bitkom

# EU Corporate Sustainability Due Diligence Proposal (CSDD)

Bitkom Position Paper, 23 May 2022

At a glance

# EU Corporate Sustainability Due Diligence

## What is this about?

On 23 February 2022, the Commission adopted a proposal for a Directive on corporate sustainability due diligence. The aim of this Directive is to foster sustainable and responsible corporate behaviour and to anchor human rights and environmental considerations in companies' operations and corporate governance.

## Bitkom's view

Bitkom welcomes the European Commission's objective to strengthen human rights through corporate sustainability due diligence and thus contribute to the global economy's resilience and long-term prospects. Nevertheless, recognising the complexities and limits of statutory measures as well as the capacity for companies to exert influence, is crucial.

## Core points

To strengthen the objective of the Directive and simultaneously ensure its feasibility in practice, we propose some adjustments. Our key points:

- **Obligations & Liability: Clearly define obligations and adopt a risk-based approach.**

  We believe that the obligations in their current wording create legal uncertainty due to unclear definitions and their difference to the established UN Guiding Principles. We recommend limiting the obligations to the supply chain rather than the value chain and adopting a risk-based approach as envisaged by the UNGP.

- **Scope: Expand scope and integrate small and medium-sized enterprises.**

  The scope of the Directive should be broader and also include small and medium sized businesses to ensure that the intended objective can be achieved. As we are aware of the different resources based on company size, we would propose a graduated system obligation and the support by public authorities for SMEs.

- **Civil Liability: Art. 22 of the CSDD proposal would cause unproportionate and uninfluenceable civil liability risks for companies.**

  The behaviour (actions and omissions) of independent third parties, such as direct or indirect business partners, e. g. suppliers, must not lead to civil liability of companies. Therefore, we recommend the civil liability provisions laid down in Art. 22 of the CSDD proposal to become subsidiary to already existing provisions.

- **Implementation: Use digital tools to comply with obligations.**

  We ask the European Commission to further conduct research on the application of digital tools to facilitate the implementation of obligations. This would not only help companies, especially SMEs, to comply with the rules, but also contribute to a better protection of human rights.

# Content

# 1 General Remarks

The digital economy acknowledges its responsibility when it comes to corporate social responsibility (CSR) and sustainability, and hence has been highly engaged in improving its activities. **Bitkom's member companies support the European Commission's objective to strengthen human rights through corporate sustainability due diligence** and thus contribute to the global economy's resilience and long-term prospects. ICT enterprises have integrated sustainability systematically in corporate governance and their supply chain management and have taken concrete measures to implement the UN guiding principles on business and human rights and the OECD guidelines for multinational enterprises. Several national and supranational sectoral initiatives exist in which digital enterprises are active.

ICT companies are conscious of their role in society. Sustainability, CSR, environmental, social governance aspects (ESG) and the common good play an essential role in strategy and investment decisions, given the opportunities and risks involved. Hence, companies increasingly integrate sustainable actions, as it contributes to the success of a company in the long run by considering volatile supply chains as well as changing consumer behaviour among others.

Striving for responsible global supply chains, improving the performance of corporate duties of care, and safeguarding human rights are of utmost importance for the digital economy.

**Nevertheless, recognising the complexities and limits of statutory measures as well as the capacity for companies to exert influence, is crucial.** The practical impact of European regulation on the protection of human rights at the local level should not be overestimated, especially since the application is limited to companies operating in Europe. Moreover, the successful protection of human rights worldwide also depends on respective governments and their diplomacy power. Companies can contribute to the protection of human rights with their engagement in developing and emerging countries, but it is essential that states continue to negotiate better working conditions with other governments, as **we can only reach the objective of better human rights protection in a joint effort.**

**Considering the complexity of the topic, we would further suggest close cooperation with the private sector so that businesses can share key learnings from corporate due diligence programs and challenges faced by industry**. Despite the intent of harmonisation, the European Commission has suggested a directive. It is therefore of utmost importance, that the European Commission works with the Parliament and Council to ensure that the directive results in full harmonisation. The best human rights outcomes result when companies have clear, attainable requirements and guidance under the law.

Berlin,
23 May 2022

Bitkom e.V.

