



ROYAL NORWEGIAN MINISTRY
OF CHILDREN AND FAMILIES

Norwegian Position paper on the Commission Proposal for a Directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937

Introduction and assessment of the proposal's objectives

Norway is an integral part of the EU Internal Market through the European Economic Area (EEA)-agreement, whereby incorporation of relevant EU legislation into the Agreement ensures legal homogeneity throughout the EEA.

Norway has legislation in place concerning corporate responsibility, namely the *Act relating to enterprises' transparency and work on fundamental human rights and decent working conditions (the Transparency Act)*. The Transparency Act is based on the United Nations Guiding Principles on Business and Human Rights (UNGP) and the OECD Guidelines for Multinational Companies (OECD Guidelines). The Transparency Act is also part of the Norwegian government's measures to achieve the United Nations Sustainable Development Goals.

The Norwegian government welcomes the Commission's proposal for a Directive on Corporate Sustainability Due Diligence, and supports the overall objectives of the proposal which are to improve corporate governance practices, avoid fragmentation of due diligence requirements in the single market, increase corporate accountability for adverse human rights, labour rights and environmental impacts and improve access to remedies for those affected by adverse impacts of corporate behaviour. The Norwegian government supports that the initiative is based on internationally recognized principles and guidelines, namely the OECD Guidelines and the UNGP. The initiative will contribute to achieve the United Nations Sustainable Development Goals, and place Europe in a leading position when it comes to corporate responsibility.

Related national regulation

The Norwegian Transparency Act entered into force on 1 July 2022. The purpose of the act is to promote enterprises' respect for fundamental human rights and decent working conditions in connection with the production of goods and the provision of services, and to ensure the general public access to information regarding how enterprises address adverse impacts. The Norwegian Consumer Authority (Forbrukertilsynet) provides guidance to enterprises and monitors compliance with the act.

The act applies to larger enterprises and consists of a duty to:

- 1 Carry out due diligence concerning fundamental human rights and decent working conditions
- 2 Publish an account of the due diligence assessments
- 3 Reply to information requests

For the purposes of the Transparency Act, «larger enterprises» means enterprises that are covered by Section 1-5 of the Accounting Act, or that on the date of financial statements exceed the threshold for two of the following three conditions: 1) sales revenues: NOK 70 million, 2) balance sheet total: NOK 35 million, 3) average number of employees in the financial year: 50 full-time equivalent. Parent companies are considered larger enterprises if the conditions are met for the parent company and subsidiaries as a whole. The act also covers larger foreign enterprises that offer goods or services and are liable for tax in Norway.

The duty to carry out due diligence is based on the recommendations from the OECD Guidelines. It consists of six steps to be taken. These are based on the six steps of the OECD due diligence wheel. Due diligence assessments are to be carried out within the enterprise itself, subsidiaries, supply chains, and within business partners that are not part of the supply chain. The due diligence assessments must be carried out regularly and in proportion to the size of the enterprise, the nature of the enterprise, the context of its operations, and the severity and probability of adverse impacts on fundamental human rights and decent working conditions. The enterprises must publish an account, no later than 30 June of each year, and otherwise in case of significant changes to the enterprise's risk assessments.

The duty to reply to information requests entails that any person, such as consumers, journalists, investors, non-governmental organisations, trade and labour unions, public bodies, or other enterprises, can request information on how the enterprise, as part of their due diligence assessments, addresses actual and potential adverse impacts on fundamental human rights and decent working conditions. This includes general information and information linked to a specific product.

The Norwegian Environmental Information Act entered into force on 1 January 2004. The purpose of the act is to ensure public access to environmental information and thus make it easier for individuals to contribute to the protection of the environment, to protect themselves against injury to health and environmental damage, and to influence public and private decision-makers on environmental matters. The act obliges enterprises established in Norway to obtain information on their environmental impact and to provide such information to the public on request. These obligations apply equally to public authorities and private enterprises regardless of their size and fields of operation.

The Norwegian government would appreciate the opportunity to share with the EU further information and experiences regarding the Transparency Act and the Environmental Information Act.

General opinions summarised

The Norwegian government recognizes and supports the importance of the Directive being based on the OECDs Guidelines and the UNGP. These instruments are developed by leading experts on business and human rights, widely known and recognized by the international community, and incorporated by businesses across global markets. Accordingly, and as a contribution to achieving the Directive's purpose, the Norwegian government would first and foremost like to highlight the ***importance of adopting a due diligence regime aligned with the UNGP and the OECD Guidelines, and avoid creating a new regime parallel to these international standards***. This entails endeavouring in the final Directive ***for identical terminology, principles, criteria and delimitations*** as these international standards, and by ensuring that ***interpretations and practices*** developed from the national legislations implementing the Directive, are in line with the interpretations and practices stemming from the international standards.

