

D⁴: Directors` Due Diligence Duties?

ECGI Online Policy Workshop on the
European Commission Directive on Corporate
Sustainability Due Diligence

Florian Möslein, March 29th, 2022



Due Diligence and Directors' Duties



Brussels, 23.2.2022
COM(2022) 71 final

2022/0051 (COD)

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

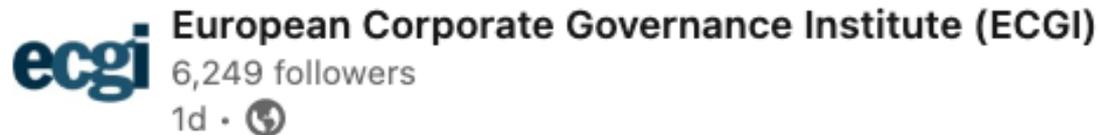
on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937

Due Diligence and Directors' Duties



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DIRECTIVE OF  Looking forward to this discussion today at 4:30 pm CEST!
on Corporate Sust  Register here: <https://lnkd.in/dVmF849u>

The two-day online seminar, today and tomorrow (28–29 March), will correspond to the main themes of the proposed directive:

-  Day 1 (28 March): Due diligence in supply chains and net-zero plans
-  Day 2 (29 March): Director's duties and climate remuneration issues

Due Diligence and Directors' Duties



- **Joint research with Karsten Engsig Sørensen, University of Aarhus**
- **Due Diligence and Directors' Duties – two worlds apart?**
 - Due Diligence as a Contract Law Topic: Focus on Supply Chains > Information and Disclosure within these Contractual Relationships
 - Due Diligence as Public Regulation: Similar to bank regulation, cf. Ferrarini
 - Due Diligence as (also) Company Law
 - Art. 5: Integrating due diligence into companies' policies, w/ details on these policies, integrating obligations of Arts. 6-11
 - Art. 26: Directors responsible for putting in place and overseeing due diligence actions and in particular that due diligence policy
- **Three Key Points to Discuss**
 1. What is a Due Diligence Policy?
 2. How to establish a Due Diligence Policy?
 3. Effects of Due Diligence Policy?

1. What is a Due Diligence Policy?

- **Art. 5 (1): MS “shall ensure that companies integrate DD into all their corporate policies and have in place a DD policy”**
- **Elements of such policy:**
 - Description of co’s approach, including in the long term, to DD
 - Code of conduct describing rules and principles to be followed by co’s employees and subsidiaries
 - Description of implementation processes, including compliance

1. What is a Due Diligence Policy?

- **Art. 5 (1): MS “shall ensure that companies integrate DD into all their corporate policies and have in place a DD policy”**
- **Elements of such policy**
- **Substance: Identifying, Preventing, Ending Potential Adverse Impact**
 - Reference to Arts. 6-8, with detailed steps – probably to be included in DD policy
 - Recital 27: Clear distinction required between prevention and bringing to an end
 - Recital 16: Reference to OECD Due Diligence Guidance for Responsible Business Conduct
 - Recital 26: Embedded in international soft law framework
 - Art. 13: Additional (non-binding?) guidelines to be issued

1. What is a Due Diligence Policy?

- **Art. 5 (1): MS “shall ensure that companies integrate DD into all their corporate policies and have in place a DD policy”**
- **Elements of such policy**
- **Substance: Identifying, Preventing, Ending Potential Adverse Impact**
- **Nature: Policies are forward-looking => Ex-ante perspective**
 - Key difference to traditional reporting obligations; similar to forecasts or letters of intent
 - Purposes:
 - Behavioural effect (nudging) on directors
 - Basis for later evaluation for shareholders and also stakeholders

1. What is a Due Diligence Policy?

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 - Purposes:
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 - Basis for later evaluation for shareholders and also stakeholders
 - Does DD policy create obligation of results or obligation of means (Ferrarini)? If so: Best Efforts or Reasonable Efforts?
 - More general question: Binding effect of DD policy? Relevance for directors’ discretion? Potential impact on Business Judgment Rule (BJR)? Cf. Recital 64: Directors should adapt corporate strategy.

2. How to establish a Due Diligence Policy?

- **Which body is competent? Cf. Art. 26 (1)**
 - Directors of companies
 - Defined in Art. 3(o): (i) members of administrative, management or supervisory bodies, (ii) CEO/deputy CEO, (iii) other persons who perform similar functions => all together? Specifications by MS possible?
 - Recital 64: Responsibility to be assigned „in line with the international due diligence frameworks“

2. How to establish a Due Diligence Policy?

- **Which body is competent? Cf. Art. 26 (1)**
- **Consultation of stakeholders?**
 - „with due consideration for relevant input from stakeholders and civil society organisation“
 - Which stakeholders? Also employees?
 - Duty or only encouragement to consult? Art. 26 (1): “directors shall report to the board of directors in that respect“ => comply-or-explain rule

2. How to establish a Due Diligence Policy?

- **Which body is competent? Cf. Art. 26 (1)**
- **Consultation of stakeholders?**
- **Updating and Assessing**
 - Art. 5 (2): Annual updates
 - Art. 10: Periodic assessments, in order to monitor effectiveness, to be based on qualitative and quantitative indicators

2. How to establish a Due Diligence Policy?

- **Which body is competent? Cf. Art. 26 (1)**
- **Consultation of stakeholders?**
- **Updating and Assessing**
- **Disclosure?**
 - Art. 11 very vague: If not subject to reporting requirements under Non-financial reporting directive, then „publication of an annual statement by 30 April each year, covering the previous calendar year“ ... But not the policy itself!

3. Effects of Due Diligence Policy?

- **(Internal) complaint procedure, Art. 9 (1):** lack of policy as a “legitimate concern”?
- **Supervision by MS authorities, Art. 17:** referring only to Art. 6 to 11 – but Art. 5 as a general clause, including these more specific provisions; lack of policy as a “substantiated concern” (Art. 19)?
- **Directors’ duties?**
 - Art. 26: Duty to establish DD policy => Liability in case of lack or errors
 - But: Does DD policy create obligation of results or obligation of means (Ferrarini)? If so: Best Efforts or Reasonable Efforts?
 - Fundamental question: Binding effect of DD policy on directors?
 - Relevance for Business Judgment Rule?
 - (+) Art. 26 related to Art. 25 on directors’ duty of care (but how?)
 - (+) Art. 26 (2) duty to embed DD policy into corporate strategy
 - (P) ex-ante nature: Possibility to adapt policies? If so, under what circumstances? Duty to explain such adaptations?
- Relation to liability of the company, Art. 22?

Thank you for your attention!



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