

IOGP Position on the Corporate Sustainability Due Diligence Directive (CSDDD)

IOGP, the International Association of Oil and Gas Producers whose member companies account for approximately 90% of oil and gas produced in Europe, supports the goals of the Paris Agreement and the EU's ambition to reach climate neutrality by 2050. We are committed to provide input and expert advice to the EU Institutions, Member State Governments, and the wider community, to contribute in a constructive and pro-active way to the development and implementation of EU policies and regulations.


To establish a corporate due diligence framework that is proportionate and provides legal certainty, while taking into account the differing circumstances in which companies operate, as well as their ability to influence such circumstances, please consider our main concerns and recommendations below.

1. Directors' duties should be limited to due diligence policy and companies should have the flexibility to choose how they meet their sustainability requirements.

Due diligence legislation should be limited to requiring directors to put in place a due diligence policy. It should not impose sustainability related requirements on companies, nor should it impose additional liability on individual directors overlapping or conflicting with existing domestic liability regimes concerning the same matter. Firstly, companies should be able to choose how they meet their sustainability requirements as circumstances vary significantly between companies and sectors. Secondly, overly onerous and uncertain, inflexible, or imprecise requirements imposed upon individual directors could discourage highly qualified individuals from accepting directorships of European companies.

2. Due diligence obligations should cover only direct contractual suppliers (upstream), not downstream.

The proposed requirement to implement a due diligence system covering the entire value chain as per Art. 1(a) appears to be an unreasonable burden on companies (also see Annex on "Definitions"). A typical company in the oil and gas industry may have around 100,000 first tier suppliers. Each of those suppliers may have tens or even thousands of its own suppliers making a value-chain coverage unworkable. Of further significance, the concept of "established business relationships" - particularly when applied to indirect business partners - is unclear (also see Annex on "Definitions") and unlikely to limit the material scope of the obligations imposed by the Directive to a level commensurate with the level of control that a company may have on its supply chain. A legally mandated course of downstream due diligence requiring companies to conduct due diligence on the entirety of their downstream value chain - beyond where otherwise required by law or individual company commitments - would be overly complex and expensive, if not impossible. Such requirements would create problems across industries, but they would be especially acute in the oil-and-gas sector in light of the numerous uses of petroleum products, the difficulty in tracking their use by consumers, and the fungible nature of these products which could mean they have been traded/sold dozens of times prior to reaching the end consumer. Therefore, IOGP recommends that the legally required due diligence obligations cover direct contractual supplier relationships only (own activities and first tier of suppliers).



In addition, the Commission should consider if there are ways to reduce practical complexities (see first point of the Annex) and provide for a more efficient approach, for example, by including an exception to the requirement to provide due diligence for “established business relationships” where the business partner is based in an EU Member State or is otherwise directly subject to the due diligence obligations provided by the Directive. It should not be the obligation of private enterprises to double-check whether their business partners are complying with applicable Member State or EU law. To further reduce practical complexities, the Commission could consider the prioritization of risks and impacts in line with the UN Guiding Principles on Business and Human Rights and the OECD Due Diligence Guidance on Responsible Business Conduct.

3. IOGP supports clear limitations regarding civil liability linked with the due diligence obligation.

The proposal as drafted contemplates an overly punitive system where both supervising authorities and civil liability enforcement mechanisms overlap. Moreover, the relation between the two is not clearly described which may result in each legal regime developing its own interpretations and case law, as well as an increase in the potential for simultaneous proceedings. Enforcement should be addressed through either supervisory authorities or by civil liability proceedings but not both.

Any civil liability, if adopted, should be based on a failure to put in place due diligence procedures in accordance with the law, damages actually incurred, and a direct causal link between the two in accordance with Member States’ tort law. Further, any obligation to remedy an adverse impact under Art. 8 should only arise if the risk that materialized was identifiable and the company failed to take appropriate measures to prevent the risk from materializing. Any different concept would turn the “obligation of means” envisaged by Recital 15 into an obligation to guarantee results. It should be noted that issues related to covering the entire value chain would be aggravated if civil liability or the remedy obligations are attached to the due diligence obligations as proposed.

