

# DÁIL ÉIREANN

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## AN COMHCHOISTE UM FHIONTAR, TRÁDÁIL AGUS FOSTAÍOCHT JOINT COMMITTEE ON ENTERPRISE, TRADE AND EMPLOYMENT

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*Dé Céadaoin, 7 Nollaig 2022*

*Wednesday, 7 December 2022*

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Tháinig an Comhchoiste le chéile ag 9.30 a.m.

The Joint Committee met at 9.30 a.m.

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Comhaltaí a bhí i láthair / Members present:

Teachtaí Dála / Deputies	Seanadóirí / Senators
Richard Bruton,	
Paul Murphy,	
Louise O'Reilly,	
David Stanton.	

I láthair / In attendance: Senator Martin Conway.

Teachta / Deputy Maurice Quinlivan sa Chathaoir / in the Chair.

## **EU Legislative Proposal on Corporate Sustainability and Due Diligence: Discussion**

**Chairman:** I remind people to exercise personal responsibility in protecting themselves and others from the risk of contracting Covid-19. Members who are participating in the meeting remotely can do so from within the Leinster House complex only. Apologies have been received from Senator Garret Ahearn and Deputy Matt Shanahan.

Today we are going to look at the further scrutiny of EU legislative proposal, COM (2022) 71 on corporate sustainability and due diligence. A draft directive on corporate sustainability and due diligence was published by the European Commission on 23 February 2022. The proposal has been published against the backdrop of a variety of other European Union issues in the environmental, social and governance area. The proposal aims to foster sustainable and responsible corporate behaviour throughout global value chains. The measures will help to enable the European Union to meet its commitment on the EU green deal and the United Nations sustainable development goals. The proposals will require companies to develop and adopt due diligence policies and procedures to prevent, mitigate, or bring to an end, adverse environmental and human rights impacts which arise from their operations, those of their subsidiaries or in their value chains.

I am pleased we have the opportunity today to consider these matters further with the following representatives: I welcome Mr. Conor Linehan, senior counsel solicitor, vice-chair of the environment and planning law committee at the Law Society; Ms Caroline Spillane, chartered director, chief executive officer, Institute of Directors in Ireland; Ms Karen Hennessy, chartered director, Institute of Directors in Ireland member and chief executive of Real Leaf Farm; and Ms Anne Mannion, head of marketing and communications, Institute of Directors in Ireland.

Before we start, I wish to explain some of the limitations to parliamentary privilege and the practice of the Houses regarding references members or witnesses may make to another person when giving evidence. The evidence of witnesses physically present or who give evidence within the parliamentary precincts, is protected pursuant to both the constitution of statute by absolute privilege. Witnesses are again reminded of the long-standing parliamentary practice that they should not criticise or make charges against any person or entity by name or in such a way to make him, her, or it, identifiable, or otherwise engage in speech that may be regarded as damaging to the good name of the person or entity. Therefore, if their statements are potentially defamatory in relation to an identifiable person or entity, they will be directed to discontinue their remarks. It is imperative that they comply with any such direction.

The opening statements have been circulated to all members and to commence our consideration of this matter, I invite Mr. Conor Linehan of the Law Society to make his opening remarks.

**Mr. Conor Linehan:** In our set of written submissions on behalf of the Law Society, and I acknowledge the contribution of Dr. Geoffrey Shannon, senior council of the Law Society, we have looked at the overall legal design of this measure and who it applies to, and we have indicated why we think it is particularly positive that it covers regulated financial undertakings - lenders, essentially. We have looked at what obligations it creates and whether they are reasonable, proportion or an unfair regulatory burden; what enforcement looks like and who will regulate. I am very happy to take any questions on any of those points from the submission. A key question, of course, is whether this is doable as a legal regime and will it work. Is it an appropriate area for regulation at all? We believe the answer to all of those points is "Yes". There

are legal and regulatory regimes in the EU environmental law field that are equally ambitious, far-reaching and testing and function well in achieving their objectives. Therefore, we consider this to be feasible.

