Corporate Sustainability Due Diligence Directive (CS3D)

POSITION PAPER
July 2022

Table of Content

Large French companies have been engaged for many years in putting CSR and responsible business conduct (RBC) at the heart of their strategies and operations. They present the highest level of sustainability related information compared to companies worldwide and have made strong commitments, notably to reduce their GHG emissions, to respect human rights and environmental adverse impacts.

Large French companies already apply the French law on the Corporate Duty of Vigilance and can bring a useful experience-based contribution when analysing the Commission's proposal for a Corporate Sustainability Due Diligence Directive 2022/0051 (COD) (CS3D).

They support the introduction of a European due diligence obligation under the condition that is provides legal certainty and a fair level playing field. They are particularly supportive of the extension of the due diligence obligations to third country companies, allowing for fairer competition within the EU. Large French companies also welcome the fact that the directive proposal encompasses both the environment and Human Rights, which should be addressed in their daily operations.

However, the first analysis of the Commission proposal raises several legal, practical, and operational difficulties which give rise to the following demands of AFEP member companies:

Key messages

AFEP MAIN ISSUES

I. Adapt the scope of the directive to the ways companies operate

- **Take into consideration the group dimension**: Setting due diligence obligations only at legal entity level is not appropriate. CSR and due diligence policies are usually adopted by the parent company which ensures their implementation throughout the entire group. The essential role played by parent companies should be clearly reflected in the directive.

- **Focus risk-based due diligence on supply chains instead of value chains**: In order to keep the scope of CS3D feasible and realistic, downstream activities, such as the use of a product by clients or consumers, should be explicitly excluded from the scope of the directive.

II. Improve definitions to provide for clarity and legal certainty

- **Adverse environmental impacts:** It should be made clear that climate is outside the scope of the due diligence obligation because climate change is a global issue and individual companies cannot be held liable for the failure of bringing it to an end.

- **Business relationships:** A clear definition of indirect relationships should be provided for.

- **Established business relationships:** The definition should be clarified as it refers to subjective criteria without explaining how to appreciate the "intensity, duration and negligible or ancillary part of the value chain", leading to substantial risks of diverging interpretations.

- **Directors:** It is necessary to distinguish between executive and non-executive directors especially when it comes to setting variable remuneration in article 15 § 2 which cannot concern non-executive directors.

III. Design workable and realistic due diligence obligations

- **Provide for the prioritisation of adverse impacts**: With a view to make the legislation efficient, including through effective allocation of companies' resources, the obligations laid down in the directive must focus on the **most severe adverse impacts**, as per a **risk-based approach**, taking into account the fact that it is impossible to mitigate every single risk that may occur on supply chains.

- **Delete unclear and unfeasible provisions to prevent, mitigate and bring to an end adverse human rights and environmental impacts**: The conclusion of contracts with indirect relationships is not part of the usual due diligence measures recommended by UNGP or OECD Guidelines. The provision in article 7 § 3 should either be deleted or brought in line with OCDE due diligence guidance and recital 15 of the draft proposal which acknowledges that companies cannot "guarantee, in all circumstances, that adverse impacts will never occur or that they will be stopped."

- **Clarify the due diligence obligations regarding non-EU companies**: It should be clarified that their due diligence obligations concern only those linked to the products or services offered in the EU and not <u>all</u> operations of the non-EU entity worldwide.

- **Adopt a more nuanced approach on suspending or terminating commercial relationships**: The disengagement process should be brought in line with the OECD Guidelines, which invite companies to "take into account potential social and economic adverse impacts related to the decision to disengage".

- **Provide protection under competition law regarding exchanges of sustainability related information between competitors**: The Commission is currently revising its guidelines giving examples of agreements which are not raising competition concerns. However, these examples are illustrative and not exhaustive and there remain many grey areas. Companies need clarity on the conditions allowing them to benefit from a safe harbour.

- **Address the problem of local legislations which may conflict with the international conventions listed in the Annex:** It should be clarified in the directive proposal, in line with OECD guidelines, that "obeying domestic laws is the first obligation of enterprises. (…). In countries where domestic laws and regulations conflict with the principles and standards of the guidelines, enterprises should seek way to honour such principles and standards to the fullest extent which does not place them in violation of domestic law".

- **Design a monitoring process which does not create undue burden on companies:** A yearly assessment of <u>all</u> operations and measures which have to be performed on the value chain is totally unrealistic and unfeasible considering the scope of the obligation. The periodicity should not be less than 3 years unless a significant risk has been identified.

IV. Reframe climate change provisions

- **Modify article 15 §1 to create legal certainty for companies**: Article 15 of the proposed Directive would require companies to adopt a plan to "<u>ensure</u>" compatibility of their business models and strategy with the limiting of global warming to 1.5° C. Compliance with this obligation would be supervised by national authorities entrusted with investigative and sanctioning powers. However, **no regulated or generally recognized standard exists today for**

aligning a company strategy on a given temperature goal. In addition, the CSRD and the CS3D would create two related 1.5° requirements, subject to two distinct enforcement regimes with no legal and procedural coordination, which would inevitably conflict and result in a legal stalemate. Therefore, the requirement should be reframed to make it more future-oriented and aligned with the objectives of the European Climate Law and the Paris Agreement.

V. Circumscribe the civil liability regime

- **Clarify the civil liability regime:** It should be clarified that companies, when they have carried out appropriate diligence measures (contractual clauses and cascading), **should not be liable as regards damages caused by their <u>business relationships</u>,** whether they are direct or indirect. Also, the burden of proof should be reversed, and it should be up to the plaintiff to prove that the due diligence measures were manifestly insufficient, in the circumstances of the case, to tackle the issue.

- **Delete the overriding mandatory application of Member States' law:** Companies call into question the Commission's rationale for wanting the EU to become through this provision the most attractive territory for actions against companies filed by victims from all over the world.

OTHER POINTS OF CONCERN

I. Avoid duplication of provisions on directors' remuneration

- **Delete the provision regarding directors' remuneration**: Article 15 § 3 states that companies will have to take into account fulfilment of the obligations to combat climate change 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". **The long term view and notion of sustainability have already been addressed by the shareholder rights directive (SRD).** If the intention is to go further by requiring climate related criteria, it would be more suitable to amend the SRD. Indeed, SRD concerns listed companies which have a responsibility towards the market and would avoid interfering in the governance of non-EU companies.

