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Position

Eurochambres position on the Proposal for Corporate Sustainability Due Diligence

Eurochambres reiterates that sustainability is at the heart of businesses activities and is key to ensuring long-term economic growth. European businesses are ready to commit to an even stronger responsible business conduct if EU institutions adopt a well-balanced regulatory framework on corporate due diligence.

However, Chambers consider that the Commission's proposal on Corporate Sustainability Due Diligence does not guarantee the legal certainty and harmonisation needed in terms of scope, reporting standards, liability, and enforcement modalities. The proposal also adds considerable administrative and regulatory burden, and without the proper adjustments to make it workable, may have a real social cost at a time of long-lasting disruptions, delays and protracted supply shortages affecting the Single Market.

Finally, Chambers consider that the proposal falls short to deliver the necessary level playing field in a globalised economy where less scrupulous competitors wait to take over market shares that EU businesses will be obliged to abandon once compliance with EU standards of protection has been proven unattainable. Chambers therefore urge the co-legislators to fully reconsider how such short-sightedness might in reality affect the level of protection in certain regions of the world that the proposal intended to serve and enhance.

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1. General remarks

Eurochambres considers that the proposal on Corporate Sustainability Due Diligence (thereafter the "Proposal" or the "Directive") critically impacts companies' operations and respective supply chains. The most important goals of the proposal should be to **guarantee harmonisation, level playing field, effectiveness, and legal certainty across Member States**. It is important as well as to abide by **the Think Small First principle**, with full consideration of SMEs needs, and to avoid undue administrative burden. Despite the high level of expectations and a series of legal mishaps leading up to its adoption, Chambers consider that **the Proposal falls short on its promises and does not contribute to these goals**.

Complex legal concepts and vaguely defined key terms create legal uncertainty for businesses, as noted by the Regulatory Scrutiny Board, and will result in difficulties when transposing and implementing the Directive across the EU. The Proposal continues to conflate two parallel concepts - due diligence and sustainable corporate governance – and presents a bias against **European companies due to unattainable obligations that go far beyond** (or even contradict, in certain cases) **existing legislation** at the national level. The nature of the due diligence obligations under the Directive as obligations of means does not really alleviate the compliance costs. The wide discretion given to Member States e.g., when it comes to administrative sanctions will also contribute to more fragmentation in the Single Market.

In order to maximise coherence between the Proposal's strategic objectives and its intended outcomes, it is necessary to create an informed and positive attitude among businesses toward due diligence. Internationally established guidelines clarify that businesses have an independent responsibility to respect environmental and human rights, but this does not mean that they should be made responsible for factors over which they have no control. Accordingly, States have a crucial role and responsibility in this discussion following the fundamental principle of the rule of law.

Entrepreneurs need a stable legal environment, a condition sine qua non for responsible trading. This can only be achieved by **making the corporate due diligence process as streamlined and clear as possible**.

2. Key points

- **Proportionality**

In the last decades, European companies have made substantial efforts to increase their responsibility and sustainable impact in global chains and, in many cases, contributed to enhance environmental and labour standards in less diligent jurisdictions.

However, **businesses have varying degrees of influence along their supply chain** and cannot accept the imposition of legal obligations over an extremely broad coverage of operations which, as a rule, they are unable to comply with or thoroughly verify. Adopting the concept of "established business relationship" beyond tier 1 companies is problematic because tier 2-n business partners are often unknown and contractually sensitive information should not be disclosed.

The focus should instead be on process requirements, based on the values and principles of international guidelines on due diligence, that support businesses' continuous performance improvement and avoid unnecessary costs linked to monitoring obligations for each supplier. **The Proposal needs to be more practice-oriented than theorical in scope, in order to have more chances to attain its objectives.**

The Proposal also indicates that if companies are unable to mitigate or stop severe human rights and environmental impacts they must suspend or terminate the business relationship. This is seemingly incompatible with international covenants on economic development as well as Article 16 of the Charter of Fundamental Rights of the EU on the freedom to conduct a business. In addition, considering that in certain cases, these markets will most certainly be overtaken by third-country competitors, which are not always subject to the same standards of protection, the above solution seems to contradict the objectives of the Proposal.

Eurochambres believes that due diligence should be **proportionate, risk-based, and sector-specific**. The **Proposal should thus only have practical implications for large companies' own operations and up to their respective tier 1 suppliers**.

