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BUSINESSEUROPE main messages on Due Diligence

Introduction

As the leading advocate for growth and competitiveness at European level, BUSINESSEUROPE is happy to contribute to this debate that will have an impact on the way companies' function and operate in their supply chains.

A large majority of EU companies, from all sectors and sizes, expect a potential future Due Diligence legal framework to be workable, proportionate and effective. It should not be a way to simply transfer state responsibilities on to companies as they are not able nor have the mandate to solve all the problems on their own. Without a good balance there is a risk that European companies simply disengage from markets and leave the field to global competitors.

The messages below are based on a more detailed BUSINESSEUROPE position as a [reply](#) to the recent Commission public consultation on sustainable corporate governance.

Conditions for a workable and balanced EU framework

The EU future legislative measure needs to meet the following fundamental considerations:

A realistic scope and legal certainty

- The focus should be on the area of direct impact, i.e., companies' own operations, and **tier 1** suppliers in the supply chain according to the severity of the risk, as mentioned in the OECD guidelines.
- The **level of detail** required should be **proportionate** to provide clarity for business and legal certainty, but without being prescriptive to a point that encourages an inflexible tick-box approach.
- Regulatory requirements also need to be **sufficiently clear** so that business can implement with confidence of compliance. In particular, it is essential that **key terms** are clearly defined, i.e. due diligence requirements, severe impacts and human rights covered (the definition of which should be in line with definitions in internationally recognised standards such as, UNGPs, Universal declaration of Human Rights, OECD guidelines and the 8 fundamental ILO conventions).

The needs of **Small and medium-sized companies (SMEs)**

- The EU measure needs to **take account of the needs of SMEs considering** several options, from exemptions to softer requirements.



- **Support for SMEs** will be required whether they are in or out of the scope of a binding framework.

Preserving the **level playing field**

- One of the benefits of EU action could be to ensure the same rules apply in all member states. In any further implementation process any **gold plating should be avoided** as it will counteract this aim.
- When they are active in the internal market, **third country private or publicly held companies** should also be covered by the future EU framework.
- Consideration should be made to the impact on EU companies' overall **competitiveness** vis-à-vis companies from other parts of the world.

Accountability and remedy

- Due diligence is a process, therefore, any framework should be based on an **obligation of means** rather than an obligation of results.
- On accountability, it is inappropriate to hold only European companies accountable for damages **when it is impossible to control all the components of the chain and many other actors involved**.
- **Civil liability** should only apply if (i) due diligence has not been carried out and (ii) usual rules of civil liability are satisfied (damages occurred and a causal link between the two is established). There should be **no vicarious liability** whereby companies become responsible for actions of other autonomous entities.
- **Rules on burden of proof** should be proportionate, meaning no reversal of the burden, giving rise to prejudice in companies.

Creating an enabling environment to apply effective due diligence

- The **EU and member states need to take their responsibility** and share of the burden when it comes to due diligence and create an enabling environment for companies to be able to perform their duties in an effective, workable and legally certain way.
- The task of gathering information on the global human rights situation must not be placed solely on companies. As a supplementing measure to the upcoming proposals the EU should consider the idea to develop a **“European contact point/observatory”** (name to be defined), where European companies could obtain reliable information (informed and authoritative opinion) on regional human rights situations that would enable them to take/justify decisions in relation to their value chains, get guidance and support. The European External Action Service and the European Commission delegations in third countries could be used to collect and pass



on such information to the contact point. The latter could then, on the basis of the information received, comprehensibly categorize the risk of violations in order to provide companies with the necessary information for fulfilling their due diligence obligations.

✚ Stakeholder engagement

- Engagement of stakeholders is **important** to be able to conduct proper due diligence, but **flexibility** must be given to companies to determine which stakeholders should be involved and how.
- **Workers are important stakeholders, however of a different nature to other stakeholders, as they are part of the company.** Whilst it is important that they also have the possibility to be involved in discussions on company strategy (including due diligence), this must occur in full respect of national industrial relations systems. There is **no need for further EU legal requirements** to ensure this involvement, as there is already a well-developed and well implemented framework. This includes general obligations in the EU directive on information and consultation, as well as obligations in the EU framework directive on health and safety at work, the directives on transfer of undertakings and redundancies, the European Works Councils directive, and obligations within EU company law. These already provide for employee involvement on the issues of concern to them and set out how this should take place.

✚ Current and future requirements need to work together

- **Coherence** must be the goal of all legislation so overlap must be avoided with other EU requirements (e.g. taxonomy and non-financial reporting). The same should apply in the case of targeted due diligence rules such as in the area of responsible sourcing of minerals and other ongoing initiatives (deforestation and batteries).

✚ Alignment with international standards

- **Any EU measure** should be aligned with international frameworks like the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for multinational enterprises. Companies and authorities are already familiar with these principles and refer to them to ensure a responsible business conduct.

✚ Potential of sector/company-led initiatives

- Whether complying with mandatory requirements or in their own actions, companies should be able to devise solutions which fit their size, sector, operating markets and business model and allow them to identify where the material risk of adverse impacts. The EU should ensure that **best practices taken by sectors are respected and can be as considered** as means of compliance with any future framework.