II. Provide consistency of complaints procedures

- **Provide consistency with other EU whistle-blower laws and better circumscribe the persons who can submit complaints (article 9 § 2 c) or substantiated concerns (article 19 § 1):** The proposal should clearly address the relationship between article 9 and other legislations such as the directive on the protection of persons who report breaches of Union law. In addition, Member States should be able to make the admissibility of complaints subject to a minimum of transparency in order to avoid abuses.

III. Refrain from establishing a specific liability regime for directors

- **Revise provisions regarding directors' duty of care and clarify the setting up and overseeing of due diligence**: If the general provision regarding the duty of care might be supported, § 2 seems to establish the liability of directors in the event of breach of the directors' duties. The added value of EU action in this respect has yet to be demonstrated since all Members States have in place a liability regime that apply both for companies and directors.

IV. Revise the role of supervisory authorities

- **The role of supervisory authorities should be revised:** Their role should be to **assist undertakings in their risk analysis by sharing tools and intelligence,** for example on high-risk geographical zones and to implement their due diligence strategy. They should also **integrate the mediation role played by OECD National Contact Points (NCP) as they offer a unique State-based non-judicial mechanism through which the non-respect of due diligence can be effectively raised**. At last, instead of granting investigation powers, **independent assurance providers explicitly accredited for verifying due diligence information** published by companies should be designated.

V. Provide for progressive, appropriate and proportionate sanctions

- **Sanctions should be progressive, appropriate and proportionate to the severity of the breach:** A progressive, step by step approach should be provided for as regards these different consequences and sanctions. The authority should, as a first step, order the cessation of infringement and, where appropriate, invite the company to take remedial action. As a second step, and only in the event of abstention from the cessation of infringement, or repeated infringement, sanctions should be imposed.

VI. Introduce due diligence in public procurement directives

- **Include due diligence obligations in public procurement directives:** CS3D provides currently no dedicated provision related to the public procurement directives (Directive 2014/24/EU of 26 February 2014 on public procurement and directive 2014/23/EU 26 February 2014 on the award of concession contracts ("Public procurement Directives")). Due diligence obligations in public procurement contracts would be performed more efficiently, especially if public contracting authorities were fully committed to take this subject into account, from the tender process until the completion of the contracts.

AFEP MAIN ISSUES

I. Scope

Take into consideration the group dimension (article 5)

- **CS3D introduces due diligence obligations only at legal entity level and does not specifically address the case of groups on a consolidated basis (article 5 and 15)**. As it stands, a parent company which does not meet the thresholds would not be required to establish a due diligence plan for its subsidiaries meeting the threshold. Depending on the way the group is organised, legal entities which are not in the same chain of control (e.g., sister companies) would be required to establish potentially different due diligence plans. If these legal entities are registered in different Member States, the plan would be set up according to the national legislation of their head offices which may vary to some extent.

  This approach contradicts the organisation of groups and would lead to a lack of efficiency and coherence. **CSR and due diligence policies are usually adopted at the parent company level**, which ensures their deployment throughout the group. The parent company plays an **essential role in the identification of risks and their management or mitigation**. Subsidiaries neither have the overall vision of the risks, and actions to be taken to manage them, nor do they systematically have **the legal competences to deal with complex matters such as due diligence obligations. Subsidiaries** would have to hire, and train dedicated teams which would **disproportionately increase the administrative burden, cost and risk of litigation for each subsidiary.**

  In addition, this approach is not consistent with the CSRD proposal which retains a consolidated approach. As these two initiatives are closely interrelated, a consistent approach is needed in order to avoid implementation difficulties.

  Therefore, the proposal should be amended in order to take into consideration the notion of group as mentioned above **and to clarify that:**

  - **when the parent company does not meet the required thresholds while several subsidiaries within the group meet the thresholds, the parent company may, on a voluntary basis, perform the obligations set out in articles 4 to 11 on behalf of those legal entities;**
  - **when the parent company, together with one or several subsidiaries within the group, meets the thresholds, those subsidiaries are exempted from the obligations set out in articles 4 to 11 where these obligations are performed by their parent company.**

  However, in both cases, this will not exempt these legal entities to effectively implement the due diligence in their processes.

- **Regarding climate change (article 15):** As climate change is a global issue, transition plans are defined at parent company level, which sets reduction targets for all its subsidiaries. **It is neither appropriate nor realistic to expect a subsidiary to adopt its own plan independently of its parent company and corporate group**. Investors analyse consolidated data. As already mentioned, this approach is not consistent with the CSRD proposal.

Focus risk-based due diligence on <u>supply chains</u> instead of on <u>value chains</u> (Recital 18, Article 3 g)

- According to Recital 18 and Article 3 (g), CS3D aims to cover the entire value chain, upstream and downstream. **This is not in line with OECD guidelines for multinational enterprises which do not refer to the value chain.** Instead, the OECD guidelines ask companies to carry out a **risk-based due diligence** which should seek to prevent or mitigate adverse impacts when they occur through the companies' own activities, or when the impact is directly linked to their operations, products or services by a business relationship.[1] Furthermore, OECD guidelines state that "*the term 'business relationship' includes relationships with business partners, entities in the **supply chain** and any other non-State or State entities directly linked to its business operations, products or services*"[2].

  Upstream established direct and indirect business relationships will cover a huge range of entities and activities (design, extraction, manufacture, transport, storage and supply or raw material, products, parts of products). Conducting due diligence on supply chains will represent a major challenge considering the complexity of global supply chains. In order to keep the scope of CS3D feasible and realistic, downstream activities, such as the use of a product by clients or consumers, should be explicitly excluded from the scope of the directive. There are more appropriate and specific legal instruments governing for example the relationship with consumers, such as Directive 2011/83/EU on consumer rights and more generally the safety of products.

  Therefore, CS3D should replace the term 'value chain' by 'supply chain' and align with the risk-based approach of OECD guidelines. The control of the use of products, which is problematic both practically and legally, should not be in the scope of CS3D. **The directive should focus on risk-based due diligence on supply chains, explicitly excluding downstream activities.**

II. Definitions

Improve definitions to provide clarity and legal certainty (article 3)

- **Adverse environmental impact (b):** we understand that greenhouse gas emissions and the limitation of global warning are not included in companies' due diligence obligations as article 29 (d) seems to exclude climate impacts. In addition, a specific provision is dedicated to the issue in article 15. Nevertheless, the explanatory memorandum refers to it (p.2) and Annex part 1 includes references to the environment. Companies need clarity since climate liability claims against some companies are based inter alia on human rights grounds which includes for instance the right to live in a healthy environment. **It should be made clear that general considerations around climate are outside the scope of the due diligence obligation**.