**Niklas Meyer-Breitkreutz**
Policy Officer
Digitalisation & Sustainability

P +49 30 27576-403
n.meyer-breitkreutz@bitkom.org

Albrechtstraße 10
10117 Berlin
Germany

President
Achim Berg

CEO
Dr. Bernhard Rohleder

# 2 Subject Matter

The proposal lays down rules

a. on obligations for companies regarding actual and potential human rights adverse impacts and environmental adverse impacts with respect to
   - their own operations,
   - the operations of their subsidiaries, and
   - the value chain operations carried out by entities with whom the company has an established business relationship and

b. on liability for violations of the obligations mentioned above.

The nature of business relationships as 'established' shall be reassessed periodically, and at least every 12 months.

## Obligations

**Bitkom believes that the obligations in their current wording create legal uncertainty due to unclear definitions (e. g. »business relationships«) and difference to the established UN Guiding Principles.**

**Taking into account the positive experiences of voluntary initiatives using a code of conduct** as a key obligation for their suppliers to ensure due diligence with their suppliers as well as audit programs, this could be used as an initial step to build up the system of due diligence while ensuring that it is implementable. Additionally, we ask for clarification of the term »indirect suppliers« for legal certainty reasons and for consideration of a risk-based approach when it comes to the assessment of the supply chain.

**The inclusion of all downstream business relationships** »that use or receive products, parts of products or services from the company«, i. e., also customers and customers' customer, **will technically not be feasible and difficult to monitor due to the value chain's complexity.** It also constitutes a duplication of due diligence obligations as such companies are upstream suppliers of other companies in the supply chain. If at all, only a graduated system that takes different levels into account might be feasible and representable in the long term.

**We also ask the European Commission to conduct further research on the application of digital tools to facilitate the implementation of obligations.** This would not only help companies, especially SMEs, to comply with the rules, but also contribute to a better protection of human rights.

## Liability

Binding legal, sanction- and liability-linked requirements should be limited to direct suppliers (tier-1) with whom companies have direct contractual and thus influenceable relationships.

Therefore, **we recommend limiting the obligations to the supply chain rather than the value chain and adopting a risk-based approach as envisaged by the UNGP.** Law enforcement is ensured through administrative sanctions and control by supervisory authorities. Civil liability rules that fulfil necessary conditions (damages occurred and a causal link between the two is established) already exist in the EU member states. The conduct and actions of independent third parties must not trigger disproportionally civil liability of companies, which is why we reject the new civil liability as formulated in Art. 22 of the CSDD proposal. Enablement instead of withdrawal (»stay and behave« rather than »cut and run«) should be the goal – as the European Commission itself strives for it. Companies can only be liable for their own activities in the supply chain, but not for those of their business partners or their suppliers. The German Supply Chain Act and the UN Guiding Principles on Business and Human Rights (UNGP) therefore do not provide for civil liability. The legal uncertainty for entrepreneurs and companies is immense.

# 3 Scope

**The scope should be broader and also include small and medium sized businesses to ensure that the intended objective can be achieved. As we are aware of the different resources based on company size, we would propose a graduated system obligation and the support by public authorities for SMEs.** It is essential that the proposed directive provides fair, proportionate, transparent, and non-discriminatory requirements for all enterprises concerned.

**We support the inclusion of companies from third countries that generate turnover in Europe.** Doing so will mitigate expected competitive disadvantages for European companies. This is a step towards a level playing field on a global scale. At the same time, this also strengthens the assertiveness of European companies in implementting measures with and vis-à-vis companies worldwide. Exemptions should be kept to a minimum. Nonetheless, we do not believe that the European Commission's argument for treating companies from the EU and third countries differently given on pages 16 and 17 and in recitals 23 and 24 is valid. The application of the regulation should not be limited to the turnover that companies from third countries generate in the EU, which is why this addition should be deleted in Art. 2 (2).

**In terms of third-country companies, the proposal does not provide an actual level playing field.** The thresholds for non-EU companies are substantially higher than for

EU companies (150 million EUR turnover inside the EU for third-country companies, while 150 million EUR worldwide for EU companies). As a result, EU enterprises that must comply with the proposed directive are likely to be significantly smaller than companies from third countries. The Explanatory Memorandum on page 16 in the Directive proposal indeed acknowledges this. Furthermore, it appears that Art. 15, 25 and 26 will be difficult to apply to foreign companies. Corporate governance is regulated by national company law, and a company cannot be subject to company law requirements in both a third country and the EU at the same time.