The Norwegian government would – especially – like to stress the importance of explicitly including in the Directive, ***the principle of risk-based, proportionate, and ongoing due diligence assessments***. This translates to due diligence being carried out regularly and in relation to the companies' size, the nature of the business, the context within which the business takes place and the severity of and the likelihood of adverse impacts. These principles are at the core of the OECD Guidelines and the UNGP. In the Norwegian government's opinion, these core principles should also constitute a decisive factor in the assessment and drafting of the Directive's scopes, requirements, and further delimitations. In light of this approach and as a starting point for the Norwegian government's opinion, the Norwegian government would like to support and encourage the following amendments to the Directive:

- The Directive, and the due diligence provisions, should cover human- and labour rights, the environment, and climate.
- The Directive should, on equal terms, be applicable to all sectors and businesses. This should be done by eliminating the proposed sector-specific approach, and by imposing the same duties and sanctions on all sectors, including the financial sector.
- The Directive should cover a wider range of companies. This could be done by lowering the threshold for which companies are included within the two proposed tiers in Article 2(1), or by creating a third tier with a wider range of companies. The third tier could be linked to a softer enforcement regime with more prominent focus on guidance from national authorities. The personal scope could be aligned with the Corporate Sustainability Reporting Directive (CSRD).

- The Directive’s provisions should provide legal certainty, especially where strict sanctions are attached, to ensure predictability for companies.
- The Directive should include in the due diligence provisions a non-hierarchical toolbox with possible measures that companies must consider when identifying adverse impacts and assessing appropriate measures. Contractual assurances should only be listed as one of the possible measures.
- The Directive should not on the basis of companies’ contractual assurances limit the responsibility of the companies and national authority’s competence to enforce sanctions.
- The Directive should include an obligation for companies to reply to information requests from the general public. This will contribute to increasing companies’ transparency concerning adverse impacts of their activities on human rights, labour rights, the environment, and climate, and on how these impacts are addressed.
- The Directive should not explicitly list certain matters which board members in companies must take into account when assessing the interest of the company. The Directive should, however, highlight the importance of the involvement of the company’s board of directors and management in the due diligence procedures and policy, and their responsibility for the overall due diligence policy and the companies’ compliance with the requirements.
- The Directive’s scopes, requirements, and delimitations should be better aligned with existing and planned initiatives from the EU, such as the Corporate Sustainability Reporting Directive (CSRD), the Sustainable Finance Disclosure Regulation (SFDR) the EU taxonomy for sustainable activities and the proposed regulations regarding products associated with deforestation (2021/0366 (COD)) and forced labour (2022/0269 (COD)).

General opinions elaborated

The scope of the proposed Directive

The Norwegian government supports the Commission’s proposal of a ***broad material scope*** that includes human rights and environment. There is a close connection between the challenges related to human rights and environmental impacts. The OECD Guidelines include both. The Norwegian government notes that the Commission in the preamble para 70 plans to assess and report on whether the provisions on due diligence under this Directive should be extended to adverse climate impacts. This proposed distinction between climate and environment, when it comes to due diligence requirements, is unfortunate. The same distinction is not made in the OECD Guidelines. The Norwegian government’s opinion is that

the Annex Part II defining «*adverse environmental impact*» should include The United Nations Framework Convention on Climate Change (UNFCCC), the Kyoto Protocol and the Paris Agreement. The EU should also consider including the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), as well as other multilateral environmental agreements under the UNECE, in the Annex Part II.

The Norwegian government would also like to highlight the importance of *procedural environmental rights*. These contribute to identify, prevent and mitigate adverse environmental impacts, and are therefore an important part of the framework within which companies operate and the due diligence process itself. This is also reflected in the UNGP. Procedural environmental rights should therefore be included in Annex part II. Concerning the definition of «*adverse human rights impact*», the Norwegian government understands and supports that Annex Part I also covers labour rights. The Annex should also cover the two new ILO core conventions, namely C187 - Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187) and C155 - Occupational Safety and Health Convention, 1981 (No. 155). Also, the Norwegian government finds it unfortunate that the Annex does not include the ILO convention No. 169 on the rights of indigenous peoples or the UN Convention on Enforced Disappearance.