- **Business relationship (e) (ii)** is defined as a "*business relationship with a contractor, subcontractor or any other legal entities that performs business operations related to products or services of the company for or on behalf of the company*". **It is not clear whether this definition relates to <u>indirect</u> relationships**. If it is the case, this must be clarified, as companies need to be precisely informed about the scope of their obligations and to understand to which situation the proposal refers when it mentions "indirect relationships".

---

[1] OECD Guidelines for Multinational Enterprises 2011, Chapter II, A points 10, 11, 12, 13 and 14
[2] OECD Guidelines for Multinational Enterprises 2011, Chapter II, B point14 page 23

- **Established business relationship** (f) is defined as business relationship which is or which is expected to be lasting, in view of its intensity or duration and which does not represent a negligible or merely part of the value chain. **This definition refers to subjective criteria without explaining how to appreciate intensity, duration and negligible or ancillary part of the value chain, leading to the substantial risk of different interpretations**.

- **Director (o):** It is necessary to distinguish in the proposal between executive and non-executive directors specifically when it comes to setting variable remuneration in article 15 § 2 which cannot concern non-executive directors.

III. Due diligence obligations

Provide for the prioritisation of adverse impacts (article 6, 7 and 8)

It is impossible for large companies to perform the 6 obligations laid down in article 4 all over the world concerning each of their hundreds of thousands of suppliers or sub-contractors, country by country, project by project or activity by activity. By contrast, OECD guidelines state that "*when enterprises have large number of suppliers, they are encouraged to identify general areas where the risk of adverse impacts is most significant and, based on this risk assessment, prioritise suppliers for due diligence*"[3].

With a view to make the legislation efficient, including through effective allocation of companies' resources, it must focus on the **most severe adverse impacts**, as per a **risk-based approach**, taking into account the fact that it is impossible to mitigate every single risk that may occur on supply chains. Due diligence is an ongoing process which has to be improved over time, focusing first on the most salient risks before addressing less important risks. **The requirements should therefore be focused on the most salient adverse impacts identified across undertakings' activities,** which would allow interested parties and stakeholders to better understand the due diligence strategy of the undertaking. Article 3 (q) defines 'appropriate measures' - among other criteria - as those which are commensurate with the degree of severity and the likelihood of the adverse impact.
Companies from high-risk sectors are, by way of derogation, allowed to limit their identification process to **actual or potential severe adverse impacts**. According to recital 31, the rational for this is to avoid undue burden on the smaller companies operating in high impact sector. However, due to their activities which may generate a large range of risks, logic would have dictated the reverse principle. In any case, if this burden is considered as "undue" for high- risks sectors, we do not see any reason to impose it on other large or medium size companies.

Finally, it is worth noting that the draft European Sustainability Reporting Standards elaborated by EFRAG do not refer to all impacts, but only to **material impacts** on workers in the value chain, on biodiversity and ecosystems. The CS3D should adopt the same approach and ensure coherence with the CSRD' delegated acts to be adopted following technical advice from EFRAG.

Therefore, this risk-based approach should be explicitly referred to in article 6, 7 and 8.

[3] OECD Guidelines for Multinational Entreprises 2011, Chapter II, B point 16 page 24

Delete unclear and unfeasible provisions to prevent, mitigate and bring to an end adverse human rights and environmental impacts (article 7 § 3 and article 8 § 4)

Article 7 § 3 states that "*as regards potential adverse impacts that could not be prevented or adequately mitigated, the company may seek to conclude a contract with a partner with whom it has indirect relationship, with a view to achieving compliance with the company's code of conduct or a prevention action plan".* A similar wording is included in article 8 § 4 as regards actual adverse impacts that could not be brought to an end or adequately mitigated.

The conclusion of contracts with indirect relationships is not part of the usual due diligence measures recommended by UNGP or OECD Guidelines and numerous legal and practical questions arise such as: What would be the terms of the contract? **How can a company which has concluded a contract with its direct relationship may conclude at the same time a contract with its indirect relationship**? What would be the financial or other compensation of such an agreement? In addition, as the relationship would transform into a direct business relationship, liability rules would be even stricter which means that there would be a legal risk to follow this provision.

This provision should either be deleted or brought in line with OCDE due diligence guidance and recital 15 of the draft proposal which acknowledges that companies cannot "*guarantee, in all circumstances, that adverse impacts will never occur or that they will be stopped*." Indeed, as regards potential or actual adverse impacts that could not be prevented or adequately mitigated by the measures in article 7 § 2 and article 8 § 3, the company should take **adequate steps** taking into account **the specificities of its value chain, sector or geographical area**, and above all, its **power to influence, and the possibility to increase its leverage.** These changes are indispensable to make it clear that the obligations are not an obligation of results but an **obligation of means**.

Also, **article 7 § 3 to 6 overlap with article 8 § 4 to 7 which creates confusion**. Regarding "potential adverse impacts that could not be prevented", it would be more logical to refer to article 8 which addresses the issue of mitigating. Consequently, article 7 § 3 to 6 could be deleted and replaced by the sentence "As regards potential adverse impacts that could not be prevented by measures in § 2, article 8 shall apply".

Finally, article 7 § 4 states that where measures to verify compliance are carried out in relation to SMEs, **the company shall bear the cost of independent third-party verification**. The question of who should bear the cost of independent third-party verification in relation to SMEs should be further discussed. **The French experience shows that SMEs who contribute financially to this verification** – even with a very small amount - **are more motivated to participate**. **A shared cost model has the advantage to improve supplier engagement because they also "own" the result of the verification and can use it with other buyers.** This allows them to see verification as a part of their own sustainability strategy and not as a mere compliance exercise. AFEP members believe that there needs to be flexibility for buyers to decide, together with SMEs, which cost model is best suited to improve due diligence on their supply chains. The coverage may also be much larger in the case of a shared cost model because more SMEs can be included in the scheme.

Clarify the due diligence obligations regarding non-EU companies (article 2)

AFEP supports the extension of the scope of the proposal to non-EU companies in order to create a level playing field for EU businesses, to promote the values linked to responsible business conduct outside of the EU and to avoid unfair competition. The proposal states that for determining whether non-EU companies fall under the scope of this directive, **the turnover must be generated within the EU**. If the purpose is to create a level playing field, the fact that European companies have to generate a net worldwide turnover of EUR 150 million, while third countries companies have to generate the same threshold but, in the EU, can be put into question. One would have expected that non-EU companies would have to meet a lower threshold as it only calculated at EU level.