- **Articulation with existing guidelines, rules and initiatives**

Any **deviation from the UNGPs and the OECD guidance** aimed at introducing additional requirements and checks upon businesses **will have detrimental effects** on the companies' speed of adaptation to the due diligence procedures and will result in an increase of the reporting costs.

Mandatory due diligence requirements must be aligned with international frameworks – OECD Guidelines on Responsible Business Conduct and UNGPs on Business and Human Rights – and should avoid legal pitfalls with existing legislation in the same policy area e.g., Shareholder Rights Directive and the future Corporate Sustainability Reporting Directive, in addition to a wide variety of existing sectoral legislation that regulates business relations. **It is essential to preserve the alignment with international standards** to guarantee a reasonable corporate responsibility within global supply chains.

Existing **industry standards** developed by market participants are essential and can help raise the bar across the Single Market. Companies must be able to rely on the legal sufficiency of compliance of these instruments with the assistance of the Commission and Member States in order to mitigate compliance costs. Since these initiatives also help to establish risk management and other preparatory activities, they should not only be used for contractual assurances, but also to fulfil due diligence obligations. Information platforms and digital solutions for due diligence are crucial for companies and must therefore be made available before the Directive enters into force.

The Commission and the European External Action Service should also play a more prominent role in inspiring third countries towards responsibly identifying, preventing and mitigating risks in their economies with the support of grassroots support organisations.

- **Impact on SMEs**

Despite being excluded from the scope of the proposal, **SMEs will be indirectly impacted**.

A misleading and ill-informed image focusing only on the exclusion of SMEs from the direct personal scope of the Directive, only shows the lack of understanding of how the Directive has been designed to work and how business relations function in practice. SMEs are part of global value chains of in-scope entities and will be thereby required to prove compliance with those entities' obligations under the Directive. In addition, SMEs face difficulties in conducting due diligence because their traceability and compliance costs need to be covered based on a lower turnover. More efforts should be made by Member States to help SMEs in accommodating the changes brought by the Proposal and reaping the benefits of the Single Market.

Lawmakers must guarantee that SMEs remain out of the scope of the Proposal, **address the contractual cascading** and **focus on targeted support measures** e.g.:

- carefully examined model contractual clauses that balance responsibilities across the supply chain and limit the constraints that may fall on smaller suppliers.
- easily accessible information portals, hotlines, good practices databases, and free capacity-building sessions for SME owners and entrepreneurs.
- adoption of SME-specific chapters in existing industry schemes and companies'

procurement charters.
  - collaborative actions between the EU and third countries to create more responsible supply chains at the global level.

To limit the costs linked to the considerable additional bureaucratic burden, and in accordance with the "one in, one out" principle, Member States must also be obliged to financially compensate SMEs for their efforts to pursue legal compliance.

- **Directors' duties**

A large number of EU companies integrate ESG considerations in their business strategy and include sustainability when assessing their financial performance. Modifying the notion of directors' duties through imprecise considerations risks creating legal loopholes and the notion that due diligence oversight could be achieved through modifications to company law is baseless and could result in frivolous actions against the interest of companies, deflecting attention away from the real culpable.

It is important to recognise that directors may become risk averse if the liability risk faced by them is too high, thus forgoing investment opportunities in favour of less attractive alternatives. Any hard law intervention in corporate governance will contribute to jeopardise director liability in accordance with an unknown number of externalities on which the management has no control, and result in breaching their duty of care vis-à-vis the companies' and the shareholders' interests.

Board members should be allowed to define who the relevant stakeholders are, disclose on the chosen engagement methodology and report on how they integrated their interests during their decision-making.

At the same time, EU lawmakers need to carefully consider the corporate governance ecosystems that exist in each Member State, which already provide sufficient incentives for directors to apply a duty of care, and guaranteeing that Boards of Directors, shareholders and investors focus on ensuring that companies create economic and sustainable growth. Shareholders nowadays warrant effective control due to their right to vote on the remuneration of the Board, whose performance should be assessed using both financial and non-financial performance criteria including ESG factors where appropriate.