The Norwegian government supports the *horizontal approach* taken by the Commission by including *all sectors* within the scope of the Directive Article 2 (1) point (a). Adverse impacts on human rights and the environment can occur within any business sector. It is important that all companies are aware of the potential adverse impacts of their activities, and that they establish and integrate policies on how to identify, cease, prevent and mitigate these impacts. The Norwegian government therefore questions the reason for limiting the scope of companies covered by Article 2 (1) point (b) to certain specific sectors, and encourages the EU to consider including all sectors. If the EU concludes on maintaining a limited selection of sectors identified as high-risk sectors, the Norwegian government encourages the EU to include all sectors covered by OECD sectorial guidance. This would add the financial sector to the list of sectors mentioned in Article 2 (1) point (b).

The Norwegian government encourages the EU to consider a *broader personal scope*. The threshold for the Directive's application seems very high, and it is unclear what justifies these threshold values. A narrow scope will substantially limit the impact of the Directive. To ensure that a wider range of companies incorporate due diligence in their business culture, the Norwegian government suggests *introducing a third group of companies* in a new Article 2(1) point (c). This group of companies could be subject to a lighter enforcement regime, with increased focus on guidance from the national authorities and with administrative sanctions limited to cases where companies have not carried out due diligence assessments. In order to contribute to clarity across similar EU instruments, the scope of this Directive could be aligned with the Corporate Sustainability Reporting Directive (CSRD), for example by including all listed companies.

An explicit inclusion of the principles of a due diligence assessment being risk-based, proportionate and an ongoing process, would in the Norwegian government's view accommodate a horizontal approach and a broader personal scope. This is elaborated further below.

Due diligence - The OECD Guidelines and the risk-based approach

The proposed Directive includes an obligation for companies to carry out due diligence assessments. Due diligence assessments are a key tool for responsible business and industry. It is a dynamic process requiring companies to improve their efforts to identify and address adverse impacts. The Norwegian government therefore supports the inclusion of a due diligence obligation, and that the due diligence requirements in the Directive are based on widely recognized OECD Guidelines and the UNGP.

It is, however, in the Norwegian government's opinion, unfortunate that the proposed Directive does not explicitly include ***the principles of risk-based, proportionate, and ongoing due diligence assessment***. These principles are at the core of the methodology of due diligence assessments according to the UNGP and OECD Guidelines. Due diligence assessments must be carried out regularly and in proportion to the size of the enterprise, the nature of the enterprise, the context of its operations, and the severity and probability of adverse impacts. This is important *inter alia* because the biggest risks often lie far down the supply chain and often on raw material stage.

As the Directive will be applicable across most sectors and vastly different structures of value chains it is important that the task of identifying the risk of adverse impact, prioritizing, and applying more extensive due diligence in the risk areas of their operations, is placed on the companies themselves. The OECD risk-based model gives companies better opportunities to reduce the risk of negative impact on human rights and environment in the value chains.

The Norwegian government therefore encourages the EU to explicitly include a reference to the principles of due diligence assessments being risk-based and proportionate. This could be done in a new Article 4 (3). The Norwegian government suggests the following wording:

«Due diligence assessments must be carried out regularly and in relation and proportion to the companies' size, the nature of the business, the context within which the business takes place and the severity of and the likelihood of adverse impacts».

In addition to facilitate a horizontal approach and a broader personal scope, as elaborated above, the inclusion of the principles of risk-based, proportionate, and ongoing due diligence assessment, would also accommodate due diligence requirements that are more aligned with the OECD Guidelines. This is elaborated further below.

Due diligence - The OECD Guidelines and the proposed delimitations

The Norwegian government notes that the proposed Directive's due diligence requirements have been limited in ways that appears not to be in line with the OECD Guidelines, the UNGP, or with business practice that has emerged on the basis of these international

standards. The Norwegian government cannot see that these delimitations are well-founded and is apprehensive that this may partially undermine the purpose of the Directive. Instead of creating new delimitations of due diligence requirements, the Norwegian governments suggests that the principles of *the risk-based and proportionate approach* are explicitly included and highlighted as a principle that companies must apply when addressing adverse impacts that have been identified. This will assist companies in their assessments on where to focus and how to prioritise.