In addition, it is **not clear whether their due diligence obligation concerns <u>all</u> operations of the non-EU entity worldwide or only those linked to the products or services offered in the EU**.

For example, a US subsidiary of a European company which sells goods in the EU, does it have to report on due diligence regarding its whole operations with the rest of the world or only on the value chain for goods and services exported to the EU? Indeed, as the proposal stands, the non-EU entity would have to apply articles 7 and 8 without any limitations regarding the scope of the due diligence obligations. Even if the objective of the measure is to give it an extraterritorial scope, it is necessary to have at least a territorial connection with the products or services offered. **Business relationships, whether direct or indirect, which do not affect the European market, should not be included in the scope of the Directive**.

Therefore, it **should be clarified that for non-EU entities due diligence obligations are limited to the value chain of the products offered in the EU.**

Adopt a more nuanced approach on suspending or terminating commercial relationships (article 7 § 5 and article 8 § 6)

The proposal states that "*in order to ensure that bringing actual adverse impacts to an end or minimising them is effective, companies should prioritize engagement with business relationships in the value chain, instead of terminating the business relationship, as a last resort action after attempting at bringing actual adverse impacts to an end or minimising them without success*[4]".

The suspension or termination of business commercial relationships is seen **as a last resort obligation** after the company has attempted to take all necessary preventive measures. As such, this last resort measure may be appropriate <u>under certain circumstances</u>, described by OCDE Guidelines, when **adverse impacts are irremediable**; where there is **no reasonable prospect of change**; or when **severe adverse impacts or risks are identified** and the entity causing the impact does not take immediate action to prevent or mitigate them.

However, OECD Guidelines also underline that **in some instances it may not be possible or practicable to end a business relationship**, for example where the supplier is a crucial relationship supplying a core product like rare earth minerals which are only available from very few suppliers.

Also, the **consequences of disengagement may entail further, even severer negative impacts as mentioned by the OECD Guidelines[5], which invite companies to "*take into account potential social and economic adverse impacts related to the decision to disengage*"**. Therefore, the decision to disengage is extremely difficult to take, creating dilemmas for companies and involving **ethical considerations**, for example for a company providing medical supply or infant milk. The decision to disengage or not also raises the **political question** whether the EU wants its companies to leave all high-risks area and leave operations there to less regarding competitors who are likely to make things much worse for the local population or the environment. Unless clearly dictated by law, the decision to disengage or not will have to be taken by the company after careful balancing of all options.

[4] Recital 41

[5] OECD Guidelines for Multinational Entreprises 2011, Commentary on General Policies, point 22, page 25

AFEP considers that several changes are necessary to bring in a more nuanced approach:

- **Disengagement cannot be a legal obligation**, because every company has to take this decision in the light of its specific situation, after carefully considering ethical issues and balancing risks linked to terminating the business relationship or not.

- **Disengagement cannot be the sole responsibility of the company.** In case of severity of adverse impacts that cannot be mitigated, it is up to States to bring clarity as regards the appropriate measures that have to be taken. Some States have already banned some areas from any economic activities, e.g. the US who prohibit the importation of goods made with forced labour[6]. CS3D should clarify that in such cases, the due diligence obligation would only consist in checking whether, in the supply chain, the goods or products are mined, produced or manufactured in banned areas. In addition, the proposal should offer technical and other appropriate support to comply with this rule, as it might be difficult for companies to identify the existence of forced labour.

- **The possibility of disengagement should be maintained only in article 8 on ending actual adverse impacts. It should be deleted from article 7 on potential adverse impact prevention** in order to avoid confusion between article 7 and 8. The potential impacts addressed by article 7 are not an appropriate basis for this disengagement as a last resort. As stated earlier, § 3 to 6 of article 7 should be deleted and reference made to article 8.

- **A safe harbour should be granted for any potential negative impacts caused by disengagement** to avoid that companies are being caught between hammer and anvil.

Provide protection under competition law regarding exchanges of sustainability related information between competitors (article 4 §2)

Article 4 §2 states that "*companies are entitled to share resources and information within their respective groups of companies and with other legal entities in compliance with applicable competition law*". However as progress in relation to sustainability will most likely require businesses to collaborate and exchange of sustainability-related information, clarity is needed regarding the types of resources and information that can be shared without being considered as an anti-competitive conduct falling under article 101 (1)° TFEU. The Commission is currently revising its guidelines on this issue[7] giving examples of agreements which are not raising competition concerns. However, these examples are illustrative and not exhaustive and there remain many grey areas. By contrast, companies need clarity on the conditions allowing them to benefit from a safe harbour.

Address the responsibility of States when making international conventions applicable to companies (article 3 b) and c) and the Annex to the directive proposal)

Art. 3 b) and c) define an 'adverse environmental impact' as an adverse impact resulting from the violation of one of the prohibitions and obligations pursuant to the **international environmental conventions** listed in the **Annex, Part II**; and an 'adverse human rights impact' as adverse impact on protected persons resulting from the violation of one of the international conventions listed in the Annex, Part I Section 2.

International conventions are agreements between different countries which are legally binding only to the contracting States, and only when that State ratifies it. By contrast, **the directive proposal will**

---

6 US Public Law 117-78 dec.23, 2021 (Act to ensure that goods made with forced labour in the Xinjiang Uyghur Autonomous Region of the People's Republic of China do not enter the United States market). See also the EU's envisaged ban on goods made using forced labour, announced for September 2022.

7 Draft communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements. Cf. § 9.2

make the relevant conventions directly applicable to companies within its scope without addressing the numerous question this raises in practical and legal terms.

While companies can make their best efforts to mitigate risks also in countries which have not signed or ratified certain international conventions, there may be **inextricable situations when the country has adopted legislation which is contrary to the convention**, for example by strictly prohibiting the freedom of association.

OECD guidelines explicitly state that "*obeying domestic laws is the first obligation of enterprises. (…).° In countries where domestic laws and regulations conflict with the principles and standards of the guidelines, enterprises should seek way to honour such principles and standards to the fullest extent which does not place them in violation of domestic law*"[8]This principle must be introduced in the directive proposal.

Similarly, protective legislation may exist in theory, but the government, administration or state-owned companies may be involved in human rights abuses or causing harm to the environment. In these cases, it should be clarified what is appropriate to require the EU company to do. Also, it should be underlined that **terminating the business relationship will in many, if not most cases, not bring about positive change** in the host country as non-EU competitors with different or lower human rights standards will take the place of EU companies.

