



**FESI position on the proposal on the
Corporate Sustainability Due Diligence
Directive (CSDDD)**

Brussels, May 2022

The Federation of the European Sporting Goods Industry (FESI) and its members welcome the CSDDD proposal recently published by the European Commission. Following a comprehensive review, FESI calls for the following amendments of the draft text:

- 1. Establishment of a level playing field and avoidance of market fragmentation**
- 2. Guidance and clarification on the used definitions and required terminology**
- 3. Support for the inclusion of current and future multi-stakeholders' initiatives and alignment with internationally recognised instruments and schemes**
- 4. Scope: Control of complete value chains impossible**
- 5. Concerns over the impact on the relationships with suppliers and partners**
- 6. Directors' duty of care and the inclusion of environmental factors**
- 7. Grievance mechanisms – ensure effectiveness and prevent from abuse with adequately addressed concept of prioritisation and severity**
- 8. Civil liability to be limited to one's own attributable actions**
- 9. Review and reporting obligations: Overlapping of various reporting obligations threatens to overwhelm companies with over-bureaucratization**

Among its membership, FESI counts many companies with long-standing expertise and experience in operating supply chains compliance management, involved in global multi-stakeholders' platforms such as ILO and OECD, and proactively engaged in numerous public and private initiatives focused on improving supply chain conditions. On the international level, it is worth mentioning initiatives such as the Sustainable Apparel Coalition (SAC), Ethical Trading Initiative (ETI), amfori BSCI – Business Social Compliance Initiative, the Fair Labour Association (FLA), the Fair Wear Foundation, the Better Cotton Initiative (BCI), and Zero Discharge of Hazardous Chemicals (ZDHC) – just to name a few. On the national level, one can refer to the German Partnership for Sustainable Textiles and the Dutch Textile Covenant.

Based on concrete learnings from decades of implementing human rights and environmental due diligence processes in their supply chains, FESI members would like to share their feedback aimed at improving the current proposal to make it more efficient and enforceable.

1. Establishment of a level playing field and avoidance of market fragmentation

As a globally operating industry with complex supply chains, we ask for globally applicable standards, with a harmonised regulation across the EU as a minimum. The proposal, however, comes as a directive and not a regulation. Hence, **the intended goal of contributing to a "level playing field" within the EU will be increasingly challenging to achieve**. This raises serious questions about the long-awaited harmonisation the proposal was supposed to provide. While we do recognise that the legal instruments for such a proposal did not allow for a regulation, we strongly urge the Commission, the Parliament, and the Council to strive as much as possible for **a level playing field and avoid market fragmentation**. This could be achieved by limiting the possibility of Member States to go beyond the proposal on specific provisions such as reporting obligations, civil liability, complaint mechanisms, and prioritisation of risk – in other words, the directive should include provisions to prevent gold plating.

2. Guidance and clarification on the used definitions and required terminology

Standards and precise definitions should be adopted to avoid any confusion and unforeseen negative consequences resulting from misinterpretations. Simultaneously, the federation requests the EU to engage with various stakeholders such as the industry, the UN, and OECD to clarify doubts in the used terminology.

The sporting goods industry is seeking further clarification of a number of terms in the proposed directive, such as "*value chain*", "*established business relationships*", "*civil liability*", and others that might complicate the understanding and implementation of the Directive unless they are aligned and consistent with international standards¹ as further developed throughout this paper.

The deeply detailed reference to a **large number of additional complex international agreements** in the field of human and fundamental rights as well as environmental protection is excessively far reaching. As such, a total of over 230 pages references to legal texts unnecessarily complexify its comprehension and implementation. **A clear and conclusive focus on the internationally recognised standards of the UN Guiding Principles on Business and Human Rights** is therefore required.

FESI and its members also wish to address the need for clarification regarding the financial role of SMEs in an audit process (Art. 7 and 8), as well as complaints procedure (Art. 9). While sporting goods companies support the need to aid SMEs in their due diligence path in various forms, the EU should focus on establishing special incentives and capacity building, which will be more beneficial in the long-term.

3. Support for the inclusion of current and future multi-stakeholders' initiatives and alignment with internationally recognised instruments and schemes

Drawing from its members' extensive experience, **FESI fully endorses the European Commission's acknowledgment of multi-stakeholder initiatives and industry schemes** and their contribution to the identification, mitigation, and prevention of adverse impacts. FESI members appreciate that the proposal in general aligns with internationally recognised instruments on human rights due diligence such as the UN

¹ FESI and its members support the implementation of definitions established as per OECD Guidelines for Multinational Enterprises

Guiding Principles², the OECD Guidelines for Multinational Enterprises³, and the Due Diligence Guidance for Responsible Business Conduct⁴.