**We welcome the planned support programmes for SMEs, but we would like to point out that these must be designed in a timely manner, to a sufficient extent and in a practical way to constitute real support.** It is also important that these SME support measures for the implementation of requirements are **provided by public bodies at EU or national level** and not necessarily imposed on the larger companies within the scope of the Directive. Otherwise, SMEs could suffer a competitive disadvantage. For example, the obligation to bear the costs of audits for SMEs in the supply chain may be disadvantageous for SMEs when making procurement decisions.

According to Art. 3a IV, Art. 3 g regulated financial undertakings will be included, which bears the risk of negative spill-over effects far beyond the defined risk sectors and company sizes. The consequences of including this sector have not been highlighted in the European Commission's own Impact Assessment of the proposal either.

**Additionally, the current proposal does not clarify the due diligence obligations for corporate groups.** The current text and the definition of a »company« (Art 3a) suggests that the directive's requirements are set at the company level, not at the group level. This means that a company from a member state with subsidiaries in other member states will have to follow the decisions of several different supervisory authorities. Such an arrangement will be practically difficult to handle for the companies and will be more expensive. It thereby also risks counteracting the purpose of the directive of creating a level playing field at the EU level – in particular, given that it is a directive. Additionally, it is not in line with the way reporting requirements are addressed in the framework of the Non-Financial Reporting Directive (2014/95/EU). Therefore, the proposal should align this clause to existing legislation. Major groups usually do not set up their compliance/risk/due diligence functions based on individual units. Instead, these functions are typically group-wide functions where each legal entity does not have its own processes, reporting systems, et cetera. It would lead to unnecessary extra costs, overlaps and even contradictions between companies of the same group.

Companies must comply with the national law »where the company has its registered office«, according to the draft (Art. 2,4). The term registered office is not defined. As companies may have offices/subsidiaries in different member states, it should be clarified that the national law of the headquarter of the parent company is relevant and that all due diligence obligations of the affiliated companies in other member states can be fulfilled by the parent company (on the basis of the respective national law).

# 4 Due Diligence

The draft stipulates that companies should conduct human rights and environmental due diligence. Specifically, this means that companies should:

- Integrate due diligence into all their corporate policies and have in place a due diligence policy that is updated annually (Art. 5);
- Take appropriate measures to identify actual and potential adverse human rights impacts and adverse environmental impacts arising from their own operations or those of their subsidiaries and, where related to their value chains, from their established business relationships (Art. 6) (although companies as defined in Art. 2 para. 1 b, Art. 2 para. 2 b need to take measures only in case of severe adverse impacts, Art. 3 lit. l);
- Provide complaints mechanisms for potential or actual adverse impacts and provide access to these systems to trade unions and other workers' representatives as well as civil society organisations, in addition to those directly or likely to be affected (Art. 9);
- Periodically assess the effectiveness of their measures (Art. 10);
- Publish an annual statement (Art. 11).

From our point of view, **further clarification of »appropriate measures« and »alignment« are needed** to keep the bureaucracy proportionate and to achieve the objective. **A risk-based approach would be beneficial as many companies are already conducting voluntary due diligence in accordance with the UNGPs which requires a risk-based approach.** Such an approach and the clear definition of appropriate measures, taking into account the actual possibilities of companies to influence (depending on the tier), would help to achieve the objective of the proposal, but at the same time keep the obligations for companies at a manageable level. Companies should be able to focus on where the risk and opportunity to influence is the greatest, as chances of bringing about a significant improvement are then also the greatest. **Extending due diligence to all companies in the value chain in an undifferentiated manner poses considerable to insurmountable problems for companies.** In particular, it is unclear how companies with less market power are supposed to assert themselves even rudimentarily against direct and indirect suppliers or buyers to fulfil the due diligence obligations. In case of doubt, this will lead to companies with less market power having to withdraw from existing business relationships in order not to take unmanageable risks due to the legal concept of appropriate measure leaving leeway for interpretation and companies with less scruples will benefit at least short-term.

**Often, no distinction is made between direct and indirect suppliers. The influence of companies here is very different.** Regularly, a contractual relationship exists only with the direct supplier and thus legal access to the supplier.

The Directive also states that »the statement shall be published by 30. April each year, covering the previous calendar year« (Art. 11) unless Directive 2013/34/EU applies.