In principle, IOGP welcomes the limitations on civil liability (Art. 22(2) – including contractual assurances) and recommends extending these limitations to enforcement by supervisory authorities. These limitations on liability should also logically extend to adverse impacts arising from direct and not only indirect established business partners as a company does not control its direct contractual business partners and its degree of (potential) leverage may vary widely. Greater clarity as to the structure of contractual assurances and their effect on limiting liability with regard to direct as well as indirect partners would be welcomed (also see Annex on “Clarification of the obligations regarding contractual assurances”).

Furthermore, IOGP supports Recital 58 stating that national law should regulate who should prove that the company’s action was reasonably adequate under the circumstances of the case.

4. Companies in a corporate group should be allowed to meet their due diligence requirements on a consolidated basis.

The proposal’s requirements appear to be drafted in a way that makes them apply to each individual company meeting the thresholds. This could result in different entities which are part of the same group being required to publish separate transition plans and due diligence reports to their parent and/or sister companies creating significant inefficiencies. Moreover, corporate groups with companies covered in various EU Member States could be required to file reports in such Member States which may be subject to different standards given that the Directive only establishes a minimum standard. An explicit reference to the ability to deliver compliance in a consolidated manner and in one Member State, in case a corporate group is active in various Member States, is recommended.

5. Companies should have a safe harbor for antitrust concerns and other legal obligations.

The current proposal directs companies to collaborate with other entities to prevent or to end adverse impacts (Art. 7(2)(e) and 8(3)(f)). Such collaboration shall take place in compliance with EU competition law. These provisions require companies to anticipate the line that competition authorities will eventually draw between lawful and unlawful collaboration, and to do so without any antitrust exemption. IOGP recommends including an express antitrust exemption in an EU regulation, as well as other applicable laws or contractual obligations which compliance with the CSDDD may violate (e.g., privacy, contractual confidentiality).

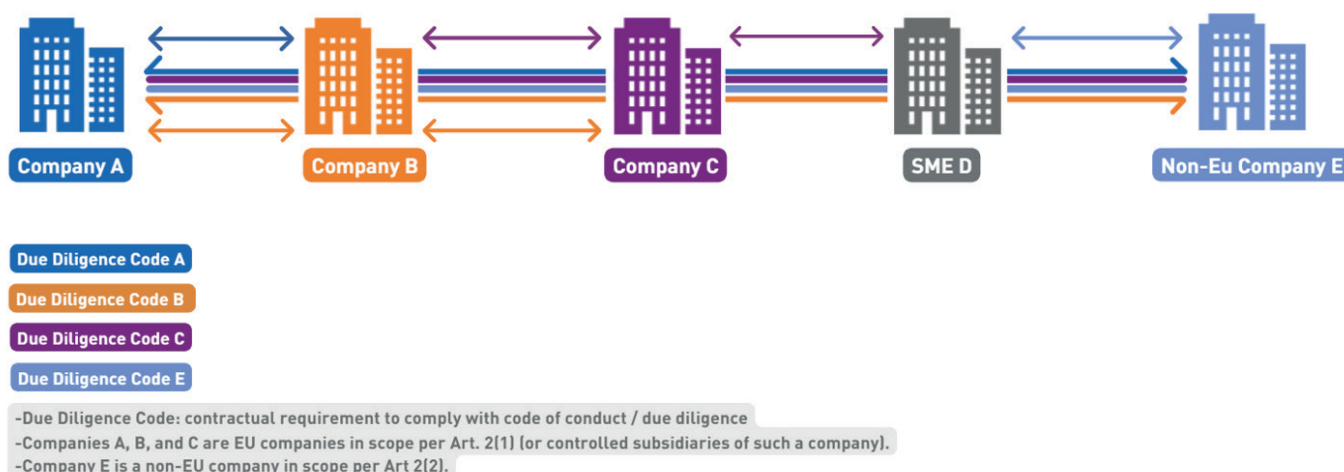
6. Alignment with other EU legislation (existing or proposed) is essential to avoid duplication and inconsistency.