The inclusion of such schemes and the recognition of the risk-based approach as instruments supporting the implementation of due diligence obligations in the Member States is seen as a step in the right direction, drawing inspiration from existing initiatives and steering clear from reinventing the wheel and multiplication of requirements. **However, the European Parliament and the Council of the European Union should be wary of relying solely on contractual assurances and audits**, which, without the support of local governments, have limited efficacy in improving standards of work and living for people. While contractual terms and verification mechanisms are relevant elements of a company's due diligence, they are not sufficient for effectively preventing and addressing human rights impacts. Therefore, we believe the Commission proposal should align with international standards focusing instead on the vital role of leverage and the ability of a company to actually influence the behaviour of an entity causing harm.

4. Scope: Control of complete value chains impossible

As mentioned earlier, FESI believes that the concept of "value chains" (defined in Art. 3 (g)), encompassing both upstream and downstream activities, is overly broad and would lead to uncontrollable obligations as well as cover unforeseeable risks. **The Commission proposal as it stands could potentially diverge the focus and resources of buyers from those activities and operations where risks have higher potential.** The experience of our members shows that the concept of risk prioritisation based on severity is a key factor in making due diligence manageable for businesses, as well as ensuring it tackles the most salient risks to people and the environment.

5. Concerns over the impact on the relationships with suppliers and partners

In relation to the point above on value chains, the introduction of the novel and untested concept of "established relationship" is unclear and runs against the principle of the OECD and UNGP. Indeed an "established relationship" is described as one that is "lasting". This could potentially incentivise market operators to distance themselves from long-lasting supplier relationships and encourage short-term commitments, which would go counter to the intention of the requirements.

Additionally, the proposal requires that in case potential adverse impacts (within the meaning of paragraph 1) could not be prevented or adequately mitigated (paragraphs 2, 3, and 4), a company shall be required to temporarily suspend commercial relations with the partner in connection with or in the value chain of which the impact has arisen while pursuing prevention and minimisation efforts or terminate the business relationship with respect to the activities concerned if the potential adverse impact is severe.

In the case where the company may have limited leverage with the partner, this request may lead to undue termination of the contract as it may be seen as a simpler course of action. This would not align with the spirit of continuous improvement.

² https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf

³ <http://mneguidelines.oecd.org/guidelines/>

⁴ <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>

Also, suspending or terminating contracts based on potential impacts, without due verification of the nature and presence of those impacts, may have severe unfair consequences on smaller sub-tier suppliers.

The potential that companies may resort to terminating supplier relationships (due to limited leverage, potential adverse impact, or short-term nature of their contract) could be an unforeseen consequence of the proposal as it stands.

6. Directors' duty of care and the inclusion of environmental factors

FESI questions the value of including the environmental factors and the Paris Agreement in Art. 15 and 25 on Director duty of care. **The inclusion of environmental factors in the proposal is not aligned with existing OECD and UNDP due diligence tools, which burdens companies along the value chain with additional requirements and further-reaching consequences.**

The protection of the environment is among the top priorities of FESI and its members. However, environment and human rights due diligence pose different challenges and require different strategies and approaches to tackle them. While the sporting goods industry acknowledges that there can be some overlaps between human rights and environmental impacts, the latter should be addressed by other EU-level initiatives, either horizontal or industry-specific, like those listed in the EU Textile Strategy⁵.

Furthermore, it should be noted that detailed guidelines or framework conditions that intervene down to deep levels of a company's organisation carry the risk incentivising a box-ticking mentality or withdrawing from any risk. This would ultimately run against the ambitions to improve working conditions and address environmental impacts. Last but not least, overly onerous, and imprecise requirements on individual directors could discourage highly qualified individuals from taking up directorships of European companies – this ought to be avoided.

7. Grievance mechanisms – ensure effectiveness and prevent from abuse with adequately addressed concept of prioritisation and severity

The proposal for the directive provides for the establishment of two complaints bodies or mechanisms. Companies should set up their own contact points (Art. 9) in the event of a breach or suspicion of a breach of due diligence obligations. In addition, there should be national bodies (Art. 19) for processing "*substantiated suspected cases*". Both directly affected persons and, for example, trade unions and non-governmental organisations (NGOs), should have a right to complain.

