

The EU Corporate Sustainability Due Diligence Directive: Article 22 - Combating Climate Change

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Portuguese Version

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Article 15 (now Article 22) of the European Commission's original proposal for a Directive on Corporate Sustainability Due Diligence (published on the 23th of February 2022) required Member States to ensure that companies would adopt a transition plan for climate mitigation. The transition plan would ensure that companies' business model and internal strategies were compatible with the transition to a sustainable economy and limiting global warming to 1.5 °C, in line with the Paris Agreement.[1]

After the release of the Council of the European Union's general approach on the legislation (30th of November 2022), and the publication of the European Parliament's amendments (1st of June 2023), a provisional agreement on the text of the Corporate Sustainability Due Diligence Directive was reached on the 15th of December 2023[2], and article 15 was modified to include key elements to ensure companies would put in place transition plans for climate mitigation. For instance, companies with more than 1000 employees were required to include appropriate policies to promote the implementation of the mitigation plan through financial incentives to members of the administrative, management or supervisory bodies concerned, and the design of the plan should include time-bound targets and the creation of reduction targets for greenhouse gas scope 1, 2 and 3. The provisional agreement was expected to be endorsed and formally adopted by the Parliament and the Council in beginning of the year of 2024, however, the final approval of the text faced setbacks.

Due to lack of consensus between the EU's Member States in the Council of the European Union, the final vote ended up being postponed many times, and the text of the legislation was altered again before its final adoption. The Council finally adopted the legislation on the 15th of March 2024 and the JURI committee of the European Parliament voted on the text on the 19th of March 2024. The final vote of the Parliament's plenary was held on the session of April 24th. In the final revision of the legislation the requirements to adopt a transition plan were moved to Article 22 and the article was revised to include the following content:

1. Adoption and Implementation of the Transition Plan:

The final version of the Directive includes a duty of companies to adopt measures and act effectively in order to transition to a sustainable economy. This duty is in line with the Paris Agreement and with the goal of achieving climate neutrality, as established in Regulation (EU) 2021/1119, including the 2050 climate neutrality targets.[3]

The Commission's original proposal had only set the obligations of adopting a mitigation plan. Nonetheless, the Parliament[4] and the Council[5] proposed the obligation of adoption and implementation of a mitigation plan to fulfil the objective of achieving climate neutrality, and the last version of the Directive's text included and clarified what these were as well as what they entailed.

To put into effect this transition plan, corporations will now have to design a plan with time-bound targets related to climate change for 2030, and a five-year step for 2050, through the creation of reduction targets for greenhouse gas scope 1,2 and 3, based on scientific evidence. When appropriate, they should also put forward targets for absolute emission reduction. In addition to that, the transition plan will have to include a description of decarbonisation levers identified, the key actions to be taken to reach the targets, what is the transition's funding plan, and the description of the role of the administrative, management and supervisory bodies with regards to the plan (Article 1a, b, c, d).[6]

All transition plans will have to be updated every 12 months and describe the progress made to achieve the proposed targets.[7]

2. The CSRD and CS3D

The Corporate Sustainability Reporting Directive (CSRD) and the Corporate Sustainability Due Diligence Directive (CS3D) are interrelated and complementary to each other. For this reason, the newest version of the text clarifies that companies that report a transition plan in accordance with the CSRD shall be deemed to have complied with the requirement or adopting a transition plan. It should be noted that companies which report a transition plan in accordance with the CSRD are compliant only with the requirement of adopting a transition plan of the CS3D, not with all other requirements.[8]

3. Nature of the Climate Obligations: Obligations of Means

The newest version of the Directive explains in its recitals that the directive should not require companies to guarantee, in all circumstances, that adverse impacts will never occur or will necessarily be stopped. It indicates that the main obligation in the Directive should be "obligations of means", not of results. It also explains that companies should take the appropriate measures which are capable of achieving the objectives of due diligence by effectively conducting due diligence in a manner commensurate to the degree of severity and the likelihood of the adverse impact. [9]

In relation to the transition plan, the text of the recitals explicitly mentions that the transition plan should be understood as an obligation of means and not of results, and that, being an obligation of means, due account should be given to the progress companies make in order to satisfy the objectives defined in the transition plan.[10]

4. Parent Companies' Liability and Climate Change:

An additional clarification in relation to the parent companies and subsidiaries' due diligence responsibilities is described in the Directive's recitals.