OECD and UN guidelines explicitly recognise that **companies cannot replace failing and weakly governed states in which protective laws are either inexistent or not applied**. EU companies alone will not be able to change such situations in their host countries but will rely on multi-stakeholder initiatives including other States or international organisations to improve the situation. **The directive proposal should address this situation to avoid that EU companies would have to massively exit certain countries** which could have serious repercussions on EU supply chains and industries' capacity to pursue their activity.

Design a monitoring process which does not create undue burden on companies (article 1 and 10)

Article 1§1 states that "the nature of business relationships as "established" shall be reassessed periodically, and at least every 12 months". In addition, article 10 states that companies should "carry out periodic assessments of their <u>own operations</u> and measures, those of their <u>subsidiaries</u> and, where related to the value chains of the company, <u>those of their established business relationships</u>" to monitor the effectiveness of their due diligence measures at least every 12 months and whenever there are reasonable grounds to believe that significant new risks of the occurrence of those adverse impacts may arise. **This frequency and scope are totally unrealistic and unfeasible**. The due diligence exercise is a highly complex process, involving the assessment of up to thousands direct suppliers. The risk identification alone takes on average 18 months for large companies. Once performed, certain risks may be considered permanent, others not.

Articles 1 and 10 should be reformulated. The yearly periodic assessment should be limited to the monitoring of appropriate qualitative and quantitative indicators. The assessment of all operations (own, subsidiaries, value chain) is impossible to perform every year. **The periodicity may not be less than 3 years unless a significant risk has been identified** which justifies updating the due diligence policy without any delay.

[8] OECD Guidelines for Multinational Entreprises 2011, Chapter I, point 2, p. 17

IV. Climate change provisions

Modify article 15 §1 to create legal certainty for companies

Large French companies confirm their commitment to fight against climate change and to contribute at global level to reaching the targets of the Paris Agreement. First, they focus on achieving reductions in emissions depending on their direct control and allowing their own investments to deliver results. Second, they exercise leverage on their value chains to urge their business relationships to adopt low carbon solutions in a view to contributing to the goals of the Paris Agreement.

Nevertheless, legal requirements must be pragmatic in terms of implementation by companies, otherwise they will generate legal uncertainty and inhibit ambitious action.

Article 15 §1 "Combating climate change" states that "***companies shall adopt a plan <u>to ensure</u> that the business model and strategy <u>are compatible</u> with the limiting of global warming <u>to 1.5</u> C in line with the Paris Agreement".***

This provision duplicates a provision contained in Article 19a (2) (a) (iii) of CSRD, which expressly obliges companies to publish "***the plans of the undertaking to ensure that its business model and strategy 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***".

However, in CSRD, **this is a reporting-oriented obligation** (i.e. a "*comply or explain*" approach), as clarified by Recital 26: "(…) ***In addition to the reporting areas identified in Articles 19a(1) and 29a(1) of Directive 2013/34/EU, undertakings should therefore be required to disclose information about their business strategy and the resilience of the business model and strategy to risks related to sustainability matters, <u>any plans they may have</u> to ensure that their business model and strategy are compatible with the transition to a sustainable and climate-neutral economy* (…)"**. This is further confirmed in the Application Guidance of the Exposure Draft of ESRS E1: "***AG 2. In case the undertaking does not or not yet have a transition plan in place that ensures compatibility with limiting of global warming to 1.5°C and reaching net-zero GHG emissions by 2050 at latest, it shall provide an explanation of its climate change mitigation ambition and whether and when it will adopt a transition plan.***"

Also, **the draft EFRAG standards contain detailed qualitative and quantitative information in their climate section ESRS E 1-1 point 13** and following, to be published by the company, such as reduction targets, resources allocated to the action plan, etc. As CSRD has an even broader personal scope than CS3D, it is difficult to see the added value of Article 15 in this proposal.

Article 15 §1 as it stands creates a substantial obligation to ensure 1,5°C compatibility of the business model and strategy which raises both legal and practical concerns :

<u>Legally</u>, although they look similar, Article 15 of CS3D and Article 19a (2) (a) (iii) of CSRD provide for **different control regimes, different sanctions, and potentially different authorities** to be designated by Member States. As a result, a company subject to both directives would be subject to **two conflicting control and sanctions regimes, with no legal and procedural coordination**, which would be contrary to due process principles and proper administration of justice.

<u>Practically</u>, there is no regulation or generally recognized standard today for aligning a company's strategy on a given temperature goal. Initiatives such as Science Based Targets Initiative (SBTi) have started proposing guidance in that regard. However, **SBTi sectoral guidance is not available for all**

sectors[9]**.** Also, **the SBTi methodology may conflict with similar initiatives** (Transition Pathway Initiative -TPI- as an example), creating **legal uncertainty** on the required approach.

Article 15 §2 states 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. **This provision is unclear**: if the risk is not considered by the company as a principal risk, in that case, what should be included in the plan which *per se* is a plan designed to limit global warming?

Article 15 should therefore refrain from creating an obligation of results for an outcome which companies cannot reasonably be expected to achieve for the following reasons:

- The temperature goal in the Paris Agreement and the European Climate Law is not "1.5°C". The Paris Agreement's goal is "***well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C** **above pre-industrial levels***" (Article 2(1)), and the European Climate Law sets out "***a binding objective of climate neutrality in the Union by 2050 in pursuit of the long-term temperature goal set out in point (a) of Article 2 (1) of the Paris Agreement***".

- The Glasgow Climate Pact indicates that the Conference of the Parties ***"reaffirms the Paris Agreement temperature goal of holding the increase in the global average temperature to well below 2°C and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels"*** and "***recognizes that the impacts of climate change will be much lower at the temperature increase of 1.5°C compared with 2°C and resolves to pursue efforts to limit the temperature increase to 1.5°C"*** (cf. Section IV 20. And 21.). Nonetheless those two statements involve specifically the States ("The Parties") **and not directly on private actors.** Furthermore, when the temperature increase of + 1.5°C is mentioned, it refers to **"efforts to limit** the temperature increase of 1.5°C" and **not to a mandatory result for the Parties**.