The Norwegian government would especially like to highlight that the proposed Directive introduces a new and unfamiliar concept when it restricts the scope of risk identification to entities with which the company has an «*established business relationship*», cf. Article 6 (1). The Norwegian government is concerned that this limitation of scope will result in companies ignoring adverse human rights and environmental impacts that are located in their value chains, but not linked to an «established» business relationship. Due diligence assessments should cover all business relationships throughout the value chain with a focus on negative risk and impact, regardless of where in the value chain the impact takes place. It should not be decisive whether the impact is linked to an established business relationship. The risk-based approach will help companies to assess where to focus their efforts. The Norwegian government is also concerned that certain companies might reorganise themselves to avoid the regulation, by prioritising short-term and ad hoc business partners, and that this development could have a negative impact on companies' long-term and continuous work with human rights and environmental impacts of their business activities. Frequent supplier changes make real insight and risk mapping difficult, while long-term supplier relationships significantly strengthen the possibility of cooperation on improving human rights and environmental conditions in the value chains. If the EU chooses to maintain this limitation of scope, it is necessary to provide further clarification on the term «established».

The Norwegian government also notes that Article 6 (2) states that companies included in the scope of the Directive by virtue of their sector, c.f. article 2(1) point (b), are only required to identify «*severe adverse impacts that are relevant to [their] respective sector*». As elaborated above, it should be avoided to limit due diligence assessments to some (high risk) sectors. It should also be avoided to limit these sectors to only identify «severe» adverse impacts whereas other companies have a broader responsibility. Human rights and environmental impacts can occur within any business sector, and the inclusion of the principle of risk-based due diligence will direct companies to those areas.

The Norwegian government also questions the reason why *financial undertakings'* obligations are limited compared to the other sectors covered by the Directive. Furthermore, the requirement of a «*violation*» in Article 3 point (b) and 3 point (c) is a significantly higher threshold than what is established in the UNGP and the OECD Guidelines, which do not require violations to occur, but refers to «*impacts*», which may or may not constitute violations.

The Norwegian government encourages the EU to ensure that this Directive's delimitations are aligned with the OECD Guidelines.

Due diligence - The OECD Guidelines and appropriate measures

The proposed Directive outlines the duties of human rights and environmental due diligence. Firstly, by including in Article 4 a version of the five-steps framework wheel of the OECD Guidelines, and secondly by including further details in Article 5 to 11 on how the due diligence steps should be carried out. The Norwegian government supports this approach and the Commissions' intention to give companies legal certainty, especially when considering the proposed provisions on sanctions and civil liability. This is highly important. The Norwegian government would, however, like to communicate its concern regarding that the proposed Directive in Article 4 to 11 appears to create a ***system of due diligence slightly divergent to the OECD Guidelines***.

Firstly, the Norwegian government encourages the EU to amend Article 4 to be more aligned with the OECD due diligence framework in both terminology and steps included. The Norwegian government supports the clarification in Article 26 of the role of the board of directors in putting in place and overseeing the due diligence actions referred to in Article 4 and Article 5. Alternatively, Article 4 should highlight the importance of integrating due diligence actions and policies into the overall strategy.

Secondly, the Norwegian government notes that Article 5 to 11 contain certain ***measures*** that companies shall implement within the specific steps of the due diligence process. The included measures seem partially to come from the OECD Guidelines. However, the Directive does not reference all appropriate measures highlighted in the international standards. The inclusion of certain selected measures in a legal text, will require companies to focus their efforts on these measures. This can create an unfortunate hierarchy of the appropriate measures to combat adverse impacts. The Norwegian government would especially like to highlight its concern regarding the dominant role that is given to ***contractual assurances***. The Norwegian government is concerned that the role afforded to contractual assurance can cause unintended and potential harmful effects in relation to the goal of the Directive: The risks of burden shifting by lead companies onto suppliers; the possibilities of superficial legal compliance measures substituting authentic risk management; and well-documented limitations of currently prevailing approaches to third-party compliance verification via 'social audit' or unrecognized ESG labelling schemes. Additionally, when contractual assurances are emphasized in connection with ***exception from liability*** in Article 22(2), one can assume that companies will prioritise this measure rather than measures based on their risk assessments. This perception is reinforced by the fact that Article 12 states that ***standard clauses*** will be drawn up, and that these can be used by the companies when entering into or revising contracts with suppliers. The Norwegian government would like to draw the attention to the OECD Guidelines principle on due diligence ***not shifting responsibilities*** and encourages the EU to make necessary amendments to ensure that

contracts and audits cannot be used to relieve companies of their obligation to cease, limit and mitigate the risk of negative impacts.