**Harmonisation of the deadlines with reference to the financial year would be desirable.**

In the description of the due diligence obligations (Art. 4ff.), the member states should create possibilities for contract termination with a view to corporate preventive and remedial measures (Art. 7 para. 5, Art. 8 para. 6). Our interpretation is that a provision would have to be created in national civil law that allows a company to terminate a contract »for cause« in the event of violations. It is unclear to us how such a provision would apply to contracts with third-country companies, especially if such contracts are concluded under third-country law.

# 5 Accompanying Measures

According to Art. 14, member states and the European Commission are obliged to offer accompanying measures to the companies that fall within the scope of this Directive and to the actors along the global supply chains that are indirectly affected by the Directive's obligations. This support should build on existing EU measures and instruments to promote the implementation of due diligence within the European Union and in third countries as well as develop new measures. It can range from operating dedicated websites, portals, or platforms to financial support for SMEs and facilitation of joint stakeholder initiatives. This provision also clarifies that companies can rely on sectoral schemes and multi-stakeholder initiatives to support the implementation of due diligence. In cooperation with member states, the European Commission can issue guidelines for assessing the suitability of such schemes. According to the proposal, this can be complemented by EU development cooperation instruments to support governments of third countries and upstream economic operators in third countries in addressing negative human rights and environmental impacts of their activities and upstream business relationships.

From Bitkom's point of view, it would be important that not only the instruments of development cooperation mentioned in the draft come into play here, but that the **EU member states fulfil their very own state duty to protect human rights within the framework of their foreign policy and advocate through the EU for international agreements on improved human rights standards.** The EU should also reliably inform companies about human rights risk situations in countries and business sectors. It should recognise existing sectoral standards.

**The wording in the draft on industry regulations and multi-stakeholder initiatives (Art. 7 and 8, 22) does not standardise a safe harbour regulation**; reference is only made to the industry initiatives and industry standards within the framework of the business partner review/screening. Furthermore, the draft defines the possibility that

the European Commission will first issue guidelines for assessing the suitability of industry regulations and multi-stakeholder initiatives in cooperation with the member states. This is not a recognition.

Art. 12 requires the European Commission to adopt guidelines for non-binding model contract clauses to assist companies in complying with the preventive measures described in Art. 7 (2 b) and remedial measures described in Art. 8 (3 c). The European Commission notes that the envisaged model contract clauses may include a harmonised methodology for aligning industry systems and multi-stakeholder initiatives.

# 6 Combating Climate Change

Art. 15 requires member states to ensure that certain companies submit a plan whereby the enterprise's business model and strategy are consistent with the transition to a sustainable economy and limiting global warming to 1.5 °C (with reference to the Paris Agreement). To enforce climate change mitigation obligations, executives shall be incentivised to mitigate climate change in the case of variable remuneration.

It is of great importance that the EU moves forward ambitiously on climate policy. Bitkom and its members explicitly support the goal of climate neutrality. However**, the present proposal should focus on human rights and environmental due diligence.**

**The explicit inclusion of climate damage in the Directive should be feasible and proportional and instead of largely shifting the responsibility on companies in the fight against climate change, the EU should aim for a cooperative approach**. It should be noted that this type of provision, as in Art. 15, goes far beyond original due diligence. Instead, it is an environmental impact measure that is neither suitable in a due diligence framework nor necessary to reach the stated objectives of the directive proposal. This has been stressed in the two negative opinions issued by the European Commission's Regulatory Scrutiny Board.

**This provision also raises questions on the level of interference in company law and the freedom of enterprise** (around objectives, specific business plans, internal management) as this provision seems to overrule the director's ability to judge what type of plan is appropriate for continued business with that of supervisory authorities who may have neither background nor expertise in the particular industry at hand.

The industry agrees with the importance of the objectives of the Paris Agreement, but **it should be considered that global objectives cannot be imposed as a legal obligation on individual persons or individual companies**. The proposed requirements could be replaced by encouragement in the preamble of the Directive to follow the ambi-

tions of the Paris Agreement, refer to the ongoing legislative work under the »Fit-for-55« package, the Corporate Sustainability Reporting Directive (CSRD), the Taxonomy and a requirement for climate reporting for covered companies not already subject to such requirements in the CSRD (already proposed in Art. 11). The term »ensure« should be replaced by »take into consideration«.