- As mentioned above, the Paris Agreement is binding for States Parties, **not for private actors.** It requires that States Parties define their "*nationally determined contributions*" (i.e., national objectives) and the associated mitigation measures (Article 4). Only Governments have the political mandate and capacity to set out the structural measures needed at the appropriate scale. Nevertheless, **States themselves are not aligned with a "1.5°C" pathway**, even if all their post-Glasgow COP targets would be met[10].

- The Paris Agreement long-term temperature goal is set out "***in the context of sustainable development and efforts to eradicate poverty***" (Paris Agreement, Article 2(1)). The Agreement also recognizes "***the principle of common but differentiated responsibilities***". This means that **the pace of energy transition may vary between regions and countries**, and mitigation efforts should not jeopardize the right of populations across the planet to achieve development.

- **There is no regulation or generally recognized standard today for aligning a company strategy on a given temperature goal** [as elaborated above].

Consequently**, it is not consistent to impose a 1.5° standard of results ("ensure") on companies.** Article 15 **should therefore be amended as such:**

[9] https://sciencebasedtargets.org/sectors/oil-and-gas. Some SBTi sectoral guidance projects are under development.

[10] See page 8 : "COP26 THE GLASGOW CLIMATE PACT" (UK Presidency) : https://ukcop26.org/wp-content/uploads/2021/11/COP26-Presidency-Outcomes-The-Climate-Pact.pdf

"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~~*** ***make*** *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~~*** ***the long-term temperature goal referred to at Article 1, paragraph 2 of Regulation (EU) No. 2021/1119 [the European Climate Law] , in the context of sustainable development and efforts to eradicate poverty.*** *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".*

In Article 17(1), the reference to Article 15 should be deleted to avoid subjecting this requirement to the enforcement regime provided for human rights and environmental due diligence. Indeed, the latter are oriented towards local, specific impacts whereas climate actions address global impacts of all economic actors. For the same reason, the scope of "Substantiated concerns" (Article 19) should not cover all articles of the Directive but be limited to Articles 4 to 14.

Again, it is necessary to give companies the option to consolidate the implementation of this requirement on a corporate group (parent company) level. Consistent GHG emission reduction strategies typically require a consolidated group approach which is then deployed across subsidiaries.

V. Civil liability regime

Clarify the civil liability regime (article 22 § 1 and 2)

The § 1 of the proposal states that the company should be liable for damages if they failed to comply with the obligations mentioned in article 7 and 8 to prevent and mitigate potential adverse impacts or to bring actual impacts to an end and minimise their extent, and as a result of this failure an adverse impact that should have been identified through the appropriate measures occurred and led to damages.

However the a) is too broad as it contains a general reference to articles 7 and 8. It should be amended in order to clarify that companies may be liable only when they have omitted to take "appropriate measures" as defined in article 3 q) meaning measures which are notably **commensurate with the degree of severity** and the **likelihood of the adverse impact** and **reasonably available to the company**, taking into account the circumstances of the specific case, including the **company's influence of the concerned business relationship**.

The § 2 states that companies should not be held liable for damages caused by <u>indirect business relationships</u>, if they carried out appropriate due diligence measures (contractual clauses and cascading). However, t**his exoneration should concern <u>all</u> partners, whether they are direct or indirect.** In addition, the proposal also indicates that the company should not be exonerated from liability if **"*it was unreasonable, in the circumstances of the case, to expect that the action actually taken, including as regards verifying compliance, would be adequate to prevent, mitigate, bring to an end or minimise the extent of the adverse impact*".**

The sentence "unless it was unreasonable…" (§ 2) **lacks clarity and is too vague and subjective to be the basis of a responsibility regime**. Which criteria would allow to judge whether the measures taken were inadequate to prevent or mitigate the risk? In the presence of damage, the judge will be led to consider that the measures were *de facto* inadequate. Therefore, the burden of proof should be reversed, and it should be up to the plaintiff to prove that the due diligence measures were manifestly insufficient, in the circumstances of the case, to tackle the issue.

Therefore this paragraph should be amended as followed: "Notwithstanding paragraph 1, Member States shall ensure that where a company has taken the actions referred to in Article 7(2), point (b) and Article 7(4), or Article 8(3), point (c), and Article 8(5), it shall not be liable for damages caused by an adverse impact arising as a result of the activities of a~~n indirect~~ partner with whom it has an established business relationship, *unless it ~~was unreasonable, in the circumstances of the case, to expect that the action actually taken, including as regards verifying compliance, would be adequate~~ is proven that the actions actually taken were, in the circumstances of the case, clearly inadequate to prevent, mitigate, bring to an end or minimise the extent of the adverse impact".*

Delete the overriding mandatory application of Member States' law: (article 22 §5)

In order to ensure that victims can bring an action for damages and claim compensation for damages arising due to a company's failure to comply with its due diligence obligations, even when the law applicable to such claims is not the law of a Member State, the directive requires Member States to ensure that the liability provided for in provisions of national law transposing this article is of overriding mandatory application in cases where the law applicable to claims to that effect is not the law of a member state. **This article intents to derogate from the Rome II Regulation** (article 4 and 7).

Companies call into question the Commission's rationale for wanting the EU to become through this provision the most attractive territory for actions against companies filed by victims from all over the world.

OTHER POINTS OF CONCERN

I. Directors' remuneration

Delete the provision regarding directors' remuneration

Article 15 § 3 states that companies will have to take into account fulfilment of the obligations concerning climate change 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. This subject has already been dealt with by the shareholder rights directive (SRD) which provides in article 9 a § 6: " *The remuneration policy shall contribute to the company's business strategy and long-term interests and sustainability and shall explain how it does so. (…) Where a company awards variable remuneration, the remuneration policy shall set clear, comprehensive and varied criteria for the award of the variable remuneration. It shall indicate the financial and non-financial performance criteria, including, where appropriate,* ***criteria relating to corporate social responsibility,*** *and explain how they contribute to the objectives set out in the first subparagraph, and the methods to be applied to determine to which extent the performance criteria have been fulfilled".*

If the intention is to go further by requiring climate related criteria, it would be more suitable to amend the SRD. Indeed, SRD concerns listed companies which have a responsibility towards the market and would avoid interfering in the governance of non-EU companies as they are not included in the scope. In addition, as the definition of directors does not distinguish between executive and non-executive directors, we do not see the rational to require that non-executive directors remuneration be linked to CSR criteria as they are not in charge of the implementation of the strategy.

II. Complaints procedures

Provide consistency with other EU whistle-blower laws and better circumscribe the persons who can submit complaints (article 9 § 2 c) or substantiated concerns (article 19 § 1)

The proposal should clearly address the relationship between article 9 and other legislations such as the **directive on the protection of persons who report breaches of Union law**.