At its height - at its best really - what will corporate sustainability due diligence look like in practice under this measure? I will take some extraterritorial examples though of course the measure is very much about corporate due diligence at the local, regional and national scales as well. I will take a number of the classic scenarios that this measure is designed to address. It is clear that while an Irish-headquartered entity, running a global food business or importing raw materials from South America, west Africa, or wherever, is already required to manage the local environment here in Ireland through the Environmental Protection Agency, EPA, license or whatever other pollution controls apply, it will now be required to think about identifying adverse human rights and environmental risks and impacts abroad at a transboundary level in terms of waste, any human displacement, indigenous rights or land grabbing, directly or indirectly associated with its operations and supply or value chain abroad. Some transboundary due diligence is, of course, undertaken by some businesses under voluntary corporate social responsibility or environmental, social and governance, ESG, but a huge amount is not done, or at least remains to be done and there are important differences and advantages under the proposed approach. A huge amount is not done or at least remains to be done and there are important differences and advantages under the proposed approach. There is much greater level of detail, rigour and analysis required for the COM (2022) 71 sustainability policies, risk identification and follow-through that is expected. This will have the force of law and the Law Society considers that the environmental and climate emergencies now require that we move from voluntary to legal approaches in this area. Most importantly of all, this is not about other regimes such as the non-financial reporting directive, which is largely about seeing environmental or climate risk as business risk for disclosure to the market for investment decision-making. That has an important role to play, but this COM (2022) 71 initiative is directly about the people and the environment that are to be protected for their own sakes and the draft directive uses that term "protected persons". That is what really stands out in this proposal and is what we believe is needed at this time.

We agree with the principle of this proposal. It is ambitious in terms of its design, but we think that is a positive feature. Some of it be challenging for regulated companies and for the supervisory authority here, but there are a range of other EU-based environmental regimes with detailed requirements on prior impact assessment, reporting, mitigation, monitoring and verification, such as project-related environmental assessment, the EU chemicals regime, and the EU carbon emissions trading scheme. All of those three are highly complex EU environmental-related regimes that function well.

Briefly, on the identity of the supervisory authority here in Ireland, we have made some written comments on this, highlighting in particular the likely need for skills and experience beyond general corporate supervisory or corporate governance experience to include also people with experience in the fields of environmental protection but particularly in the human rights field to be able to assess, for example, whether reports have adequately documented human rights risks and impacts and to be able to assess compliance.

Those are some additional remarks to supplement the written points we have already made and, again, I am very happy to take questions on those or on this oral submission.

**Chairman:** I thank Mr. Linehan and invite Ms Spillane to make her opening remarks on behalf of the Institute of Directors.

**Ms Caroline Spillane:** The Institute of Directors, IoD, in Ireland is the leading membership body for directors and business leaders. Our purpose is to instil stakeholder trust and confidence in organisations by educating, informing, and supporting directors and business leaders to lead successfully. Our vision is for Ireland to be an exemplar of corporate governance.

The EU legislative directive on corporate sustainability and due diligence sets out requirements that will be complex for directors but are essential and the right thing to do. It is important that directors and boards lead from the top on this issue and fulfil their moral and ethical commitments to maintain human rights. Our aim today is to outline our latest research, entitled *The State of ESG Strategy in Irish Boardrooms*, and its findings, with the goal of asking for more Government and departmental supports which can in turn be used to help our members and directors meet the requirements of this directive as well as other pieces of environmental, social and governance, ESG, legislation.

IoD Ireland is a not-for-profit institution with education and training at its core. We are committed to both the concept and practice of ESG practices as a facilitating platform whereby our members and company directors can develop their understanding and knowledge in the area. We are a provider of director and board training. Some of our training courses include the chartered director programme, our IoD essentials workshop series, and other courses. We also run different training programmes for boards.

ESG has become a key element of our training portfolio. It is now embedded within our chartered director programme, and we have established a stand-alone course called *Leading Sustainability: What Directors Need to Know and How to Do It*. This course includes four sessions designed to equip directors with the knowledge and skills to strengthen their organisations' orientation towards sustainability. It is based on a director's sustainability checklist, provides a practical approach to this critically important issue with a focus on immediate take-aways, and includes an opportunity to apply learnings to the participant's own organisation. We also support our members with access to expert insights through content on our website, including fact sheets, webcasts, blogs and more. Information on this particular directive has been made available to our members with a specific focus on what directors need to be aware of and what actions they need to take.

We are involved in a number of research and advocacy activities but I will just highlight two that may be of interest to the committee. We undertake research among our members to understand their needs and to reflect their views. In regard to this committee meeting, I will address the substance of the report later on, but in the past year we have also conducted research on hybrid working, future skills and training, and diversity and inclusion. I would be happy to share electronic copies of these reports with the committee.

