

POSITION PAPER

# Supply Chain Due Diligence

For a harmonised framework that reflects the complexity of global supply chains



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**CLEPA welcomes the European Commission's intention to embed sustainability and supply chain due diligence into a new EU corporate governance framework. This position paper focuses on the supply chain due diligence component of the EU sustainable corporate governance framework. A harmonised framework for supply chain due diligence can under the right conditions support and reinforce automotive supplier efforts to reduce the sector's environmental footprint and avoid human rights infringements along the value chain.**

It is necessary that the framework does not impose responsibility and liability on suppliers beyond their span of control. The framework should recognise that a company's capability to influence another company depends on contractual and commercial partnerships and the limitations individual businesses face to control global and vast supply chains. A framework that does not reflect the inevitable reliance on and the complexity of global supply chains could undermine the competitiveness of EU industry.

First experiences with legislation in France and Germany highlight the need of an adequate framework which can be implemented by any responsible company. Too widely scoped corporate responsibilities and the use of indefinite terms on legal obligations could create legal uncertainty for companies operating in global supply chains. Legal uncertainty will undermine business' ability to invest and perform a constructive role in the global economy to the detriment of the very same people and environment that the supply chain due diligence efforts seek to better protect.

This position paper sets out three objectives for an effective sustainable corporate governance and supply chain due diligence framework:

-  Provide a clear and harmonised regulatory framework supported by public commitments and expertise building.
-  Address span of control issues related to due diligence responsibilities in deep and global supply chains.
-  Leverage international cooperation and use of market surveillance instruments to mitigate impact on competitiveness.

# 1. Provide a clear and harmonised regulatory framework supported by public commitments and expertise building

The supply chain due diligence framework should establish a legal framework under which automotive suppliers can contribute to limit the risk of human rights infringements and environmental damage connected to economic activity in the vast, global automotive supply chain. The framework should be clear and avoid legal uncertainty that could paralyse business and limit it in its ability to play a positive role in improving oversight on global supply chains.

CLEPA therefore recommends that the responsibility imposed on business reflects the limited span of control of an individual business. EU governments should furthermore recognise that business cannot be expected to gather continuous intelligence on human rights and environmental risks at a global scale and that public authorities are better placed to make human rights related risk assessments. Effective supply chain oversight therefore requires public investments to expand the capabilities of public agencies to provide business with support. Legal certainty will further be enhanced by a harmonised European supply chain due diligence framework.

## 1.1 Responsibility should reflect limitations in the span of control of individual businesses

### Effort instead of outcome obligation

No liability should be imposed where the business can show it undertook reasonable due diligence. Reasonable due diligence needs to be clearly defined, for instance through a certification requirement. The framework could recognise pathways through which supply chain due diligence procedures of companies can be certified as being aligned with international standards. To reflect sectoral differences the legal framework should open the possibility for sectoral alliance to fulfill this certification.

## Proportionate responsibility

A mandatory due diligence should reflect the fact that while a company has full control over its own operations and certain insight and influence into the operations and supply chain management of direct suppliers, it has very little to no control over indirect suppliers / sub-suppliers. The framework should recognise that companies have certain possibilities to demand and review due diligence efforts of its direct suppliers but cannot be held responsible for the outcome of these efforts. Moreover, the legal framework should reflect that a company's enforcement abilities towards suppliers located within the EU may be higher than towards suppliers outside the EU.

## Defining responsibility beyond tier-1

The basis for defining companies responsibilities beyond tier-1 should be a risk analysis. A clear definition of "risk" is important for companies, in contrast to the German Supply Chain Act where Tier-n responsibilities are not clearly defined. Limitations should be in-line with the UN Guiding Principles (UNGP 19.b)i): The UN Guiding Principles set out a guideline in article 19.b on the relationship of the company towards the human rights risk: *"Appropriate action will vary according to: (i) Whether the business enterprise causes or contributes to an adverse impact, or whether it is involved solely because the impact is directly linked to its operations, products or services by a business relationship; (ii) The extent of its leverage in addressing the adverse impact."* The UN guiding principles distinguish whether a company is directly causing a risk/violation, in which case it has to act, while the further away of a risk a company is placed the measures differ (e.g. increase the influence, but no direct responsibility to stop the risk). This aspect should be included in the due diligence initiative to reflect the decreasing influence a company has on tier-n suppliers.