# 7 Supervisory Authorities, Power and Sanctions

Each member state should designate one or more supervisory authorities to monitor compliance with the obligations under Art. 6 to 11 and Art. 15(1) and (2) (Art. 17). The authorities shall have adequate powers and resources to carry out the tasks assigned to them by this Directive, including the power to request information and to conduct investigations (Art. 18).

The right of natural and legal persons to report to any supervisory authority with justified concerns if they have reason to believe that companies are not complying with the provisions of the Directive (Art. 19) should, in our view, be limited to certain persons or groups as in Art. 9 of the Directive instead of a right for »everyone«.

According to Art. 20(1), member states shall determine effective, proportionate, and dissuasive sanctions.

The Directive foresees far-reaching powers for authorities. Investigative powers go beyond what classical national authorities are entitled to do today in areas that are far more specific in terms of regulation. Furthermore, the proposed powers are not appropriately counter-balanced with due process and appeal rights for companies targeted. **The competence of the supervisory authority should be limited to the diligence obligations in the Directive, i. e., Art. 6-11, which is the focus of the Directive.**

**When imposing sanctions under Art. 20(2), account should be taken not only of the efforts made by undertakings to comply with remedies requested by a supervisory authority, but also of the initial efforts already made** by the undertaking to comply with the obligations of the Directive or its national implementation.

**As to the possible sanctions, no discrimination is made between the various stages of the supply chain** though upstream stages will have substantially more influence on their suppliers than stakeholders at the end of the supply chain. Effectiveness to

prevent or mitigate adverse impacts should be ensured by limiting and concentrating responsibility and liability on actors with substantially influence on their suppliers.

# 8 Civil Liability

**The behaviour (actions and omissions) of independent third parties, such as direct or indirect business partners, e. g. suppliers, must not lead to civil liability of companies.** Therefore, we recommend the civil liability provisions laid down in Art. 22 of the CSDD proposal to become subsidiary to already existing provisions. Prior to publishing its CSDD proposal, the European Commission announced the goal that any new rules should be aimed at empowerment rather than withdrawal. Nevertheless, the civil liability provisions in Art. 22 of the CSDD proposal are not compatible with this goal.

Companies should only be liable for their activities in the supply chain, not for those of their direct or indirect business partners. Therefore, the German Supply Chain Act does not provide for civil liability.

**The provisions in Art. 22 of the CSDD proposal would cause unproportionate and uninfluenceable civil liability risks for companies.**

According to Art. 22 (1) companies shall always be liable if they have not taken »appropriate (due diligence) measures« (preventive and remedial measures according to Art. 7 and 8 of the CSDD proposal), and as a result of this failure, an »adverse impact« occurs, which results in damages. In this respect, the only prerequisite is that the potential of an »adverse impact« arising could at least have been identified with appropriate (due diligence) measures. No prerequisite is that the »adverse impact« or damages resulting from it could have been prevented with appropriate (due diligence) actions of the company. Thus, even if the company could not avoid the adverse impact or damages resulting from it, it shall still be liable. Further, the company's civil liability is not limited to cases where the company's own activities caused the adverse impact. The civil liability of companies under Art. 22 of the CSDD proposal also applies if the behaviour of third parties from the company's value chain(s) exclusively caused the adverse impact.

Further, regardless of whose action caused an adverse impact, there is no foreseeability on which (due diligence) measures would be deemed appropriate or inappropriate in assessing civil liability under Art. 22, as Art. 3 (q) gives immoderate room for interpretation and assessment of the appropriateness of (due diligence) measures in the individual case. Thus, **there will always be a risk for generally considered appropriate (due diligence) measures of companies to be deemed inappropriate in individual legal proceedings concerning civil liability suits against the company. Clear guidance could help to reduce the uncertainty.**

