of the proposed provisions of the Directive or Regulation. This creates a huge risk of forum shopping and frivolous complaints. By contrast, paragraph 5 seems to stipulate some reasonable limits in this context, as it includes the requirement of having a legitimate interest in the matter, however, this is related to the access to a court or other independent and impartial public body, not to the submission of the concern itself. **FIEC and EIC ask for the qualification of a 'legitimate concern' established in paragraph 5 to be inserted also in paragraph 1.**

## Standards and data, public support (Article 14)

- **Standards and certification are key factors for making the due diligence requirements efficiently manageable.** Being able to rely on standards (for the due diligence process) and recognised shared data sources and control systems provide various advantages, in terms of ease of implementation, reduction of the risk of non-compliance and economies of scale, etc. The Directive or Regulation should more **precisely provide for the recognition of industry and multi-stakeholder schemes**, beyond the mere possibility to issue guidance for assessing the fitness of such schemes, as provided in Art. 14 (4). For instance, standard 'risk assessment checklists' allowing to categorise subcontractors and suppliers involved in a project, standard ESG scorecards established by internal or external audits to assess specific key subcontractors or suppliers would be very useful to facilitate the implementation of efficient due diligence processes.
- Complying with risks management standards and using data or audits from recognised providers should lead to an **exemption from indirect civil liability** beyond the usual rules.
- **Sharing relevant information and risk analysis along the supply chain should be the rule to avoid *bis in idem* and redundant investigations**. Public authorities should also systematically contribute to the information of companies and the analysis of the risks. Article 4 (2) and 14 (1) are not enough.

- Accompanying measures and public support should not be limited to certain sizes of companies, as proposed in Art. 14 (2), but extend to **thematic approaches**, e.g. on condition of multipartite action.

## Model contract clauses (Article 12)

- Model contract clauses are an **avenue to be developed**. Passing on liability back-to-back from upstream is often difficult if not impossible, as subcontractors / suppliers might be reluctant to accept such far-due diligence clauses, in particular in countries where they are uncommon. The Directive or Regulation ought to be **more precise and stringent**. It should be provided that the Commission shall publish more than a general guidance, useable model contract clauses – such as a 'suspend or justify' clause in case of non-compliance by the supplier or subcontractor – within a short timespan after the adoption of the Directive or Regulation and prior to its implementation and entry into force for companies.

## Material scope (Article 2)

- The transition from guidelines to statutory requirements requires making the mandatory standard of conduct more explicit. **The materiality of the human rights to be respected by companies should be more precisely qualified**. The conventions listed in Annex, Part I are not formulated in a way that makes the role and obligations of companies sufficiently clear for practical and legal purposes.
- The idea expressed in Recital 17, that due diligence should cover impacts generated throughout the life cycle of production and use and disposal of product or provision of services, is hard to implement in a meaningful way in the construction industry where the works, structures and building have a very long lifespan.

*Berlin/Brussels, 08 July 2022*