## Limited and clearly defined civil liability

Civil liability will greatly limit any effort to reduce legal uncertainty in a situation where business' control on outcomes is limited due to the multi-stakeholder nature of global supply chains. Challenges presented in this position paper illustrate why civil liability would lead to risks of business



being held responsible for events they cannot control. If a civil liability element is added to the framework, it should clearly be limited to being liable for breaches of supply chain due diligence efforts. No liability for outcome of supply chain due diligence efforts should be imposed and the proposal should clearly identify which breaches could lead to civil liability.

### **Certification as a key tool of legal certainty**

Legislation should assess and recognise existing due diligence standards and tools based on clear and transparent criteria to assess their quality. Moreover, a process for cases where such acceptance is withdrawn should be laid out. Clearly described procedures to recognise and certify due diligence practices could result into European-wide accepted standards, which would help companies introduce meaningful measures. This applies to auditing, self-assessments, etc. Clarity on certification procedures would also enable sectoral certification initiatives that could address sector specific challenges.

### **Clear guidance**

The framework should provide clear guidance on suitable due diligence methodologies to avoid any uncertainties, especially as regards certification and auditing. A mere reference to OECD or UN guidelines alone will not provide sufficient legal certainty as long as there are no formalised certification and auditing channels recognised in the legal framework. Vague rules as contained in some pieces of national legislation along with insufficiently defined legal terminology lead to legal uncertainties.

Those, in turn may result in companies engaging in ineffective allocation of resources for compliance activities, potentially leading to increased administrative burden or extending delivery times and disrupting supply chains rather than contributing to the protection of the environment and human rights. Clear specifications or definitions of what would constitute sufficient measures in the event of a supplier's breach of duty are necessary. Here, the company's limited ability to influence the supplier must be taken into account. Furthermore, human rights infringements outside of the business scope

should be explicitly excluded. The human rights infringement of forced labour includes for instance forced marriage but businesses have no ability to effect this.

### **Tailored conditions for SMEs**

Small and middle-sized companies will have less means to conduct supply chain due diligence. The legal framework should acknowledge this and public authorities should provide dedicated support. It is in this context worth noting that the French and German supply chain laws both went beyond the very narrow EU SME definition. The European framework should ideally be aligned with these definitions.

## **1.2 Effective supply chain due diligence requires public commitments**

### **Public-private cooperation**

Regulatory agencies at the European level should invest in their knowledge and service capabilities to provide guidance and assistance to companies regarding compliance with sustainable corporate governance legislation and supply chain due diligence. This guidance could together with (sectoral) certification reduce legal uncertainty and help companies in their risk assessments. The role the European Chemicals Agency (ECHA) performs as an advisor to businesses regarding the implementation of REACH, the Waste Framework Directive and other regulations of relevance to the chemical sector should serve as an example here. Furthermore, the ECHA list of Substances of Very High Concern could be a template of a list of high risks regions and products. In the EU conflict minerals regulation, the absence of a clear definition of CAHRA countries, despite being requested as early as 2016, leads for instance to uncertainty for suppliers and requires a strategic assessment beyond their reasonable scope of operational expertise.



## **EU cooperation programs**

The responsibility to prioritise and coordinate support in the development of solutions to specific environmental or social challenges that occur around the world needs to be attributed to an existing or newly established agency. These cooperation programs should join forces with industry initiatives and provide a safe harbor to companies that contribute to the creation of responsible supply solutions.