Second, we are a founding body of Chapter Zero Ireland. This is the Irish chapter of the climate governance initiative, CGI. The purpose of Chapter Zero is to build a community of non-executive directors and equip them to lead crucial boardroom discussions on the impact of climate change. This is facilitated through knowledge-sharing activities and events. For example, the next session, which IoD Ireland is co-leading with HSBC Ireland, will focus on scope 3 emissions and specifically what directors need to understand. This is a membership body and it is restricted to non-executive directors but it is free to join. If any member of the committee is interested in attending this event, I would be happy to facilitate this.

In terms of IoD research on the corporate sustainability due diligence directive, CSDDD, we are pleased to share the findings of *The State of ESG Strategy in Irish Boardrooms* with

the committee. This is a collaboration between IoD Ireland and the Diligent Institute and was published just last week. It involved a survey of IoD Ireland members between 27 September and 24 October 2022. Our membership is individual and not corporate, and for this reason this research reflects individual member views. The survey respondents, like our membership base, were composed of chief executives, managing directors, chairpersons, non-executive directors, senior executives and entrepreneurs. It is important to note that the majority of the research survey respondents were from organisations that had 249 employees or fewer, 62% worked in SMEs, and 11% were in the charity or not-for-profit sector.

Given the profile of respondents, this statement will reflect on the aspects relating to SME supports in the initial proposal published by the European Commission on 23 February 2022 and the Council of the European Union negotiating position published on 1 December 2022. We note that the Council of the European Union has just adopted its negotiating position, general approach, on the CSDDD. The next step will be to start the negotiations with the European Parliament.

With this in mind, the most relevant report findings are that there is a lack of clarity around EU legislation, with just over one in five of respondents rating their understanding of the EU corporate sustainability due diligence directive as good or excellent, only 1% saying it is excellent, and 39% rating their understanding as weak. In respect of the EU corporate sustainability reporting directive, 24% of respondents said their understanding was good or excellent and a third reported their understanding as being weak. As regards the EU taxonomy for sustainable activities, 20% reported their understanding as good or excellent and 44% said their understanding was weak.

Other findings were that more Government support is needed around Ireland's circular economy Act. There is almost an even split between those respondents who are aware of Ireland's circular economy Act and those who are not. There is a desire for education around ESG. About one third of respondents said they had undertaken ESG training in the past 12 months, but 63% had not. Full board oversight of ESG has increased, with 58% of respondents indicating their full board has primary responsibility for the oversight. ESG is being discussed more frequently at board tables, with 23% saying ESG is discussed at every board meeting. Boards find it challenging to implement key performance indicators, KPIs, around ESG. There is an equal split - 47% - between boards that have ESG KPIs in place and those that do not. Of the 47% that have KPIs in place, six out of ten said they found it difficult to apply ESG-related KPIs and metrics. This may in part be due to the level of awareness and understanding of current and upcoming legislation. The majority of boards are not integrating ESG KPIs with compensation. Most boards do not incorporate ESG expertise and experience into their organisations' skills matrix to identify new board members.

In terms of recommendations we would make to the joint committee today, while this directive is specifically for larger businesses, SMEs, due to the nature of supply chains and tendering processes, will also be impacted. As a result, more information and support will be needed to help directors of SMEs on this area. Our recommendations are on this basis.

Our first recommendation is that further stakeholder engagement with business and consumer groups should be adopted. As previously noted, we welcome the invitation from the committee to outline the findings from our report, as well as some of the concerns we found from this new research. This level of engagement should continue with further business and consumer groups to ensure a deeper understanding at Government and Department levels of any potential business concerns around issues with compliance. For example, the unintended

consequences of burden-sharing on SMEs which will have limited resources and budgets.

We also ask for more information and updates on the status of the European network of supervisory authorities, and how this will bring representatives from national bodies to ensure a co-ordinated approach, and the enabling of knowledge and experience-sharing on this directive. We would recommend that this information is shared widely so all relevant stakeholders are aware.

Our second recommendation is that, as noted, this directive is for larger businesses.

**Chairman:** I ask Ms Spillane to please briefly state the recommendation. .

**Ms Caroline Spillane:** We feel that as many requirements will get pushed down to SMEs through supply chains and tendering processes, it will be essential for SMEs to have supports, and particularly financial supports.

In conclusion, I thank the committee once again for the invitation to attend. We take our roles and responsibilities very seriously. We are very happy to work with all parties to ensure that if there is consultation or a requirement for training or dissemination of information that we will do that among our members.