The parent companies falling under the scope of the Directive should be allowed to fulfil some of the due diligence obligations also on behalf of its subsidiaries that fall under the

scope of this Directive^[11]. However, according to the recitals^[12], this does not exclude the subsidiary's responsibility to carry out effective due diligence.

Irrespectively of whether the due diligence obligations were carried out by the parent company on the behalf of the subsidiary or by the subsidiary itself, the subsidiary can still be held liable if the conditions for civil liability are met, and it continues to be subject to the exercise of the supervisory authority's powers.

When the parent company fulfils the obligation of combating climate change on behalf of the subsidiary, the subsidiary should comply with those obligations in accordance with the parent company's climate change mitigation plan adapted to its business model and strategy. When a subsidiary does not fall under the scope of the Directive, it is not obliged to carry out due diligence, but the parent company should cover operations of the subsidiary as part of its own due diligence obligations.

5. Scope of application: High-Risk Sector Out and a Higher Threshold

The Commission's original proposal did not include companies from the high-risk sector (Article 2 (1)b and (2)b) under the scope of the obligations of Article 15 (now Article 22). The implementation of a transition plan was only required from the companies with more than 500 employees and which had a net worldwide turnover of more than €150 million (Article 2 (1)a and 2(2)a). For third country companies, only those who had generated a net turnover of more than €150 million in the Union were to fall under the scope obligation of article 15^[13].

The Council of the European Union's general approach to the text followed this proposal^[14], however, the European Parliament proposed the extension of the obligations set forth in this norm to all companies referred to in Article 2 (including high-risk sector)^[15]. In the provisional agreement from December 2023, it was decided that companies from the high-risk sector (article 2, (2, b) would be left out of the scope of application of Article 15.^[16]

In the final version of the Directive, the scope of application of Article 22 has changed significantly. The scope of the article was altered to include EU companies comprising a minimum of 1000 employees and a net turnover of €450 million, according to the new criteria defined in article 2(1),a,b,ba, and article 2(2)a,b,ba which changes the scope of the entire legislation and its corresponding articles.

Article 2 altered the size of companies subject to due diligence obligations from 500 employees to 1000 employees and changed the gross revenue threshold of these companies from more than €150 million to more than €450 million. Therefore, Article 22 will now apply the new criteria defined in article 2(1)a,b,ba and 2(2)a,b,ba. In addition to that, the newest text removed the high-risk classification of industries or sectors from article 2. As a consequence, Article 22 will not target specific sectors, contrary to what was suggested by the Parliament, and neither will any other provisions which classified different kind of obligations for companies operating in the high-risk sector.

Adopted Text:

Article 22

Combating Climate Change

1. Member States shall ensure that companies referred to in Article 2(1), **points (a), (b) and (ba)**, and Article 2(2), **points (a), (b) and (ba)**, adopt and **put into effect a transition plan for climate change mitigation which aims** to ensure, through **best efforts**, that the business

model and strategy of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C in line with the Paris Agreement and the objective of achieving climate neutrality as established in Regulation (EU) 2021/1119, including its intermediate and 2050 climate neutrality targets, and where relevant, the exposure of the company to coal-, oil- and gas-related activities.

The design of the transition plan referred to in the first subparagraph shall contain:

- (a) time-bound targets related to climate change for 2030 and in five-year steps up to 2050 based on conclusive scientific evidence and including, where appropriate, absolute emission reduction targets for greenhouse gas for scope 1, scope 2 and scope 3 greenhouse gas emissions for each significant category;
- (b) a description of decarbonisation levers identified and key actions planned to reach targets referred to under point (a), including where appropriate changes in the undertaking's product and service portfolio and the adoption of new technologies;
- (c) an explanation and quantification of the investments and funding supporting the implementation of the transition plan;
- (d) a description of the role of the administrative, management and supervisory bodies with regard to the plan.

