The European Commission’s proposal for a Directive on “corporate sustainability due diligence”
Initial analysis of Environmental issues

October 2022

Discussions on the European Commission’s proposal for a Directive on “corporate sustainability due diligence” (hereafter, the “draft Directive”), published on the 23rd of February 2022, are progressing but raise crucial questions about how to address the obligations and liability of companies for environmental harms occurring in their global value chains. One of the main challenges is to define the substantive scope of the future European duty of vigilance in environmental matters.

Diverging approaches as to how to define environmental harms in the draft Directive have emerged which are indicative of the various interests at stake and the different conceptions of the duty of vigilance both at national and EU levels. A broad and holistic approach, like the one of the French Duty of Vigilance Law, enables to cover all possible types of environmental harms that may be caused by companies within their value chains. To the contrary, the EU Commission has adopted a particularly restrictive approach which tend to narrow the scope of companies’ obligations to a very limited set of environmental adverse impacts.

The first approach is that adopted in the French Duty of Vigilance Law, enacted on the 27th of March 2017, in which reference is made to “the environment” in a very broad sense. In a similar vein, the 2020 draft report by the parliamentary rapporteur Lara Wolters refers to the notion of “environmental risk” in a general clause, including any potential or actual adverse impact that may impair the right to a healthy environment.

Based on a much more limited approach, in the Annex to its resolution the 10th of March 2021, the European Parliament suggested that the term “potential or actual adverse impact on the environment” be defined as “any violation of internationally recognized and Union environmental standards, as set out in Annex xxx to this Directive.” This definition represents a significant change from the original proposal as the definition of environmental impacts would be now conditioned upon the prior violation of an international or European norm.

In the draft Directive, the Commission suggests defining environmental harms, first, by reference to specific international conventions, listed in an Annex. According to article 3 (b), the term “adverse environmental impact” is defined as “an adverse impact on the environment resulting from the violation of one of the prohibitions and obligations pursuant to the international environmental conventions listed in the Annex, Part II”. Thus, companies’ obligations are conditioned upon the prior violation of one of the prohibitions explicitly spelled out in one of the listed international environmental conventions.

Second, the Annex listing human rights impacts contains a provision relating to human rights violations that may be caused by certain environmental degradations (harmful soil change, water or air pollution...), considering environmental harms through the prism of human rights.
The notion and definition of “adverse environmental impacts” under the draft Directive would be tantamount to regression in relation to the French Duty of Vigilance Law. Our legal analysis, based on our litigation experience in relation to the French law, shows that the Commission’s approach seems particularly restrictive and raises several issues, as described further below:

- First, it risks creating legal loopholes and blind spots regarding the type of environmental damage covered by the Directive (1);
- Second, the horizontal effect of environmental conventions, i.e. their application to non-state actors, appears to be difficult (2);
- Third, the provision linking human rights violations to environmental degradation, while interesting in some respects, may leave aside “pure ecological damage”, which do not have an impact on property or persons (3);
- Finally, the draft has considerable shortcomings regarding the climate issue as Article 15 appears to separate climate-related impacts from the definition of “adverse environmental impacts” and to exclude these impacts from the scope of civil liability in Article 22, except through the prism of human rights (4).

To achieve its objectives, the European duty of vigilance should rather provide a broad material scope to environmental matters, covering all actual or potential damage to the environment and its components; otherwise, the obligations enshrined in the Directive will be largely ineffective (5).

The risk of creating legal loopholes and blind spots

First of all, it should be noted that international environmental law is sectoral and highly fragmented. There is no single overarching normative framework that could be defined as the rules and principles of general application in international environmental law. On the contrary, as a report by the Secretary-General of the UN General Assembly points out, “international environmental law is piecemeal and reactive. It is characterized by fragmentation and a general lack of coherence and synergy among a large body of sectoral regulatory frameworks.”

The existing principles of international environmental law (including the prevention principle, the precautionary principle or the polluter-pays principle) tend to structure this fragmented discipline, which has progressively emerged in response to successive disasters, but which is still not unified. However, the draft Directive does not refer to these general principles of international environmental law.