In addition, the proposal states that complaints may be submitted also by "civil society organisations active in the areas related to the value chain concerned" without requiring that these organisations are affected or have reasonable grounds to believe they are affected by an adverse impact (article 9 c). Companies do not contest the important and constructive contributions of many NGOs in general, but regret that their concerns are presumed legitimate without requiring any **transparency requirements obliging these organisations to disclose who they are, how they are funded, which interests they represent and how they are affected**. The broad formulation of article 9 § 2 c opens the door to abuses contrary to the aim of this directive and could result in an excessive number of complaints procedures. Indeed, some NGOs act in an opaque manner which gives rise in particular to fears that some of them may serve as vectors of influence, intelligence or interference for the benefit of private or State organisations and with a view to destabilise a company (e.g competitor hidden behind the persons funding the NGO). Member States should therefore be able to make the admissibility of such complaints subject to a minimum of transparency or to the fact that the organisations filing a complaint are associations recognised as being of public utility.

In article 19 § 1, it is not clear why natural and legal persons can submit **substantiated concerns** to the supervisory authorities while, when it comes to companies, persons and organisations can submit

legitimate concerns. Indeed, the **concerns addressed in article 9 should not only be legitimate but also substantiated** in order to avoid a flow of insignificant or anecdotal complaints. Also, the person who reports should have "*reasonable grounds to believe that this information reported was true at the time of reporting*"[11].

At last, it would be important to explicitly **provide for group solutions as subsidiaries may have limited resources in terms of employees and means to meet their obligation under the directive**. Indeed, it is not clear whether article 4 § 2 is applicable to complaints procedures. Therefore, **subsidiaries should be allowed to share resources as regards the receipt of reports and the carrying out of investigations with the parent company**. The compliance officer of the subsidiary, if any, may not have the expertise to deal with complex matters alone and it is important that the parent company be aware of concerns which may have a reputational impact on the whole group.

III. Corporate governance

Revise provisions regarding directors' duty of care and clarify the setting up and overseeing of due diligence (article 25 and 26)

a) Directors' duty of care

Article 25 refers to the concept of duty of care, which is well known in the Anglo-Saxon world, but less widespread in Europe. Moreover, when it exists, it usually refers to the duty of managers towards the company and not towards third parties which seems to be confirmed by recital 63 which refers to the "*general duty of care of directors to act in the best interest of the company*". Therefore, the reason to introduce such a provision in a directive dedicated to due diligence towards third parties and the environment appears rather unclear. AFEP shares the Regulatory Scrutiny Board's concerns and does not see either "*why existing sustainability strategies and corporate management practices are considered as insufficient or what in practice companies would have to do to have adequate sustainability governance practices in place*". When comparing this provision with the provisions introduced by the French Pacte law on the consideration of social and environmental issues, one should note that **the aim of article 1833[12] of the French civil code is to anchor CSR in the management of the company and not to create a new cause of corporate liability.** This is why the supreme court for administrative justice (Council of State) amended the draft proposal by replacing the expression "*considering*" by *taking into consideration*" so that the new provision only reflects a general concern for the company and not a precise normative goal that must be achieved. It explained that the principle of reasonable management is not accompanied by any sanction other than that covered by the ordinary law on liability.

Conversely, Article 25 § 2 seems to establish the liability of directors in the event of breach of the directors' duties. However, the added value of EU action in this respect has yet to be demonstrated since all Members States have in place a liability regime that apply both for companies and directors.

Therefore § 1 should be amended as followed :

" *Member States shall ensure that when fulfilling their duty to act in the best interest of the company, directors of companies referred to in article 2 (1)* ***take into ~~account~~*** *consideration the consequences of their decisions for sustainability matters, including, where applicable, human rights, climate change and environmental consequences, including in the short, medium and long term".*

---

[11] DIRECTIVE (EU) 2019/1937 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 23 October 2019 on the protection of persons who report breaches of Union law (article 6 § 1 a)).

[12] "The company is managed in its corporate interest taking into consideration the social and environmental stakes linked to its business."

Regarding § 2, the uncertainty surrounding this provision and the fact that it would not lead to any harmonized regime leads AFEP to ask for its deletion or for a more **explicit confirmation that the directive does not include an additional enforcement regime in case directors do not comply with their obligations under this directive** (as is clearly stated by the Commission)[13].

b) **Setting up and overseeing due diligence**

The wording of article 26 is unclear and needs to be amended. The word "responsibility" has to be understood as an attribution of roles for putting in place and overseeing the due diligence actions. However, it should be made clear that putting in place the due diligence actions according to article 4 should be assigned to corporate bodies and not to directors. Indeed it should be up to Members States to decide who among executive and non-executive directors is responsible for putting in place and overseeing the due diligence policy.

In addition, article 26 § 1 introduces an additional consultation of stakeholders and civil society organisations at the level of directors which is not appropriate as the way communication with third parties is conducted depends on each company and can be organised in very different ways, usually not at board or executive directors' level.

Therefore, article 26 should be amended as follows:

" Members States shall ensure that ~~directors~~ administrative, management or supervisory bodies of companies referred to in Article 2 (1) are, where applicable, responsible for putting in place and overseeing the due diligence policy referred to in Article 5, ~~with due consideration for relevant input from stakeholders and civil society organizations.~~ Where applicable, the ~~directors shall report to~~ board of directors or the supervisory board is informed in that respect.

Members States shall ensure that ~~directors~~ administrative and management bodies take steps to adapt the corporate strategy to take into account the actual and potential adverse impacts identified pursuant to article 6 and nay measures taken pursuant to Article 7 to 9".

IV. Supervisory authorities

Provide for a well-balanced supervisory system including non-judicial remediation mechanisms

The role of the **supervisory authorities should be revised**. From a practical point of view, it is difficult to see how a national authority, even the most staffed one, may supervise, in an effective way, all companies subject to the due diligence requirements, request information and carry out investigations.

Instead of granting such investigations powers, AFEP proposes the **designation of independent assurance providers explicitly accredited for verifying due diligence information** published by undertakings. This would be a coherent addition to the verification of non-financial statements, already required in some EU Member States and systematically imposed by CSRD. To guarantee the quality, legitimacy and credibility of such verifications. A rigorous process of accreditation of the independent assurance providers by one of the signatories of the European Accreditation Multilateral Agreement (EA MLA) should be put in place.
As regards the role of the supervisory authority, they should:

[13] https://ec.europa.eu/info/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence_en.
"The rules of directors' duties are enforced through existing Member States' laws. The directive does not include an additional enforcement regime in case directors do not comply with their obligations under this directive"

- **act as “help desks”.** Their role should be to **assist undertakings in their risk analysis by sharing tools and intelligence,** for example on high-risk geographical zones and to implement their due diligence strategy.