The Norwegian government encourages the EU to rather include in the Directive a non-hierarchical list of measures, a toolbox, that companies must consider in their due diligence assessments. Such list should be based on the recommendations of the UNGP and the OECD Guidelines, and used by companies in their concrete assessments of the adverse impacts they are addressing, and their given situation. The Norwegian government would like to highlight the importance of including collaboration, communication, and stakeholder engagement. On that note, the Norwegian government encourages the EU to clarify that the use of the term «*relevant stakeholders*» in Article 6(4) does not entail that the company is afforded a right to define what stakeholders are relevant in the given situation.

Thirdly, the Norwegian government would like to signal the possibility of unintended consequences regarding the *cancellation (termination) of contracts*, cf. Article 7(5) and Article 8(6). In the instances where contracting parties are not living up to their obligations on addressing adverse impacts on human rights and the environment, a withdrawal can easily become a preferred solution to avoid liability. There is also a risk that the right to withdraw is used as leverage in negotiations by larger companies, and that this contributes to shifting responsibility for the due diligence process from the companies and onto their suppliers or other business relationships. Termination of a business relationship should be the last resort where companies have exhausted all other efforts to remedy adverse impacts.

The importance of transparency

The Norwegian government would like to highlight the importance of companies' transparency concerning what adverse impact their activities have on human rights and the environment, and how they address these impacts. The proposed Directive does not include any *right for the general public to request information from companies* on their impact on human rights, labour rights and the environment.

In Norway, there are two acts in force that provide such rights: The Norwegian Transparency Act and the Environmental Information Act. Stakeholders such as public authorities, investors, journalists, trade and labour unions, non-governmental organisations, and businesses, can require access to information on how companies address adverse impacts on human- and labour rights and the environment and climate, in order to fulfil their respective roles. The rights to request information provides for transparency on how companies actively work to cease, prevent or mitigate adverse impacts, further the dynamic between stakeholders and enterprises, and subsequently, creating a more fruitful dialogue between various actors in society. It enables the public to encourage and influence companies to improve their policies.

The inclusion of a right to information from companies would, in the Norwegian government's opinion, contribute to the realisation of the Directive's objectives. It would be a useful supplement to the information companies are obligated to disclose, according to the

CSRD and the EU Taxonomy. The Norwegian government encourages the EU to include a right for the general public to request information from companies.

Combating climate change

The Norwegian government recognizes Article 15 as an important element in the proposed Directive. It is a useful tool for companies to ensure that their business models and strategies are compatible with the transition to a net zero-emission society. The requirements for emission reduction objectives could, however, be more specific. This is specified at an aggregate level in the CSRD, and will most likely be specified on a more granular level in the reporting standards. The Norwegian government suggests a direct reference to these specifications in the CSRD. Additionally, the Norwegian government encourages the EU to include climate impacts in the due diligence requirements.

Directors' duties

The Norwegian government recognises the importance of the involvement of the board of directors in the company's efforts to mitigate and reduce its negative impacts on human and labour rights, and the environment and climate. The Norwegian government therefore supports the clarification in Article 26 that the board of directors is responsible for putting in place and overseeing the due diligence actions referred to in Article 4 and the due diligence policy referred to in Article 5. In the Norwegian government's view, such processes and policies under the Directive will form an integral part of the management of the company.

However, the Norwegian government does not support the proposed Article 25. The article is stated to be a clarification of the existing requirements under the different national laws, and the Norwegian government therefore questions the need for such a provision. In addition, the extent of the requirement to «take into account» sustainability matters is unclear. It is unclear whether the article is a procedural obligation, or if it entails requirements on the result of the decisions of the board of directors. The proposed provision would therefore provide for substantial uncertainty for the directors of the companies, without necessarily leading to a more sustainable development. Finally, the Norwegian government notes that highlighting a specific matter to always be taken into account, could undermine the responsibility of the board of directors to consider the totality as part of their decision making.

Enforcement and collaboration

The Norwegian government supports the use of ***administrative enforcement and sanctions*** to uphold the goals established in the Directive, and the establishment of a European Network of Supervisory Authorities. The Norwegian government finds it, however, important to stress that human rights and environmental due diligence is a dynamic process requiring companies to continually improve their efforts to identify and address adverse impacts on human rights and the environment. Supervision and enforcement in the area of due diligence should therefore aim to ***guide, support and reinforce companies' commitment*** to pursue a better understanding and handling of issues arising in their value chains. This is especially important if the adopted Directive includes a broader personal scope, for instance with a third

tier of companies, as suggested above. The Norwegian government also encourages the EU to ensure an enforcement system that includes the valuable and recognised role, mandate, and competence and of the *National Contact Points for the OECD Guidelines*. This is also important in order to prevent the development of two parallel systems represented by respectively the OECD and the EU.