The Commission’s approach risks creating significant legal loopholes and several blind spots by choosing to refer to international environmental conventions. In particular, the proposal is likely to fail to cover significant environmental damage caused by economic actors within their global value chains.

As the German Environment Agency pointed out: “Given the fact that international environmental agreements constitute a highly patchy and at best fragmentary legal order, relying solely on references to those results in a just as patchy environmental due diligence obligation.”
For instance, there is no international legal instrument governing soil pollution and the prevention of soil degradation by industrial and mining activities. However, soil interacts with other natural resources. Consequently, soil degradation has considerable implications for water protection, climate change, human health, biodiversity, and nature conservation. However, the Commission's restrictive approach does not allow to consider such environmental harm.

Similarly, there is no global legally binding instrument governing forests and the prevention of deforestation, nor is there a satisfactory global instrument to prevent damage to marine biodiversity on the High Sea.

In our view, the approach proposed by the Commission, which relies on fragmented instruments, is inadequate for the protection of the environment and considerably weakens the draft Directive.

In addition, by referring to a list of environmental international instruments in the Annex, the proposal makes it very complex to identify the types of environmental damage covered or not by the text and could jeopardize the intelligibility of the law.

We therefore recommend changing the approach by removing the reference to the Annex and providing a broad definition of environmental harms.

In any event, as it stands, the list of international standards in the Annex already omits several key areas of environmental law such as:

- the UNFCC and the Paris Agreement governing climate obligations;
- the Ramsar Convention on Wetlands of International Importance especially as Waterfowl Habitat, which is governing the conservation and sustainable use of wetlands;
- the International Convention for the Prevention of Pollution from Ships, 1973 as modified by the Protocol of 1978 (MARPOL 73/78);
- the UN Convention on the Law of the Sea (Montego Bay), which contains a clear general obligation for State parties to protect and preserve the marine environment (Art. 192);
- the 1997 UN Watercourses convention.

It is however worth noting that adding additional international environmental conventions to the Annex in an attempt to fill its loopholes is unlikely to succeed. Given that environmental international law consists of over 500 international treaties and agreements, including 300 regional ones, any attempt at comprehensiveness would seem vain.

The difficult application of international environmental conventions to companies

As it stands, the draft Directive only qualifies as environmental damage, violations of "internationally recognized objectives and prohibitions included in environmental conventions" listed in the Annex. In other words, it would be necessary to demonstrate beforehand that the identified environmental harm results from the violation by a company of a specific norm included in an international convention.
As a preliminary point, it should be noted that the violation by a company of an “objective” set by an international convention, as mentioned in the draft Directive, is not self-evident. As a matter of fact, the majority of international environmental treaties are framework conventions, outlining the objectives to be achieved through loose or very flexible treaty commitments to which only the States Parties can give consistency and force. Hence, the implementation of the various objectives and obligations enshrined in environmental treaties depend mainly on the measures taken by each State parties.

In this respect, the approach taken by the European Commission seems to be highly problematic, as the horizontal effect of environmental conventions, i.e. their application to non-state actors, appears to be difficult.

For example, the Convention on Biological Diversity⁹ (CBD - listed in the Annex to the draft Directive), contains notably a mere requirement for State Parties to develop national biodiversity strategies and action plans. The draft Annex refers to the “violation of the obligation to take the necessary measures related to the use of biological resources in order to avoid or minimize adverse impacts on biological diversity in line with Article 10(b) of the 1992 Convention on Biological diversity (…).” However, the application of this obligation incumbent originally on States to companies’ activities remains unclear.

In addition, the CBD does not address important issues such as the conservation and sustainable use of forests, pollution of marine areas by land-based plastic waste, soil protection, pesticide use, or noise pollution. As a result, it appears very difficult to characterize certain damage to biodiversity caused by economic activity (such as deforestation, plastic pollution) as a violation of one of the “objectives and prohibitions” of the CBD Convention, as required by the draft Directive. In other words, most of the serious damage to biodiversity will likely remain outside the scope of the Directive if the Commission’s approach was to be adopted.