2. Companies that report a transition plan for climate change mitigation in accordance with Article 19a, 29a or 40a, as the case may be, of Directive 2013/34/EU of the European Parliament and of the Council shall be deemed to have complied with the adoption obligation set out in paragraph 1 of this Article. Companies that are included in the transition plan for climate change mitigation of their parent undertaking, reported in accordance with Article 29a or 40a, as the case may be, of Directive 2013/34/EU of the European Parliament and of the Council, shall be deemed to have complied with the adoption requirement set out in paragraph 1 of this Article.

3. Member States shall ensure that the transition plan referred to in paragraph 1 is updated every 12 months and contains a description of the progress the company has made towards achieving the targets referred to under paragraph 1, point (a). [17]

[1] EU Commission, *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (COM/2022/71 final)*, Article 15, 2022, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071>

[2] Provisional Agreement, *Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (Text with EEA relevance) 2022/0051(COD)*, Article 15 (1), 15-12-2023 at 17h15 166/234.

[3] EUROPEAN PARLIAMENT AND COUNCIL OF THE EU, *AMENDMENTS BY THE EUROPEAN PARLIAMENT to the Commission proposal of the DIRECTIVE (EU) 2024/... OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859. Article 22.* 2024. Available at: https://www.europarl.europa.eu/doceo/document/A-9-2023-0184-AM-430-430_EN.pdf

[4]European Parliament, *Amendments adopted by the European Parliament on 1 June 2023 on the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (COM(2022)0071 – C9-0050/2022 – 2022/0051(COD))*, Amendments 247 to 256 , 2023, available at: https://www.europarl.europa.eu/doceo/document/TA-9-2023-0209_EN.html

[5]Council of the EU, *Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 – General Approach, Article 15*, 2022, available at: <https://data.consilium.europa.eu/doc/document/ST-15024-2022-REV-1/en/pdf>

[6] EUROPEAN PARLIAMENT AND COUNCIL OF THE EU, *AMENDMENTS BY THE EUROPEAN PARLIAMENT to the Commission proposal of the DIRECTIVE (EU) 2024/...OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859. Article 22*. 2024. Available at: https://www.europarl.europa.eu/doceo/document/A-9-2023-0184-AM-430-430_EN.pdf

[7]Ibid.

[8] Ibid. Article 22 (3).

[9]EUROPEAN PARLIAMENT AND COUNCIL OF THE EU, *AMENDMENTS BY THE EUROPEAN PARLIAMENT to the Commission proposal of the DIRECTIVE (EU) 2024/...OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859. Article 22*. 2024. Available at: https://www.europarl.europa.eu/doceo/document/A-9-2023-0184-AM-430-430_EN.pdf

[10]Ibid. *Recitals* 73.

[11]Ibid. *Recitals* 21.

[12]Ibid. *Recitals* 22.

[13] EU Commission, *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (COM/2022/71 final)*, Article 15, 2022, available at: <https://data.consilium.europa.eu/doc/document/ST-6145-2024-INIT/en/pdf>

[14]Council of the EU, *Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 – General Approach, Article 15*, 2022, available at: <https://data.consilium.europa.eu/doc/document/ST-15024-2022-REV-1/en/pdf>

[15] European Parliament, *Amendments adopted by the European Parliament on 1 June 2023 on the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (COM(2022)0071 – C9-0050/2022 – 2022/0051(COD))*, Amendment 247, 2023, available at: https://www.europarl.europa.eu/doceo/document/TA-9-2023-0209_EN.html

[16]Provisional Agreement, *Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (Text with EEA relevance) 2022/0051(COD), Article 15 (i)*, 15-12-2023 at 17h15 166/234.

[17]EUROPEAN PARLIAMENT AND COUNCIL OF THE EU, *AMENDMENTS BY THE EUROPEAN PARLIAMENT to the Commission proposal of the DIRECTIVE (EU) 2024/...OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859. Article 22*. 2024. Available at: https://www.europarl.europa.eu/doceo/document/A-9-2023-0184-AM-430-430_EN.pdf

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