**Chairman:** I thank Ms Spillane. I invite members to discuss the issue with the representatives. I remind members participating remotely to use the raise hand function in Teams to indicate their wish to speak and, more importantly, to cancel it when they are finished speaking. Deputy O'Reilly is first and she has 14 minutes.

**Deputy Louise O'Reilly:** I thank the witnesses. First, I wish to apologise as I will have to leave shortly to avail of a speaking slot in the Dáil Chamber but I will catch up by reading the transcript afterwards.

I have read both of the statements and listened to them. Ms Spillane outlined in her statement that environmental, sustainability and corporate governance is not just about targets and legislation but is about values. I welcome that statement. It is very good for us, as a committee, to hear that because sometimes we can get a little bit bogged down and distracted when what is at the back of this is values, which is incredibly important. There are people out there, whom the delegations will have met and we have met too, who want to paint this directive as anti-business but Ms Spillane has painted a different picture, which is welcome.

There are over 100 high-profile companies, investors and business associations and initiatives, including IKEA, Primark, Danone and Patagonia, that earlier this year called for ambitious due diligence directives from the EU. Does the witnesses believe the directive will help level the playing field for business with sensible obligations on companies proportionate to their size and sector?

**Ms Caroline Spillane:** Most definitely the directive is welcome but the caveat is that its implementation will be challenging. We have got feedback that preparedness is probably a little bit behind the curve but I think that the sharing of information will be helpful.

In terms of levelling the playing field, first the implementation of this directive will mean that there is clarity across the European Union as regards the legal status. Second, it sends a signal to company shareholders that there is an expectation which I hope will, in turn, drive a practice among senior executives and board members to look at longer-term stakeholder value



in a company. One of the things that we try to imbed in our guidance and training for directors is that they really need to think about longer-term stakeholder value as part of their strategic planning process. Allied to that is making sure that sustainability is a very significant element of strategic planning.

One last point is that consumers expect this. I mean that this is something that is going to be driven by everybody when making choices to buy services or products. Companies will respond positively and actively. Research has repeatedly indicated that companies that have a proactive approach to ESG probably do better. I think that there is a piece of research that indicated that even during Covid those companies that focused on having a resilient supply chain fared better. Companies will have a better bottom line if they get on board with this at an early stage.

**Ms Karen Hennessy:** I am here to represent the Institute of Directors in Ireland and have a small start-up business in the green space. I am building an extremely green, sustainable business in the midlands as part of the just transition and everything that I do looks at life cycles and across things. To give some examples of where, as an SME, the directive will have an impact on us, if I want to do business with major multiples or retailers and if they are complying with the directive, then I will have to be able to comply and be shown to comply. I have done life cycle analysis so all year round my company in the midlands grows leafy greens without soil or peat and use a limited amount of chemical pesticides. We will be an exemplar across Europe because we do not use fossil fuels to heat our glasshouse. Having looked at the life cycles, I see a possible weakness in that at the moment, the substrates that I want to grow in come from Sri Lanka. For me, that is a red flag because they have carbon miles and I cannot stand over the human rights aspect of where that item comes from. That shows the directive has an unintended consequence because now I am thinking can I get the substrates in Europe and that will have an impact for displaced people. We must be careful how the directive is rolled out and ensure that one of the unintended consequence is not taking business away from countries that need the business. Therefore, we must provide assurances and that is why I am here to show what can happen even with a very sustainable company. I am lucky that I have set up a business in this environment and I am looking across all of this but other people are not aware of this aspect. We know from our conversations with companies that their main concerns are what is the liability for companies and how do we identify that. Companies just want guidance and want to do the right thing but there is a lot of confusion and a lot of different rules and regulations, so this directive will help. The big thing for a lot of companies is guidance, support and knowledge of the likely liabilities.

**Mr. Conor Linehan:** The Deputy expressed concerns about the possibility of having a level playing field and how the directive might play out. All of the issues that we are discussing will feature in contractual negotiations. For large companies, and right the way through, the value chain is recognised and there are concepts of direct and indirect business partners. At various points in the draft directive, it is recognised that there will be contractual negotiations. It is proposed that the Commission will come up with model clauses to recognise these issues and where it is appropriate to not displace but at least share responsibility for meeting the obligations as between the large companies and right down. We can expect the Commission to come forward with model clauses.

Those which are principally caught by this measure are the large companies, which really have the capability or intend to have the capability to deal with all of this. They cannot unfairly avoid their obligations simply through unfair contract terms or anything like that because that would be seen as being a breach of the core obligations of the directive.