The Proposal's provisions on directors' duties risk disrupting effective legal systems implemented in Member States and the careful balance achieved through national company law, corporate governance codes and well-established business practices. They show that the Commission has unfortunately based its choices on erroneous and biased presumptions towards directors, which will only increase insurance costs and create a risk aversion environment where qualified personnel shall no longer accept mandates. In addition, **there is no need for this matter to be further regulated at EU level**.

  - Boards must retain the ability to adapt their corporate strategies to the particular needs, considering pre-established liability safeguards and their fiduciary duties. Over time, this will allow the development of sustainability expertise instead of going through redundant tick-the-box exercises. Flexibility in the decision-making process of the management body is more appropriate in light of the externalities that management has no control of and the necessity to avoid decisional deadlocks.
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- The need for the company to adopt a plan compatible to limiting global warming to 1.5 °C, in line with the Paris Agreement on climate change, and variable remuneration linked to it is overly ambitious and represents a competitive disadvantage vis-à-vis third country companies not subject to a similar duty.
  - Even though the adoption of such a plan is not part of the due diligence obligations and directors' liability does not seem to extend to it, it remains unclear how companies could ensure that the business model and strategy are compatible with the limiting of global warming.
  - As regards variable remuneration, it is also unclear how the authorities in charge of enforcing the Directive's provisions following its transposition into national law, can have access to the various components of such individual remuneration which in principle are not made public.
- Lawmakers should not question the legitimacy of directors in addressing stakeholders' input in a flexible manner.

Chambers believe that the Commission should explore the opportunity of creating an **Expert Group specifically dedicated to sustainable corporate governance** to identify best practices on stakeholder engagement with the support of business representatives and maximise sustainable value creation based on existing corporate governance models and the valuable work developed by the members of the European Corporate Governance Codes Network (ECGCN).

The Commission should also take a more **flexible approach and adopt a Recommendation for Member States centred around alternative forms of companies aimed at purposes beyond the sharing of profit** based on existing national initiatives e.g., "benefit companies" in Italy.

Chambers call for a revised balanced approach as regards directors' duties, taking into consideration both the intrinsic difficulty of balancing divergent interests of multiple stakeholders for directors and the real objective of actively promoting sustainable management, and advocate for an educational approach, practical support and conclusive examples of good practices are necessary to this effect for persons acting as directors.

- **Civil liability**

Chambers believe that the proposal introduces overly complex and inadequate liability clauses. Companies may be held liable for harms committed at home or abroad by their subsidiaries, contractors and suppliers, and potential third country victims will have the opportunity to file lawsuits before EU courts. This will result in a bigger burden for companies with fewer resources and a higher risk for damages that are beyond their control.

The inclusion of such clauses is unsuitable because companies cannot be charged for potential damages in their (as it now stands) entire value chain if they did not cause these damages, could not reasonably know about them, or if they took the appropriate measures to prevent and remediate them.

Chambers believe that, instead of targeting businesses with the possibility of an additional regime of civil liability, regulatory incentives should be considered as more effective tools.

Due diligence obligations on direct and indirect business partners should be preferably discussed independently of damages.

- **Inclusion of the financial sector**

The Proposal is largely tailored to challenges of primary sectors, which makes it difficult to apply it to the financial sector where detailed sectoral regimes already apply. Regulated financial undertakings are subject to various regulations on sustainability-related matters and ESG factors are already captured by provisions relating to due diligence and stewardship both on asset managers and product levels and related publications[1] so it is redundant to capture once again the same actors in the scope of the proposal.

Due diligence on the entire investor chain could be challenging (or even unfeasible) to implement for funds with a high number of investors and/or large international investor chains. Effective due diligence is feasible only in the context of the financial services company and the natural/legal person receiving the service. Finally, investment funds should not be assimilated to corporates and a clear exemption regarding investment funds should be considered. Clarifications are also needed on the inclusion of venture capital SPVs and (re)insurance holding companies in the scope of the proposal.

The chamber network encourages the Commission to reconsider the inclusion of the financial sector in the Proposal taking into account the existing robust financial regulatory framework.

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3. Detailed remarks

- **Article 1 Subject Matter**

First of all, references to “value chain” should be replaced by “supply chain” in accordance with the principle of proportionality and taking into account the German and French legislation. In addition, preparatory work carried out by the Commission[2] relates to supply chains instead of value chains.