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)¹⁰, which is also listed in the Annex to the draft Directive, is another example. It imposes controls on international trade in certain wild animals and plants (listed in three appendices to the Convention). The draft Directive recognizes the “adverse environmental impacts” resulting from the “violation of the prohibition to import or export any specimen included in an Appendix of the CITES (…) without a permit”. However, the implementation of this obligation depends heavily on the adoption of national laws and measures by the States parties. Indeed, the CITES provides that Parties [i.e. States] “shall take appropriate measures to enforce the provisions of the (…) Convention and to prohibit trade in specimens in violation thereof”.¹¹ Therefore, the effectiveness of this prohibition might be compromised in the event that a State-party does not take regulatory measures to implement the CITES nor issues a permit in violation of the CITES provisions.

Another good example to illustrate the difficulties induced by the current wording, is the reference to the Stockholm Convention on Persistent Organic Pollutants (POPs), where most of the obligations are addressed to the signatory States and require national regulations for their implementation.
According to the draft Directive\textsuperscript{12} an adverse environmental impact may result from “the violation of the prohibition of the handling, collection, storage and disposal of waste in a manner that is not environmentally sound in accordance with the regulations in force in the applicable jurisdiction under the provisions of Article 6(1) (d) (i) and (ii) of the POPs Convention”. Therefore, if a company operates in a State without adequate regulation in application of the Stockholm Convention, the obligation under the Directive will be totally ineffective.

The limitations of an anthropocentric approach

The draft Directive also includes in its Annex\textsuperscript{13}, within the list of “adverse human rights impact”, environmental degradations (harmful soil change, water or air pollution…) that may have an impact on certain human rights (right to food, water, health…) or that may affect “ecological integrity, such as deforestation”:

\begin{quote}
18. Violation of the prohibition of causing any measurable environmental degradation, such as harmful soil change, water or air pollution, harmful emissions or excessive water consumption or other impact on natural resources, that
\begin{itemize}
\item[(a)] impairs the natural bases for the preservation and production of food or
\item[(b)] denies a person access to safe and clean drinking water or
\item[(c)] makes it difficult for a person to access sanitary facilities or destroys them or
\item[(d)] harms the health, safety, the normal use of property or land or the normal conduct of economic activity of a person or
\item[(e)] affects ecological integrity, such as deforestation,
\end{itemize}
\end{quote}

This provision seems especially relevant because it allows the close links between environmental damage and human rights to be established. Nevertheless, it does not explicitly mention the right to a healthy environment, which has been progressively developed since the adoption of the Stockholm Declaration both at national and regional levels\textsuperscript{14}.

Furthermore, the above-mentioned provision still depends on an anthropocentric approach. Thus, for an environmental harm to be taken into account, an impact on a specific human rights provision appears to be required. As a result, as it stands, the draft Directive may exclude “pure” ecological damage, regardless of the possible repercussions on a particular human interest (e.g. property or persons).

This seems very problematic because, under the liability regime of the draft Directive, corporate actors would not be accountable for environmental damage that cannot be linked to an impact on human rights, such as significant water pollution caused by an industrial activity that cannot be shown to affect a person’s access to drinking water or safety.
However, it should be noted that the draft Directive includes an interesting reference to environmental degradation affecting “ecological integrity”, taking the example of deforestation. The concept of ecological integrity has been used in various national and international legal texts\textsuperscript{15} to promote the conservation of the natural environment from human activities or the sound management of the natural environment by people. In our view, this provision is of particular relevance as it follows a comprehensive and non-sectoral approach of environmental damage.

Environmental harms should indeed be defined under a general clause, but this clause should be carefully worded to include all damage caused to the environment or its components, including “pure” ecological damage.

Considerable shortcomings regarding the climate issue

The issue of climate change is mentioned in a separate article of the draft Directive (Article 15) and the Paris Agreement is not included among the international environmental standards listed in its Annex. As a result, the draft Directive appears to separate climate impacts from the definition of “adverse environmental impacts”, and it does not include them in the scope of civil liability in Article 22, except through the prism of human rights:

“Article 15

Combating climate change

1. Member States shall ensure that companies referred to in Article 2(1), point (a), and Article 2(2), point (a), shall adopt a plan to ensure 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. This plan shall, in particular, identify, on the basis of information reasonably available to the company, the extent to which climate change is a risk for, or an impact of, the company’s operations.