- **integrate the mediation role played by OECD National Contact Points (NCP) as they offer a unique State-based non-judicial mechanism through which the non-respect of due diligence can be effectively raised**. Almost 50 NCPs currently exist for each government adhering to the OECD Guiding Principles. The NCPs offer a non-judicial grievance mechanism which help to resolve issues that can arise if the OECD due diligence guidelines are not observed. **NCPs are often more efficient than lengthy judicial procedures**. They contribute to improving access to remedy for victims of business-related rights violations, especially in cross-border transactions where judicial systems may fail.

- **liaise with embassies and diplomatic networks in third countries** who could work closely together with companies and facilitate cooperation with key actors in the third country (administrations, authorities, independent agencies, associations, international organizations, NGOs, etc.). Only such multi-stakeholder cooperation will be able to meet the challenges of very complex issues such as forced labour or child labour, challenges which are impossible to be solved by a single company. In order to fulfil this role, embassies should train at least some of their staff on the environmental and human rights risks likely to exist in the countries of their assignment. This staff could then proactively lead a network for the exchange of best practices and support for EU companies operating in the country in question.

If the investigative and sanctioning powers of the supervisory authorities were to be maintained, **companies should not be exposed at the same time to investigations with potentially administrative sanctions and judicial proceedings on the same grounds.** The proposal should indicate it clearly to avoid that a company is sanctioned twice for the same facts under administrative and judicial proceedings.

In the case of a group of companies, where the resources are shared within the group, there should be **one single authority to avoid multiple supervisions**.

V. Sanctions

Sanctions should be progressive, appropriate and proportionate to the severity of the breach (articles 18, 20, 24)

The proposal provides for multiple sanctions which may hit the company simultaneously or in a cumulative manner which seems disproportionate. Indeed, the following consequences in case of ineffective or failing due diligence can be identified:

- Payment of damages to the affected persons (article 8 § 3 a)
- Payment of financial compensation to the affected communities (article 8 § 3 a)
- Remedial action ordered by the supervisory authority (article 18 § 5 a)
- Payment of pecuniary sanctions in accordance with article 20 (article 18 § 5 b)
- Adoption of interim measures to avoid the risk of severe and irreparable harm, ordered by the supervisory authority (article 18 § 5 c)
- Ban from “public support” in case of sanctions (article 24)
- Civil liability for damages (article 22).

Article 18 § 5 provides for a range of powers of the supervisory authorities which are put at an equal footing. A **progressive, step by step approach** should be provided for as regards these different consequences and sanctions. The authority should be required, as a **first step, to order the cessation of infringement** and, where appropriate, **invite the company to take remedial action**. As a second step, and only in the event of abstention from the cessation of infringement, or repeated infringement, sanctions should be imposed.

Article 20 indicates that sanctions shall be "effective, proportionate and dissuasive". However, there is **no provision obliging Member States to ensure a certain level of harmonisation regarding sanctions**. This seems to contradict article 21 which provides for the cooperation and alignment of "regulatory, investigative, sanctioning and supervisory practices". These provisions should be clarified and reinforced to ensure that from one Member State to the other, similar infringements are subject to the same administrative sanctions.

The risk of fragmentation of different sanction approaches is a **strong argument for a full harmonisation directive instead of a minimum harmonisation** as currently proposed. Companies therefore propose to add a provision according to which "Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more, or less, stringent provisions, unless otherwise provided for in the Directive."

Sanctions must be commensurate to the severity of the non-compliance and of the damage (if any) and not based on parameters that are wholly unrelated, such as company's turnover (remove article 20 (3)).

In addition, article 24 states that "*member states shall ensure that companies applying for public support certify that no sanctions have been imposed on them for a failure to comply with the obligations of this directive*". There is **no definition of public support.** It does not make sense that article 24 amounts to creating a systematic ancillary sanction, barring access to any type of public support, with no time limit and no conditions in particular in terms of severity of the breach. Article 24 should therefore be deleted If not deleted, article 24 needs to include clear definition and limits.

VI. Public procurement

Include due diligence obligations in public procurement directives

CS3D currently does not provide for a dedicated provision related to the public procurement directives (Directive 2014/24/EU of 26 February 2014 on public procurement and directive 2014/23/EU 26 February 2014 on the award of concession contracts ("Public procurement Directives")). By contrast, French law (e.g. French public procurement code article L2141-7-1) provides for the possible exclusion of a tender process when a company does not deliver a duty of care plan compliant with due diligence obligations of the French law.

Due diligence obligations in public procurement contracts would be performed more efficiently if public contracting authorities were fully committed to take this subject into account, from the tender process until the completion of the contracts.

Therefore, **CS3D should include provisions leading to modify the Public Procurement Directives** in order to make it mandatory for the contracting public authorities to include in the procurement documents used for the tender process, precise and objective requirements regarding due diligence obligations that should apply for the project and contract.

Tender documents should also **integrate the share of responsibilities between companies and contracting authorities.** Indeed, in public procurement partnership approaches will be crucial and contracting authorities should also take their part in the success of the due diligence process.

***

ABOUT AFEP

Since 1982, AFEP brings together large companies operating in France. The Association, based in Paris and Brussels, aims to foster a business-friendly environment and to present the company members' vision to French public authorities, European institutions and international organisations. Restoring business competitiveness to achieve growth and sustainable employment in Europe and tackle the challenges of globalisation is AFEP's core priority. AFEP has over 110 members. More than 8 million people are employed by AFEP companies and their annual combined turnover amounts to €2,600 billion. AFEP is involved in drafting cross-sectoral legislation, at French and European level, in the following areas: economy, taxation, company law and corporate governance, corporate finance and financial markets, competition, intellectual property and consumer affairs, labour law and social protection, environment and energy, corporate social responsibility and trade.

Contacts:
Odile de Brosses, Legal Affairs Director, o.de.brosses@afep.com
Elisabeth Gambert, CSR & International Affairs Director, e.gambert@afep.com
Justine Richard-Morin, European Affairs Director, j.richard-morin@afep.com

Transparency Register identification number: 953933297-85