**Deputy Louise O'Reilly:** I have one question for each delegation starting with the institute. We will have heard from the negotiations that the Minister of State, Deputy Calleary, protected or attempted to protect many aspects of this law from being watered down, which is the opposite to the role that we played in the run up to this. I commend the Minister of State on that even though his efforts were somewhat in vain. A recent report from the Irish Coalition for Business and Human Rights, Don't Buy into Occupation: Exposing the financial flows into illegal Israeli settlements, found that between January 2019 and August 2022, 725 European financial institutions, including banks, asset managers, insurance companies and pension funds, had financial relationships with 50 businesses that are actively involved in Israeli settlements. I ask the Institute of Directors in Ireland why many businesses support the directive when financial institutions have lobbied heavily against it. What is the possible damage their partial exclusion will do to the environmental, social and governance, ESG, goals?

**Ms Karen Hennessy:** I am not sure I can answer that perfectly but I see a considerable role for financial institutions to make this a reality. We are all aware of the climate coming at us and the only way we will tackle the problem is to be held accountable. Just as we have financial statements, accountability has to come in, from investors to green, right and social aspects. We must also make sure we carry out what we say and that it is not lip service. The audits have to happen and people have to go on to the different sites and make sure they are properly carried out. What is measured is managed and we need to look at that.

**Ms Caroline Spillane:** We are seeing positives in the research. One of them is around the composition of the board and the other is having ESG skills on the board. If we could get to a point where boards understand that they need to have a level of ESG skills at the boardroom table and this needs to be discussed, issues will surface. A more educated board will be able to anticipate risks with relationships and investments and be able to make better, longer-term decisions that will be better for their companies.

**Deputy Louise O'Reilly:** Who does the Law Society believe the competent authority will be and, more importantly, who does the Law Society think it should be? Should the oversight be annexed into an existing agency? Will it be necessary to establish a stand-alone agency? I am not asking Mr. Linehan to appoint someone here but does he have a view on the best place for the authority to be situated?

**Mr. Conor Linehan:** It is difficult to identify whether the competent authority would be under the aegis of the Department of Enterprise, Trade and Employment. One could look at the Corporate Enforcement Authority, which is a body traditionally associated with corporate governance. We traditionally know it to be so with regard to the companies legislation and so forth and while there have been obligations under companies legislation to report, which is a soft obligation insofar as necessary on non-financial matters, for some years, there has been very little guidance or observance of it. It is difficult to see the Corporate Enforcement Authority, as it is currently constituted or with its current capabilities, being able to switch rapidly in the next couple of years by which time this directive will come into force.

The competent authority will have to receive complaints from stakeholders, trade unions, whistleblowers and company employees about whether particular companies are meeting their objectives under this. Allegedly not meeting objectives involves investigations into documenting whether there are human rights implications for company activities abroad. It is very difficult to see how that can be dealt with. I cannot identify any body at present that could do it, but there certainly needs to be a coming together of capabilities to discharge the regulatory side of this.



**Deputy Louise O'Reilly:** That is the concern. It may be an entirely separate entity that starts from scratch and is built up. That may be the way it has to go but unless it is properly resourced, it will be all complaints coming in and no results going out. It would be difficult for any existing agency to take on that workload without considerable investment in personnel, resources, education and training and powers to be able to conduct those investigations because they are complex. Nobody will hold his or her hand up on the first day an allegation is made, say the allegation is a fair cop, that the agency has him or her and he or she will change ways. An investigation will have to be made. If sufficient resources, education and powers are not given, I am concerned we will end up with a toothless agency that can receive complaints, and maybe all it will have to do is process them, but there will not be much coming out the regulatory end of it.

**Mr. Conor Linehan:** The draft directive provides for a semi-formal network of member states' competent authorities to share knowledge, including in the development of a capability around in this. That would help but a close eye needs to be kept on the timeline in the lead-in to this coming in to effect. There is certainly an issue with regard to how the transposition of this into a statutory instrument looks.

**Deputy Richard Bruton:** I thank the witnesses for coming in and for their presentation. Yesterday we saw the opening of the global summit on biodiversity. It is probably worth reminding ourselves of what the UN Secretary General said in that our land, water and air are being poisoned by chemicals and choked by plastics. We all know our planet is burning, one third of all land is degraded which makes it harder to feed our people and thousands of species are at risk. No one can doubt the seriousness of the challenges we face on the sustainability front. It may be a mixed metaphor but our achieving transformative change would be like turning an oil tanker. Legislation of this sort is needed to switch the thinking of many of those potential oil tankers, that is, the big beasts who shape the policies implemented. Thus, I welcome this move.