IOGP supports the goals of the Paris Agreement and the EU's ambition to reach climate neutrality by 2050. Many of our members are already developing long-term strategies to progressively reduce their own emissions and help society reduce overall emissions as contemplated by existing and proposed EU legislation such as the Fit-for-55 package and the Corporate Sustainability Reporting Directive (CSRD).

IOGP supports a harmonized European approach to corporate sustainability due diligence legislation and believes companies should not risk being subject to competing or duplicated requirements. In this light, the CSRD is already expected to require companies to report on their transition plans. An additional requirement to do so under the CSDDD [Art. 15] would therefore risk being duplicative or lead to inconsistencies.

Annex: Other concerns and queries

- Currently multiple parties in scope of the due diligence obligation in the same value chain will all be required to perform due diligence towards each other (as supplier or customer) and require each other contractually to comply with each other's similar but not identical codes of conduct/verify each other's compliance. The current approach could also require an SME to comply, and be verified against multiple codes, in relation to the same single relationship because their counterpart is required to flow-through obligations from further along the supply chain as well as their own.



While IOGP welcomes the possibility of independent third-party verification (Art. 7(4), (8)(5)), the Commission should consider if there are ways to reduce practical complexities and provide for a more efficient approach, for example, by including an exception to the requirement to provide due diligence for “established business relationships” where the business partner is itself subject to the due diligence obligation or is based in a Member State of the EU where public authorities ensure that applicable human rights and environmental standards are complied with.

- **Recital 32 states that “this Directive should ensure that disengagement is a last-resort action”.** However, maintaining certain business relationships in the presence of human rights violations could expose companies to risks of third-party claims or significant reputational damage. Therefore, IOGP deems it important that such decisions are left to the discretion of companies to be evaluated on a case-by-case basis.
- **Art. 5(1) requires companies to integrate due diligence “into all their corporate policies”.** This provision needs to be clarified as there are corporate policies which may have no relevance to human rights. Therefore, a risk-based approach is preferable.
- **Realignment with the scope of the due diligence obligations under Art. 6(1)** is needed for
 - the definition of “stakeholders” under Art. 3(n) – also see sub-bullet under “Definitions” below;
 - the scope of the requirement to “seek contractual assurances” under Art. 7(2)(b) and Art. 8(3)(c);
 - the scope of the Complaints Procedure under Art. 9 (incl. worker representatives under (2)(b))
 - the scope of ‘substantiated concerns’ under Art. 19

- **The extent or nature of required ‘support’ to flow from larger companies to SMEs as a compliance obligation should be clarified. The circumstances where such ‘support’ is required should also be specified.** The desire to seek to mitigate the administrative burden on SMEs is understood. However, articles 7(2)(d), 7(4), 8(2)(e) and 8(5) include what appear potentially open-ended general obligations for larger companies to support SMEs in meeting obligations of compliance and respect for human rights that would per applicable laws and the UNGPs apply or be equally relevant to those SMEs.
- **Art. 19 should be limited to providing substantiated concerns related to due diligence obligations (Art. 4-8) and not the entire Directive.**
- **Extraterritorial impact**

Regarding civil liability, Art. 22(5) seeks to have effects outside the EU’s territorial jurisdiction. This is problematic because it could lead to parallel litigation processes. Countermeasures in the international civil procedural laws of other States would also have to be considered. If civil liability is included, Art. 22(5) should be deleted.

For the supervisory authority, extraterritorial jurisdiction is provided by reference to the in-scope entities without limiting this to activities linked to the EU. It should be specified that for claims pertaining to non-EU companies, only claims that have sufficient nexus with the EU can be brought before a supervisory authority. Therefore, a new paragraph limiting the scope of Art. 2(2) entities to activities linked to the EU should be added to Art. 19.