Additional to the civil liability provisions under Art. 22 (1) for inappropriate measures of the company, Art. 22 (2) of the CSDD proposal introduces even civil liability of the company for appropriate measures and, therefore, lawful behaviour. Although Art. 22 (2) subparagraph 1 in general excludes civil liability of the company for damages caused by »an indirect partner with whom it has an established business relationship« when the company has taken the actions referred to in Art. 7(2), point (b) and Art. 7(4), or Art. 8(3), point (c), and Art. 8(5), this provision also establishes that under certain circumstances companies who have taken such measures can still be held liable. Thus, Art. 22 (2) introduces civil liability for lawful behaviour regarding damages caused by certain indirect partners: even if companies did take actions, which in general are sufficient regarding all direct or indirect partners and therefore fulfilled the requirements of Art. 7, 8, they can still be held liable for damages caused by specific individual indirect partners (with an established business relationship with the company), regarding whom »it was unreasonable to [...] to expect that the action actually taken [...] would be adequate«. Furthermore, the requirement »unreasonable ... to expect« is ambiguous, giving excessive room for interpretation and therefore providing the company with no foreseeability, which is crucial for civil liability rules. Since the fact that an adverse impact has occurred proves any measure taken ineffective companies at the end of the chain will have to cope with the uncertainty of being held responsible if the relevant authority interprets the action to be an inappropriate measure.

Taking into account that the parties in the supply chain enjoy contractual freedom of the obligation to take appropriate measures including seeking contractual assurances will render the contractual negotiations highly bureaucratic with the customer possibly seeking assurances and documenting such action irrespective of his possible influence in the chain only to fulfil its supposed compliance requirements. Without the backing of large manufacturers, sole distributors will not be able to grant such assurances. This will be likely to trigger a concentration in the market.

It is a overassessment to assume that contractual assurances, even if being granted rather than rejected, will in any case ensure that actors in the supply chain are discouraged from sourcing product parts in ways that have potentially negative impacts on human rights and the environment. Such a requirement only burdens trading companies and distributors in assessing their suppliers, negotiating assurances clauses and documenting both.

In the second subparagraph of Art. 22 (2) criteria (company's efforts, et cetera) are introduced, which shall be considered when assessing the existence and extent of liability. As such consideration can be considered to only lead to a mitigation of civil liability, e. g. reduction of the amount to be paid, this should be clearly stated. Otherwise, if the criteria could also be considered for an extension of the amount to be paid, this would allow for »punitive damages«, which are non-systemic to civil liability regimes in the EU.

According to Art. 22 (3), companies should always be liable alongside any other persons. Considering the principles of joint liability, with such a provision, there is an inherent risk that companies alone will be held liable for the entire damages arising

from an adverse impact regardless of their share of causation in the adverse impact. Considering companies cannot ensure in a legally binding manner how their direct or indirect business partners behave in reality, and that Art. 22 (2) even introduces civil liability for lawful behaviour of the company, it is not appropriate that companies can be made liable for damages from adverse impacts that were entirely caused by third parties, which could also be made liable by plaintiffs.

Art. 22 (4) stipulates that member state law and other EU legal acts may provide stricter liability rules for »adverse impacts« than under the Directive. Such a provision is contrary to the harmonization purpose of the Directive and should therefore be deleted. Otherwise, Art. 22 (4) could not only lead to different sets of civil liability rules regarding »adverse impacts« in different EU member states, but would also pose a risk towards »forum shopping« in the EU when it comes to civil liability suits. Due to companies' broad civil liability provisions, which also apply to adverse impacts caused by others who are liable, cases where several companies could be made liable in different EU member states are possible. Taking Art. 22 (3) into account, the plaintiff could, in such cases, choose to sue the company in the EU member state with the most favourable civil liability rules for the whole damages, regardless of the company's share of causation in the adverse impact. To prevent »forum shopping« and adhere to the harmonisation purpose of the CSDD proposal, Art. 22 (4) should be deleted, and it should be clarified that the civil liability rules of the Directive are exhaustive.

According to Art. 22 (5), the civil liability rules of member states shall have overriding mandatory application in cases where the law of another country would, in general, be applicable. This provision should be deleted. The current rules of private international law, particularly the Rome II Regulation, already provide a sufficient and comprehensive framework on which law applies to which case. Under the current rules, cases where the law of third countries applies, can already be brought before (competent) civil courts in the member states. There is no need for new rules to ensure cases concerning events in other countries can be adequately brought before and decided by courts in the EU member states.