How many companies operating in Ireland would this apply to? Does anybody have an idea of the number? Will it be many Irish-owned companies or will it predominantly be the internationally-trading companies? I wish to have an understanding of the scale we are talking about. I was struck by the point made about small businesses trying to chase down their supply chain and identifying the potential implication of trading with any state described as a pariah or suspect on some scale. Who will be there to assist? Model clauses for contracts were mentioned but model clauses, presumably, do not alter one's liability if one is found to have been trading with people who are abusing human or environmental rights. With regard to the practicality of someone who is entering the supply chain of companies obliged by this, what assistance is likely to be there to help them make these decisions?

I ask the Law Society to address the issue of what will constitute an acceptable defence of breaches if someone fails. I imagine that as we start to get used to thinking about our supply chains in this holistic way, which is essential, there will be a steep learning curve even for companies with quite considerable reach. It will be a learning by doing, if companies do not have these systems established. How are they striking the balance of an acceptable defence? Presumably ignorance cannot be claimed, that the person did not know or did not bother to ask. Is there a spectrum within which the practicality of enforcement will tighten over time? People not having the full systems initially might be an acceptable defence, but one would expect that acceptable defences would diminish over time. I want to get an understanding of the practicality for a business or a director as to how they might see this impacting on them over the coming period.

**Mr. Conor Linehan:** The Deputy's reference to the biodiversity convention is well made.

We often tend to think of environmental measures in terms of the climate change convention and the conferences of the parties, COPs. The Deputy is right that the biodiversity COP has been taking place recently. Some of the big issues it is concerned with are protection of genetic resources and monoculture and deforestation. They are issues that Irish companies need to think about in the areas where they operate abroad. The biodiversity convention certainly comes into this.

On the number of companies, I saw that in an earlier committee hearing, one of the human rights bodies had calculated that maybe about 400 Irish entities would be caught by this. The thresholds are around €150 million worldwide turnover and 500 employees. But there are lower thresholds of €40 million worldwide turnover and 250 employees in particularly environmentally sensitive sectors such as mining, aquaculture and so on.

There are uncertainties about the practicalities of how this will operate and what a director and a board need to think about in practical terms in order to achieve compliance with all of this. It is a market-based measure and very much a framework piece of draft legislation. Our written submission made the point that expressions such as “where relevant” and “as appropriate” feature a fair bit in it. In one sense you can see the use of those expressions as almost acknowledgements of the kind of practical difficulties that are referred to but it is a market-based measure which is setting up this regime and, to an extent, leaving it to the market to find its own level in terms of what can be borne between any two contractual counter-parties in a value chain to which this legislation is relevant. It does provide for civil liability, first in relation to individual directors. The institute has emphasised how this has become an important issue at boardroom level. A real importance of this measure is the specific article on directors’ duties. For many years, there has been an unresolved debate as to whether the core directors’ duties that have always been there as to whether to act in the best interests of the company is one that despite sustainability indices, environmental, social, and governance, ESG, and all the awareness we now have about sustainability issues, is still really a duty about the financial bottom line and only the financial bottom line. This draft directive puts it beyond doubt that is no longer the case because it very clearly says that they must take account of this when they are discharging their duty to act in the best interests of the company and it requires member states to amend their national legislation wherever directors’ duties are expressed to reflect that. We will see changes and not only a statutory instrument transposing this measure but also probably changes to the Companies Act to reflect all of that.

It provides for civil liability. It quickly goes on to water that down a bit. Article 22 says that “Member States shall ensure that companies are liable for damages if: (a) they failed to comply with the obligations laid down in Articles 7 and 8.” Those are the obligations where actual or potential human rights or environmental adverse impact risks are identified. They need to step in to prevent, mitigate or terminate if at all possible. If there are any failures in that it speaks first of civil liability. It then sort of waters it down a bit. Of course, it has a causation element. There is a strong causal element to begin with as it refers to a company failing to comply and the failure or the adverse impact caused by the company’s failure to observe its due diligence under this. It is open to the company by way of part defence to point the finger others in the supply chain and say it relied on their assurances, on contracts with them and their record and it was not unreasonable to do so. The starting point is a civil liability for breach of the obligations here. They are no different from the type of defences one would find for civil liability regimes outside of this territory. Ultimately it is a market-based measure. The idea is that it will not all be down to one responsible party in many cases. They will face civil liability in many cases outside of this with joint or several responsibility amongst many parties. There will be contrac-

tual relationships between the parties here and it is in that context that I think it will play out.