2. Member States shall ensure that, in case climate change is or should have been identified as a principal risk for, or a principal impact of, the company’s operations, the company includes emission reduction objectives in its plan.

3. Member States shall ensure that companies duly take into account the fulfilment of the obligations referred to in paragraphs 1 and 2 when setting variable remuneration, if variable remuneration is linked to the contribution of a director to the company’s business strategy and long-term interests and sustainability.”

Therefore, although such liability may result from the application of common tort law principles in national laws, Member States would have no obligation to ensure that companies are liable for the lack (or inadequacy) of climate vigilance measures and for the damage that may result from the climate impacts of their activities and products.
It should be noted that, as it stands, the Commission’s proposal would also constitute a regression in relation to the approach of the French Duty of Vigilance law, in which climate is not separated from other environmental aspects and therefore necessarily included in the scope.

In addition, the obligations in Article 15 could be significantly enhanced. First, Article 15 does not explicitly take into account scope 3 GHG emissions from companies (which account for 90% of total emissions for sectors such as oil and gas). Although it can be easily argued that Scope 3 emissions are indeed included in the climate change-related risks resulting from a company’s operations, it is worth noting that some companies currently subject to the French Duty of Vigilance law do not include Scope 3 emissions in their vigilance plan, arguing that these do not “result” from their activities, such as the company Total.

Second, although companies must establish a “plan” with “emission reduction objectives” to ensure compatibility with the Paris Agreement, the proposal does not require them to set CO2 emissions reduction trajectories with short and medium-term targets. In a context where many companies are already posting “commitments” to be carbon neutral by 2050, the draft Directive may encourage greenwashing in companies’ climate strategies if short and medium-term targets are not clarified.

In conclusion, the draft Directive fails to consider the inevitable interdependence of climate and other environmental issues, which it would be counterproductive to fragment. It also fails to tackle the urgency of holding companies accountable for their climate-impacting activities. Finally, the proposal does not ensure that interested persons - such as NGOs or victims of climate change - will have access to judicial mechanisms, which may render the obligations in Article 15 totally ineffective.

**The urgent need for a broader approach to environmental matters**

Providing for a broad definition of environmental damage, as opposed to a reference to violations of specific international conventions, would be more relevant and appropriate to achieve the Directive’s objectives.

**A broad definition of environmental damage would cover all actual or potential damage to the environment and its components, whereas a list of norms limits the scope of the obligations to restricted types of damage. It would also cover the possible cumulative effects of certain environmental harms, in contrast to the sectoral approach adopted in international environmental conventions.**

Indeed, the elements of the environment (air, soil, water, fauna, flora, forests) are interdependent, and damage to one element almost always has consequences for the others. The EU duty of vigilance must provide a broad substantive scope in environmental matters. Otherwise, the obligations provided for by the Directive will be largely ineffective. A change of approach would also make it possible to address the current difficulties related to applying international environmental conventions to companies.
Moreover, it should be remembered that the environment has value in itself. Damage can be caused to the environment independently of direct effects on human rights. In this respect, the European legislator could be inspired by the French Duty of Vigilance Law, which concerns human rights, fundamental freedoms, the health and safety of persons, and the environment. This substantive scope specifies that it concerns environmental damage and not the violation of international environmental norms. In our opinion, such a general clause making reference to the environment as a whole should be replicated in a future European legal instrument. As a result, the cases brought before the French courts on the basis of the Duty of Vigilance law relate to various types of environmental damages, such as the environmental impacts of Total’s activities due to its direct and indirect greenhouse gas emissions\textsuperscript{19}, the deforestation caused by Casino’s beef suppliers in the Amazon\textsuperscript{20}, and the ecological damage caused to protected species in Uganda, due to the Total oil project\textsuperscript{21}.

Another source of inspiration could be the definition of “pure” ecological damage and its compensation regime in French civil law,\textsuperscript{22} which describes environmental harm as significant damage to the elements or functions of ecosystems, or the collective benefits derived by man from the environment.