We believe those complaint mechanisms must first and foremost be effective and must not contribute to abuse or undue complication and legal uncertainty. To ensure legal certainty and avoid a proliferation of unsubstantiated complaints by professional warning or campaign entities, the possibilities of complaint and legal action should be limited to those directly affected by the infringements. The possibility of bundling and managing complaints should also be addressed and supported through industry initiatives. The complaint mechanism for "*substantiated suspected cases*" as the term itself suggests, are potential violations with a

⁵ https://ec.europa.eu/environment/publications/textiles-strategy_en

certain scope. Therefore, it is necessary to clarify that Art. 19 refers only to possible breaches of due diligence obligations of undertakings but not to the obligations arising from Art. 19, 15, 25, and 26.

The concept of prioritisation based on severity is a key factor in making due diligence manageable for business, as well as ensuring it tackles the most salient risks. This is currently not the approach of the due diligence duty proposal. The focus should be on elevating working conditions, and both requirements would create a tremendous burden that would divert time, energy, and resources away from diligence and appropriate remediation efforts. As stated in the proposal, the complaint mechanism “should not lead to unreasonable solicitation on companies”. However, the open-ended concepts of “*legitimate*”, “*well-founded*”, and “*substantiated*” concerns would increase the risk for “unreasonable solicitation on companies” and should be clarified.

Furthermore, the wording around the compensation of damages is very broad and leaves room for interpretation and should be clarified. In a similar vein, the obligation around “*Affected Stakeholders*” and “*Stakeholder Input*” require further definition.

8. Civil liability to be limited to one's own attributable actions

Extensive and ambiguous civil liability entails boundless uncertainty for companies. This is especially true considering the numerous references in the framework of the protected interests and vague legal concepts associated with those. **However, legal certainty, especially in matters of civil liability, is a basic prerequisite for successful and, above all, responsible business.** Any form of liability should, in principle, be based on whether an actor has caused or contributed to the damage or is otherwise linked to it. The draft directive attempts to do justice to this principle to some extent by concentrating the previously very broad concept of the value chain at the level of direct business partners. However, this approach still falls short, as any civil liability must end where the action of a legally independent third party intervenes. **Liability under civil law is to be limited to cases in which damage is attributable and foreseeable as a result of the company's own action.** A mechanism that provides for liability for the actions of third parties is, therefore, a rare exception in European and international jurisdictions and is not in accordance with the UNGP or the Guiding Principles of the OECD.

9. Review and reporting obligations: Overlapping of various reporting obligations threatens to overwhelm companies with over-bureaucratization

Due to many reporting obligations in the area of sustainability, companies are increasingly charged to report on redundant requirements and requests from a multitude of uncoordinated international and national authorities and private stakeholders, diverging resources away from the actual exercise of conducting human rights due diligence. **The proliferation of EU initiatives should aim at establishing a harmonisation that would combine coherent yet manageable reporting obligations for businesses.** However, despite the good will, this is currently not the case. The Commission has already recognised this risk in detail and has anticipated the threat of duplication by the Corporate Sustainability Reporting Directive (CSRD). FESI also invites the Commission to align reporting requirements with EU taxonomy regulation, in particular with the social safeguard provisions.

Standardisation and simplification of reporting obligations should be continued so that companies cease to be subjected to excessive demands that add limited value in terms of achieving the actual goal of conducting due diligence. Experienced industry stakeholders should be involved in the elaboration of the specific details of reporting obligations.

In conclusion, FESI together with its members, firmly believe that a strong and ambitious EU legislation can make a tangible contribution to improving human rights along complex supply chains, helping simultaneously businesses of different sizes to become more resilient and future oriented. However, if such legislation is to be meaningful and properly enforceable, the European Commission, the European Parliament, and the Council of the European Union, should consider taking into consideration the factors raised in this paper. The improvements around definitions and alignment with existing international standards and practices could also be addressed in sectorial guidance documents developed together with interested stakeholders.

Contact

Email: info@fesi-sport.org

Tel: +32 (0)2 762 86 48

About FESI

Founded in 1960 FESI - the Federation of the European Sporting Goods Industry represents the interests of approximately 1.800 sporting goods manufacturers (85% of the European market) through its National Sporting Goods Industry Federations and its directly affiliated member companies. 70-75% of FESI's membership is made up of Small and Medium Sized Enterprises. In total, the European Sporting Goods Industry employs over 700.000 EU citizens and has an annual turnover of some 81 billion euro.