**Ms Caroline Spillane:** On the number of companies within this jurisdiction, we have not done that analysis. The research we are presenting today has a very small sample size and 16% are publicly listed companies so I would be cautious about extrapolating. The majority of companies domestically and across the EU are small and medium-sized enterprises, SMEs. That is why we are pulling out some of the research findings today that really relate to SMEs and making the point that in regard to those kinds of organisations financial supports and guidelines are really essential. Even though they will not be directly impacted, they will be impacted because of the implications to the supply chain. Ms Hennessy will speak specifically from an SME perspective.

**Ms Karen Hennessy:** From the discussion today, what we are looking at is very complex, even for companies to understand what their responsibility is. Across the sector, we need guidance on how, if a company does not fall in with the groups set out here, it can still impact a business as well as what assistance and training is available. SMEs need assistance with guidance on how we move forward with this directive and who it will impact. We are living in a world, as the Deputy just highlighted, that is changing at a pace. Over the next 35 years we must produce more food than we have grown in the last 10,000 years to feed the population. We need to look at regenerative and destructive innovations to make all that happen but with that there is the onus to make sure that not only do we not destroy the planet but that we are protecting humanity while we are doing it. I welcome the directive but as it stands it is not clear enough about who will be impacted. That is what the SMEs seek. It is about how we get clarity and then how we get assistance and supports. There are things such as Chapter Zero which was mentioned earlier with the coming together of Chartered Accountants Ireland, the Institute of Directors and IBEC. The intention behind this approach is to make non-executive directors as aware as possible of the likes of this proposal, scope 3 emissions and what we need to be doing, including bringing representatives of committees on to boards focused on climate and corporate sustainability. All of this is beginning to move in the right direction, but this is an entirely different playing field we are looking at here.

**Deputy Richard Bruton:** When Ms Hennessy says it is a market-based measure, is there an expectation that a new profession will grow of sustainability compliance experts, who would be similar to architects or accountants and undertake these audits? Is it intended that this area will become one where small businesses will be able to outsource to bring in the required expertise and then have a fair level of confidence in being covered?

**Mr. Conor Linehan:** Yes, to an extent. Professional industries, or subsets thereof, do grow up arising out of EU environmental regimes. A good example is the building energy rating, BER, directive, energy efficiency and this whole area. A whole professional sector is now dealing with all of what is involved in this area, everything from electrical vehicle charging points to building design and undertaking auditing, rating and verification. The EU carbon emissions trading scheme, ETS, which covers about 45% of EU greenhouse gas, GHG, emissions, covers approximately 12,000 installations across the EU27, including power stations and other large carbon emitters. The cap-and-trade scheme for this sector is entirely dependent on a regime of reporting, monitoring and verifying emissions and feeding all this information back to the European Commission and the competent authorities. A whole professional sector now exists around verification and independent auditing and this has grown out of environmental engineering and various consultancies, particularly engineering. These companies are dealing with this context. I expect what is being proposed in this context will take a similar direction. There are

environmental health and safety, EHS, officers and corporate social responsibility people within organisations, and people in the field of human rights will certainly need to be brought into this area as well.

**Chairman:** I thank the Deputy and Mr. Linehan. I call Deputy Paul Murphy.

**Deputy Paul Murphy:** I thank the witnesses for their presentations. Since the last time we discussed this issue a few weeks ago, the directive has been watered down at European Council-level under the impact of corporate lobbying. The most significant aspect in this regard is that it is now up to member states to decide whether they include the finance sector. Where countries do not do this, it would mean that banks and other financial institutions would not be subject to the requirements in this regard to this directive and would not have a responsibility in terms of environmental, social and labour rights. This means there will be a real danger this will create a race to the bottom between member states and a fragmentation of the market. I ask the witnesses from the IDI to comment on this point and whether they think it is fair to exempt one sector from this process when other sectors are included.

**Ms Caroline Spillane:** We did not specifically ask about this in our research. One of the fundamentals in the legislation is a level playing field and to have clarity across the board, so I would imagine that over time having everybody within the scope is probably going to be a positive thing. We did not, though, ask a specific question about this within the research.