# 9 Public Support

We note that the EU proposal in Art. 24 explicitly does not include an optional exclusion from the award of public contracts. In the legislative process, it should be ensured that this is maintained. However, the proposal establishes in Art. 24 that companies breaching the directive's duties will be deprived of public support. Not only is the concept of public support vague, but the way this consequence is laid out is not in line with the principle of proportionality. **Art. 24 should therefore be clearly defined and formulated in accordance with the principle of proportionality or deleted.**

# 10 Director's Duty of Care

The proposed Directive addresses the responsibility of management for human rights and environmental concerns in a much more concrete way than the German Supply Chain Act. Management must consider the short, medium, and long-term impacts of their decisions on sustainability matters, including human rights, climate change and environmental impacts. Provisions in national law on breaches of duty by management are intended to capture this duty. Furthermore, in certain circumstances, the company must take climate change into account when determining the variable remuneration of the company's management.

The due diligence obligations of company management (Art. 25 and 26), including liability in sustainability, are significantly expanded and deeply interfere with existing company law. **Climate change is, in any case, a socially, politically and economically important issue that the industry takes very seriously and addresses with innovative solutions. However, the liability for companies tied to political targets, as provided for in Art. 25 CSDD**, including the link to bonus payments, **is too extensive and therefore not acceptable.**

# 11 Transposition

The Directive must be transposed into national law two years after its entry into force (Art. 30). The provisions are to apply two years after the entry into force of the Directive for companies within the meaning of Art. 2 (1) a) and Art. 2 (2) a) and four years after the entry into force for companies within the meaning of Art. 2 (1) b) and Art. 2 (2) b).

Concerning the distinction in Art. 30 of the draft Directive on the transposition period of two years (companies with >500 employees and >150 million EUR annual turnover) or four years (companies with >250 employees and >40 million EUR annual turnovers), **clear rules should be established on how larger companies should position themselves vis-à-vis smaller companies in supply chains during the two-year longer transition period.** For larger companies, this can result in a dilemma situation (»contractual cascading«/indirect obligation of smaller companies through the backdoor versus violation of due diligence obligations).

# 12 Annex

The Annex specifies the adverse environmental and human rights impacts relevant to the Directive and lists the violations of rights and prohibitions regarding selected international agreements and conventions, including the international human rights conventions (Part I Section 1), human rights and fundamental freedoms conventions (Part I Section 2) and environmental conventions (Part II).

Compared to the German Supply Chain Act, more environmental conventions regarding environment-related due diligence obligations are listed. Likewise, the human rights due diligence obligations refer to further conventions on human rights and fundamental freedoms. The high level of complexity will pose significant challenges for businesses: The Directive entails enormous bureaucratic processes, and the implementtation process will require considerable effort and additional capacity. Moreover, many of the international norms in the Annex are mostly government-to-government standards. **The absence of applicable material norms is an existential concern, as legal certainty for companies, supervisory authorities, and judges depends on it.** Moreover, Recital 25 indicates that the list of the norms is not even exhaustive, which is demonstrated by Point 21 of Part I in the Annex. This is highly problematic as it could violate the principle of legality (given that sanctions can apply to breaches) and should be addressed.

Bitkom vertritt mehr als 2.000 Mitgliedsunternehmen aus der digitalen Wirtschaft. Sie erzielen allein mit IT- und Telekommunikationsleistungen jährlich Umsätze von 190 Milliarden Euro, darunter Exporte in Höhe von 50 Milliarden Euro. Die Bitkom-Mitglieder beschäftigen in Deutschland mehr als 2 Millionen Mitarbeiterinnen und Mitarbeiter. Zu den Mitgliedern zählen mehr als 1.000 Mittelständler, über 500 Startups und nahezu alle Global Player. Sie bieten Software, IT-Services, Telekommunikations- oder Internetdienste an, stellen Geräte und Bauteile her, sind im Bereich der digitalen Medien tätig oder in anderer Weise Teil der digitalen Wirtschaft. 80 Prozent der Unternehmen haben ihren Hauptsitz in Deutschland, jeweils 8 Prozent kommen aus Europa und den USA, 4 Prozent aus anderen Regionen. Bitkom fördert und treibt die digitale Transformation der deutschen Wirtschaft und setzt sich für eine breite gesellschaftliche Teilhabe an den digitalen Entwicklungen ein. Ziel ist es, Deutschland zu einem weltweit führenden Digitalstandort zu machen.

Bitkom e. V.

Albrechtstraße 10
10117 Berlin
T 030 27576-0
bitkom@bitkom.org

bitkom.org

bitkom