- **Proportionality of sanctions for non-compliance**

Due to the nature of the subject matter, the proposed Directive only provides a high-level description of what is required of companies. This should be reflected in the sanction regime. The rule of law requires that legislation is intelligible, clear and predictable, even more so if non-compliance may lead to substantial fines. However, Article 20(3) states that where pecuniary sanctions are levied by a supervising authority they must always be based on turnover. This seems inappropriately prescriptive and may be disproportionate in relation to the compliance failure, its consequences and attempts to remedy could all vary enormously. Therefore, a fine should only be imposed if a company has ignored a formal instruction by the supervisory authorities, and/or if fines are capped and not linked to revenue. Furthermore, Art. 24 should not amount to creating a systematic ancillary sanction of barring access to any type of public support (especially when “public support” is not defined), with no time limit, and no condition in particular in terms of severity of the breach.

- **Clarification of the obligations regarding contractual assurances**

The Directive should clarify when contractual assurances should be adopted. Articles 7(2)(b) and 8(3)(c), as currently drafted by the Commission, refer to seeking contractual assurances “where relevant”.

- **Definitions**

- **“Adverse impact”** (Art. 3(b) and Art. 3(c)) references the Annex which includes international conventions. Where a state has implemented in its national law an obligation it has under an international convention, companies cannot be found in violation of that international obligation without having violated that national law. For this reason, Art. 3(b) and Art. 3(c) should be amended to require a violation of the national provisions implementing one of the internationally recognized prohibitions and obligations that have been adopted as binding upon private entities. We would also note that in many cases the list of human rights identified in the Annex Part 1 bears no resemblance to the referenced international document’s description of the supposedly identified right. We would suggest that the Commission revisit this list and provide clarity, especially regarding §18 on a “prohibition of causing any measurable environmental degradation (...)” and §19 on a “prohibition to unlawfully evict or take land, forests and waters when acquiring, developing or otherwise use land, forests and waters (...)”.

Furthermore, **Point 21 of Annex Part 1 contains an open-ended provision** relating to the scope of human rights covered by the Directive. It is broadly worded and leaves the list open to interpretation and legal uncertainty, making it difficult for companies to know ex ante which human rights are included in scope. IOGP therefore recommends removing Point 21.

- As mentioned in point 3 of the position paper, IOGP recommends that the legally required due diligence obligations cover direct contractual supplier relationships only. However, if the directive were to go further, the definition of indirect “**business relationship**” (indirect partner) (Art 3 (e)) needs to be clarified with respect to the situations that would be covered by the expression “business operations related to the products or services of the company for or on behalf of the company”, where the partner has no commercial agreement with the company.
- The concept of “**established business relationship**” (Art. 3(f)) is not defined in any of the international standards on which the proposal is based and therefore leaves room for speculation as to when the definition could be met. Furthermore, the concept seems to define a due diligence based on ‘relationship’ rather than on the ‘prioritization’ given by the UNGPs.
- The definition of “**value chain**” (Art. 3(g)) is broad and open-ended (including the production of goods, provision of services, development of a product, use and disposal thereof and “related activities”), making it difficult for companies to know the extent of operations covered and ensure compliance.
- The definition of “**stakeholders**” (Art. 3(n)) is currently so broad that it could apply to anyone. It needs to be sufficiently delimited to enable proportionate and prioritized stakeholder engagement by companies and allow enforcement to focus on complaints by those with legitimate complaints with a direct, causal link to a failure to meet the obligations of due diligence by the company against which they are raised. Further, the definition needs to reflect the difficulties a company may have when finding the “right stakeholders” in particular in countries where the freedom of coalition is restricted and in which companies need to deal with state-run organizations. Finally, NGOs should be required to prove that they can speak on behalf of those they claim to represent.
- The definition of “**directors**” (Art. 3(o)) should be amended to only cover directors sitting on boards in order to safeguard proportionality.

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