### Conclusion

One of the issues at stake is the Directive’s material scope of application: for which types of environmental damage should companies be required to adopt vigilance measures? In our view, the reference to environmental norms to define environmental damage would undermine the readability and effectiveness of the Directive’s provisions. The scope of the duty of vigilance should not be reduced to the violation of a list of certain environmental norms, and a broad general clause, encompassing all environmental harms, would be preferable. The provisions on corporate climate vigilance would also need to be considerably strengthened.

A separate issue is that of the environmental standards that companies should take into account when adopting measures to prevent, mitigate and bring to an end the environmental damage falling within the Directive’s material scope. For Sherpa, the duty of vigilance can only be useful if it is defined as a general obligation to take all necessary, reasonable, appropriate, and effective measures to avoid the occurrence of abuses in the value chain or in the subsidiaries of the company. The use of standards can here help to determine whether the measures adopted by companies are “appropriate” under Article 3 q) of the draft Directive. To analyze whether a company has taken all the necessary and reasonable measures to prevent environmental damage, reference could be made to relevant national standards, as well as European and international ones. However, this reference should not be limited to international standards.
About Sherpa

Fighting new forms of impunity linked to the globalization

Sherpa carries out advocacy, strategic litigation, legal research and capacity building activities, in order to strengthen economic actors’ accountability and build up a legal framework that better protects the environment, communities and human rights.

To implement these activities, Sherpa brings together lawyers, legal experts, academics and many other experts who support its action by putting forward an innovative approach to law.

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References

1. Law n°2017-399 of 27 March 27th, 2017 on the duty of vigilance for parent and instructing companies, Article 1 : “(... The plan shall include reasonable vigilance measures adequate to identify risks and to prevent severe impacts on human rights and fundamental freedoms, on the health and safety of individuals and on the environment, resulting from the activities of the company and of those companies it controls within the meaning of II of article L. 233-16, directly or indirectly, as well as the activities of subcontractors or suppliers with whom they have an established commercial relationship, when these activities are related to this relationship.(...)

2. Draft report with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)), Committee on Legal Affairs, Rapporteur: Lara Wolters, PE657.191v01-00, 11.09.2020

3. Art. 3 of the Draft report: “(...) ‘Environmental risk’ means any potential or actual adverse impact that may impair the right to a healthy environment, whether temporarily or permanently, and of whatever magnitude, duration, or frequency. These include, but are not limited to, adverse impacts on the climate, the sustainable use of natural resources, and biodiversity and ecosystems. These risks include climate change, air and water pollution, deforestation, loss of biodiversity, and greenhouse emissions”.


11. Ibid., Art. VIII, “Measures to Be Taken by the Parties”.

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15. See Directive 92/43/CEE, Article 6, and the proposal to incorporate the concept of ecological integrity in an EU Charter of the Fundamental Rights of Nature.

16. Although a “non-regression clause” in relation to existing national law is provided for in Article 1.2 of the proposal.


18. In March 2018, Total has published a first “vigilance plan” in its “2017 registration document”. However, this first plan did not mention the risks associated with climate change, resulting from the overall increase in greenhouse gas emissions from the group’s activities. On March 20, 2019, the company published a second “vigilance plan” integrated into its “Registration document 2018”, which explicitly identified climate change within its risk mapping section. This second vigilance plan does not take into account the emission of greenhouse gas resulting from the lifecycle and the use of the products that the company commercializes (scope 3).

19. See our press release published on 28 January 2020: “First climate change litigation against Total in France: 14 local authorities and 5 NGOs take Total to court”.

20. See our press release: “Amazon indigenous communities and international NGOs sur supermarket giant Casino over deforestation and human rights violations”.

21. See the briefing published by Friends of the Earth France and Survie on October 2020: “Total Uganda: a first lawsuit under the duty of vigilance law, an update”.

22. French Civil code, Article 1247, “(...) environmental damage [consists] of significant damage to the elements or functions of ecosystems, or to the collective benefits drawn by human beings from the environment.”