**Deputy Paul Murphy:** Sure.

**Ms Caroline Spillane:** The only thing we did ask about within the research was in the context where we broke things down by sector regarding who oversees the ESG-related matters of the primary organisation and how often they reported on ESG goals and progress. We did see that a healthy proportion of the financial services sector was overseeing, at full board level, ESG-related matters in their primary organisations. Just under half of them were reporting progress annually. This compares reasonably favourably to the other sectors we looked at, which were energy and resources, information technology and healthcare and life sciences. It is still, however, less than 50% and so it is good to have these snapshots in time. I would be careful about extrapolating from them because the sample size was low for some of these sectors, but we do wish to see this improving over time.

**Deputy Paul Murphy:** I thank Ms Spillane. Turning to Mr. Linehan, when Dr. Rachel Widdis was before us, she said there is little or no access to remedy for many of those affected by corporate harm. Will Mr. Linehan outline whether he agrees with this view? I am talking about someone such as, hypothetically, an indigenous person living in the Amazon and having his or her home destroyed as a result of an extractive process, which is down the value chain from an Irish-based multinational corporation. What prospect does this person have of seeking justice in Ireland and what kind of obstacles stand in their way?

**Mr. Conor Linehan:** One of the positive features of this proposal is that it elaborates on and explains the whole prior due diligence exercise and what is involved in this regard for the large companies covered by this. Part of this does involve engaging with overseas stakeholders. Regarding indigenous communities, this type of obligation is included as part of this measure. The two complaints mechanisms in this proposal both cover various stakeholders, including environmental NGOs and those NGOs working in the human rights sector. These organisations are entitled to make complaints directly to the company, and the company must set up a responsive complaints process and account for how it deals with complaints. Companies can, though, be

bypassed and complaints made directly to a member state's competent authorities by an NGO or any individual. There are reasonably strong obligations around these approaches. There are, therefore, channels in this regard.

**Deputy Paul Murphy:** I am talking about the current situation and whether this proposal tends to represent a significant approval. To explore this point further, let us examine the issue of the civil liability regime in the draft EU proposal. To make this workable and have effective transposition of this into Irish law, are there changes we would need to make? For example, as I understand it currently, it is not possible to get legal aid for civil liability cases, when a hypothetical indigenous person is clearly not going to be able to afford to pay legal fees in Ireland.

**Mr. Conor Linehan:** Does the Deputy mean that such a person would not be in a position to take legal action?

**Deputy Paul Murphy:** Yes, under the current regime. Someone in this situation is not going to be able to take a multinational to court in Ireland unless some assistance is provided for such an undertaking.

**Mr. Conor Linehan:** Yes. I would see that there is the opportunity in transposing these proposals to address issues like that. Much of what is addressed in this directive, such as environmental damage, actual or potential, was covered by the Aarhus Convention. A fundamental plank of that convention is that there cannot be over-costly impediments to access to justice in environmental matters. This will probably extend out into this regime. The cost barriers to access to justice in environmental matters are starting to come down in this country. The Supreme Court decision a few weeks ago in the Heather Hill case means that there is now, in effect, full cost protection for environmental litigants in every type of case. Issues such like this, though, will have to be addressed when we are transposing measures as well.

**Deputy Paul Murphy:** Finally, as far as I understand it, regarding the directive, it falls to member states to define the balance in respect of the burden of proof.

**Mr. Conor Linehan:** That is correct. It does fall to member states. However, there is a core idea of causation. It says for there to be civil liability for a large company covered by that for environment and human rights damage, there needs to be a causal connection between its failure under this regime to do due diligence and the consequences, and any damage. Many EU environmental regimes simply talk about causation recognising that within one common law and many civil law regimes there are slightly different causation tests. Some are slightly stricter or open than others in different member states. The traditional just causation here is that there needs to be foreseeability and that the connection between the action and the damage is not too remote. The kind of standard of causation that has built up in the Irish courts over decades of courts cases in everything from personal injuries cases to all sorts of other tort cases will be what applies here.

**Chairman:** I thank Mr. Linehan and the representatives for attending the meeting today to assist the committee in consideration of this important matter. The committee will further consider this matter as we go forward in the next couple of days. That concludes the committee's business in public session.

*Sitting suspended at 10.43 a.m. and resumed in private session at 10.45 a.m.*

The joint committee adjourned at 10.53 a.m. until 9.30 a.m. on Wednesday, 14 December 2022.



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