## **Harmonisation with other EU initiatives**

To create a truly integrated and effective European framework the upcoming initiative should align with already existing regulations which also cover aspects of supply chain due diligence, e.g. Conflict Minerals Regulation, Battery Regulation, Corporate Sustainability Reporting Directive. Simplification instead of diversification within the EU regulation landscape should be achieved. Where possible alignment with international frameworks should be aspired.

## **1.3 Harmonisation across EU Member States will reduce legal uncertainty**

### **Multinational operations**

Automotive suppliers typically have operations across EU Member States and would highly benefit from a harmonised framework. Companies should be able to deal with their due diligence requirements at a consolidated manner to avoid that a company with procurement operations across EU Member States would have to set-up different, dedicated procedures in every member state where it operates. Where appropriate equivalence with supply chain due diligence frameworks outside of the EU should be recognised.



## Regulation or coordination

A regulation on supply chain due diligence would be the best way to ensure harmonised implementation across Member States, thus avoiding a patchwork of national requirements and legal uncertainty. A high degree of harmonisation at EU level can eventually strengthen the competitiveness of EU suppliers. It is our understanding, however, that the Commission will address supply chain due diligence requirements within the context of a social corporate governance directive that will also address director duties. The proposal would therefore fall under corporate law. In light of the limitations of EU competence re. corporate law, splitting the initiative into several legal acts – a regulation for supply chain due diligence based on Single Market competence and a directive on directors' duties – should be considered.

CLEPA members do not see significant added value in explicitly including supply chain due diligence responsibilities into the director duties. The director duties part of the proposal remains therefore unaddressed in this position paper. In case the due diligence framework would be established through a directive, the European Commission should facilitate engagement between enforcement agencies at Member State level by (for example) establishing an EU-level expert group, to ensure coherent national enforcement.

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### Provide a clear and harmonised regulatory framework supported by public commitments and expertise building



**1.1** Official recognition of sector due diligence alliances can enhance span of control, whereas sectoral certification schemes can enhance legal certainty

**1.2** Public authorities will need to perform an active supporting role to help business perform effective due diligence

**1.3** A patchwork of national due diligence frameworks is to be avoided, harmonisation across EU is critical

## 2. Address span of control issues related to due diligence responsibilities in deep and global supply chains

Automotive suppliers are ready to further optimise their efforts to limit risks of human rights infringements and environmental damage in their supply chains but making businesses responsible to conduct oversight beyond their direct supplier base will in most cases stretch their span of control. Individual businesses can hardly be expected to control the vast and deep global supply chain with up to hundreds of suppliers they depend on. Companies therefore need to be able to address responsibilities for supply chain operations beyond their direct span of control through frameworks of sectoral cooperation and standards and certification.

### Standards to improve transparency

There are no contractual agreements of a company to Tier-n, so direct influence is usually not given. Often, good will of Tier-n suppliers is needed to gain transparency or implement measures within Tier-n. The use of standards and certificates should thus be prioritised. Good practice examples are already existing initiatives of the RMI such as the Conflict Minerals Reporting.

### Safe harbour

Cooperation within sectors can lead to new standards which are easier to implement than single requirements of companies. Companies' engagement in and fulfillment of accepted industry initiatives should be recognised as a due diligence element. Moreover, industry initiatives or alliances could be granted an official status as certification body for the due diligence governance architecture of business.



**2** Address span of control issues related to due diligence responsibilities in deep and global supply chains

Official recognition of sectoral due diligence alliances will improve effectiveness of due diligence in deep and global supply chains

**CLEPA**  
European Association of Automotive Suppliers

### 3. Leverage international cooperation and use of market surveillance instruments to mitigate impact on competitiveness

The automotive supply chain is globalised and EU based automotive suppliers face both competition from suppliers located outside the EU and depend on global supply chains for an important part of their sourcing. Policymakers should therefore avoid that supply chain due diligence requirements negatively impact the competitiveness or access to necessary materials of automotive suppliers. The legal framework for supply chain due diligence can strengthen competitiveness if it establishes a fair degree of harmonisation and is aligned with leading international frameworks. Most of all, the legal framework should recognise that international cooperation between governments will be pivotal to root out human rights and environmental risks in global supply chains.

