

## D<sup>4</sup>: 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**

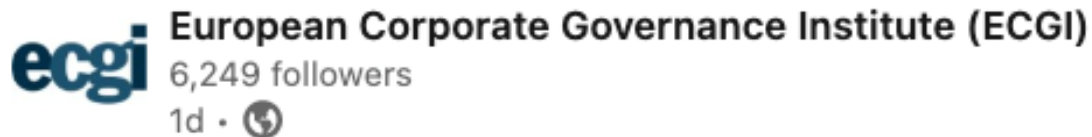
**on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937**

# Due Diligence and Directors' Duties



Brussels, 23.2.2022  
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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?

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- **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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