BRACEWELL

INSIGHTS

An Update on the EU Mandatory Human Rights and Environmental Due Diligence Law – What You Need to Know

February 24, 2022

In March 2021, the European Parliament voted by an overwhelming majority for the adoption of a binding EU law that requires businesses to conduct environmental and human rights due diligence along their full value chain or face concrete fines, sanctions and/or civil liability. On Wednesday, the European Commission adopted a proposal for such a law.

The European Commission has adopted a proposal for a binding EU law that ensures businesses are held accountable and liable when they harm - or contribute to harming – human rights and the environment. The proposal will be presented to the European Parliament and the Council for approval. Once approved and adopted, EU Member States will have two years to transpose the Directive into national law.

Below is a brief overview of the key elements of the law.

Who would fall within the scope of this?
In short, both EU and non-EU businesses:

- EU businesses with more than 500 employees on average and a net worldwide turnover of more than EUR 150 million;
- EU businesses with more than 250 employees on average and a net worldwide turnover of more than EUR 40 million, where at least 50% of this turnover was generated in one or more of the following sectors:

1. the manufacture and wholesale of textiles, leather, clothing and footwear
2. agriculture, forestry, fisheries, the manufacture of food products, and the wholesale trade of agricultural raw materials, live animals, wood, food, and beverages; and
3. the extraction of mineral resources regardless from where they are extracted, the manufacture of basic metal products, other non-metallic mineral products and fabricated metal products (except machinery and equipment), and the wholesale trade of mineral resources, basic and intermediate mineral products.

- non-EU businesses with a net turnover of more than EUR 150 million in the EU; and

- non-EU businesses with a net turnover of more than EUR 40 million but not more than EUR 150 million in the EU, where at least 50% of its net worldwide turnover was generated in one or more of the sectors listed above.

Small and medium enterprises (SMEs) are not directly subject to the law (but may be indirectly impacted by being a subject business' subsidiary or forming a part of a subject business' value chain (see below).

Note that for the purposes of determining the number of employees of an EU business, part-time employees shall be calculated on a full-time equivalent basis and temporary agency workers shall be included in the calculation of the number of employees in the same way as if they were workers employed directly for the same period of time by the business.

What is required?

The proposed law states that businesses have a corporate due diligence duty to identify, bring to an end, prevent, mitigate and account for adverse human rights and environmental impacts in their own operations, subsidiaries and value chains (established business relationships)

To fulfil this obligation, businesses must conduct effective human rights and environmental due diligence that involves the following:

- integrating due diligence into their policies;
- identifying actual or potential adverse human rights and environmental impacts;
- preventing and mitigating potential adverse impacts, and bringing actual adverse impacts to an end and minimising their extent;
- establishing and maintaining a complaints procedure;
- monitoring the effectiveness of their due diligence policy and measures; and
- publicly communicating on due diligence.

In addition, EU businesses with more than 500 employees on average and a net worldwide turnover of more than EUR 150 million, and non-EU businesses with a net turnover of more than EUR 150 million in the EU must adopt a plan to ensure that its business model and strategy are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C in line with the Paris Agreement.

Directors

Directors of the EU businesses subject to the law shall be responsible for putting in place and overseeing the due diligence actions, taking into account the input of stakeholders and civil society organisations, as well as adapt the corporate strategy to actual and potential impacts identified and any due diligence measures taken.

Further, such directors must, when fulfilling their duty to act in the best interest of the company, take into account the consequences of their decisions for sustainability matters, including, where applicable, human rights, climate change and environmental consequences, including in the short, medium and long term.

Enforcement and penalties

One or more national authorities shall be designated responsible for enforcement, with the power to carry out investigations, as well as impose sanctions, including fines and compliance orders. The Commission will establish a European Network of Supervisory Authorities that will bring together representatives of such national authorities to ensure a coordinated approach.

In addition, victims will have the opportunity to take legal action for damages that could have been avoided with appropriate due diligence measures.

What next?

The proposed new European legislation (i.e. a directive) will be presented to the European Parliament and the Council for approval. Once adopted, EU Member States will have two years to transpose the Directive into national law.

Conclusion

This forms part of a series of initiatives on mandatory environmental and human rights due diligence that have taken place in the context of increasing pressure on businesses and regulators to address ESG concerns. It is envisaged that there will continue to be greater demands for businesses to take concrete steps to address their ESG risks, alongside louder calls for businesses to transition to a lower carbon future as part of a just and sustainable economy. As such, prudent businesses need to begin working together with their advisers to implement effective measures to identify and manage ESG risks in their business activities and relationships now.