#### **EU market surveillance legislation**

Should be updated so that due diligence requirements apply to all products sold on the EU single market, whether produced in the EU or imported.

#### **Reflect sourcing dependencies**

Automotive suppliers operate in a global and highly fragmented market where procurement power in areas of materials or niche processed goods can be limited. European suppliers therefore may face competitive disadvantages if sourcing possibilities become more limited than those available to non-European suppliers. Furthermore, a wide range of raw materials of relevance for the production of automotive components can only be sourced from a limited number of countries with a high ESG risk profile. The framework should provide a clear recognition of the fact that companies for certain products may be in a dependence and asymmetric power relationship with their supplier and will face a significant commercial disadvantage if they would not be able to source a certain raw material or intermediate good. In case e.g. raw materials cannot be procured in "non-risk" areas, the framework should provide a possibility / describe circumstances on how to maintain the supply chain without compromising any of the due diligence requirements.



### **Alignment with leading international frameworks**

The framework should recognise and seek alignment with international frameworks, notably the UN Guiding Principles on Business and Human Rights (UNGP), the ILO Declaration on Fundamental Principles and Rights at Work, the UN Universal Declaration of Human Rights, the OECD Guidelines for Multinational Enterprises and the OECD Due Diligence Guidance for Responsible Business Conduct.

### **Assess supporting role of TSD chapters in FTAs**

The Commission review of TSD chapters should address supply chain due diligence and see if future trade agreements could play a supporting role. Existing trade relationships and frameworks for political cooperation could be used to support due diligence activities of companies in respective third countries. Third countries could for instance commit to increasing transparency on work or environmental conditions in local supply chains.

### **Recognition of extraterritorial limitations**

The framework should recognise the fact that automotive suppliers operate in different legal jurisdictions and can face contractual commitments that limit their ability to quickly enforce due diligence requirements along their supplier base. Anti-blocking statues in third countries could furthermore limit the ability of local companies to comply with legal requirements set in the EU. China's new Rules on Counteracting Unjustified Extraterritorial Application of Foreign Legislation and Other Measures are for instance presented as sanction blocking statute, but the scope is broader and

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### **Leverage international cooperation and use of market surveillance instruments to mitigate impact on competitiveness**

International cooperation between governments will be pivotal to root out human rights and environmental risks from supply chains.

could result in Chinese suppliers being prohibited to comply with requirements set by EU suppliers in the context of the EU supply chain due diligence law.

The EU legal framework should recognise that international businesses can be in a situation where foreign laws limit the extent to which supply chain due diligence can be rolled out quickly and provide resolution mechanisms. In cases where it might not be possible to fully comply with due diligence requirements without compromising essential parts of the supply chain, a staged system like the earlier referenced principle 19B of the UN Guiding Principles could present a solution.

## Three objectives for an effective supply chain due diligence framework



1

Provide a clear and harmonised regulatory framework supported by public commitments and expertise building

2

Address span of control issues related to due diligence responsibilities in deep and global supply chains

3

Leverage international cooperation and use of market surveillance instruments to mitigate impact on competitiveness

Would like to know more?

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CLEPA, the European Association of Automotive Suppliers, represents over 3,000 companies supplying state-of-the-art components and innovative technologies for safe, smart, and sustainable mobility.

CLEPA brings together over 120 global suppliers of car parts, systems, and modules and more than 20 national trade associations and European sector associations. CLEPA is the voice of the EU automotive supplier industry linking the sector to policy makers.

- The automotive sector accounts for **30% of R&D** in the EU, making it the number one investor.
- European automotive suppliers invest over **30 billion euros** yearly in research and development.
- Automotive suppliers register over **9,000 new patents** each year.
- Automotive suppliers in Europe generate **1.7 million** direct jobs.

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