On the other hand, companies can be expected to limit the number of suppliers in order to be able to conduct their due diligence more effectively and securely, and with lesser costs. **As a result, a certain concentration of suppliers is expected, further leading to higher prices and even possible shortages**. In light of this, alternatives to the above approach should be considered, such as a targeted due diligence obligation regime focused on the most relevant adverse impacts, in respect of certain products which could be proven to be more problematic, and not the whole body of activities undertaken by a company.

Furthermore, European companies are already accountable for human rights violations and environmental harm when carrying their activities within the Single Market. **Thus, a due diligence mechanism should only cover business activities carried out in third countries.**

[1] AIFMD and UCITS delegated acts regarding sustainability risks and factors, SFRD, SRD II, OECD key considerations for responsible business conduct for institutional investors. The stewardship role of asset managers is already prominent and extends even to the objectives of the Paris Agreement, long-term sustainable creation, etc.

[2] The « Study on due diligence requirements through the supply chain” published in February 2020, on which the Commission’s Impact Assessment was based.

The Commission could also develop a “white-list” of jurisdictions and regions in which responsible business standards are presumed to be compliant with essential criteria, reducing scrutiny costs for businesses.

- **Article 2 Scope**

The personal scope of application should be revisited especially on the basis of the two important existing European frameworks, i.e., the German and French legislation. Any change to the threshold or differentiation according to the risk level should be carefully re-analysed only after the Directive is transposed and correctly implemented in Member States.

In addition, the whole concept of targeting specific sectors for the EU companies falling under the second category, but without any additional distinction among the products or services thereof, that is to say, regardless of whether the actual product or service can be deemed to have a high impact on human rights and environment, pinpoints the lack of insight of the Commission in this respect; by targeting everything (first category of EU in-scope companies) or everything within a sector (second category of EU in-scope companies) is neither pragmatic nor fit for purpose.

The application of the EU framework to companies from third countries operating in the EU is welcomed but the level playing field can only be guaranteed if the threshold for EU and non-EU companies is based on the same metrics regarding net turnover. As the text stands, EU companies are at a competitive disadvantage vis-à-vis third country companies, without being clear at all why this differentiation between EU and non-EU companies was necessary[3] Again, the proposal falls short to deliver the promised level playing field, which will most certainly penalise EU businesses in the long-term. Hence, references in this respect should be aligned for EU and non-EU companies.

Taking the example of non-EU airline companies flying to, from and within the EU, and which are not established in the EU and whose turnover is technically always “generated’ outside the EU. These competitors to EU companies could be found to be out of scope, because of the inconsistent personal scope of the proposal as currently drafted.

- **Article 3 Definitions**

- **b) adverse environmental impact and c) adverse human rights impact**

The immense list of conventions, treaties, and laws included in the Annex, which could actually be enlarged according to recital 25, automatically renders any corporate risk prevention and mitigation effort as outrageously costly and potentially ineffective. It is also important to recognise that companies must comply with applicable laws in the countries in which they do business or source their materials however local legal standards may conflict with international legal standards, even in countries that have ratified such conventions or treaties.

As the list of legal acts included in the annex imposes obligations on states that may not

[3] The fact that non-EU entities must have activities within the EU in order to be subject to the EU framework, does not necessarily entail that the turnover related values used for the purposes of thresholds need to only consider those generated within the EU; these are two different issues.

have ratified them, Chambers believe that the scope of application should be limited to specific, well-defined human rights violations and environmentally harmful practices according to the principle of the rule of law.

Finally, recital (25) stipulates that “[i]n order to ensure a comprehensive coverage of human rights, a violation of a prohibition or right not specifically listed in that Annex which directly impairs a legal interest protected in those conventions should also form part of the adverse human rights impact covered by this Directive, provided that the company concerned could have reasonably established the risk of such impairment and any appropriate measures to be taken in order to comply with the due diligence obligations under this Directive, taking into account all relevant circumstances of their operations, such as the sector and operational context”; it is not clear how precisely companies are supposed to implement this provision, especially as regards the companies in the value chain located in countries which are not yet signatories to the relevant instruments.

Legal certainty is of paramount importance for companies and Chamber believe that they shall facilitate the fulfilment of their due diligence obligation and its effective implementation via the public and private enforcement means foreseen by the Directive.

It is important to point out in this respect that the French *Conseil Constitutionnel* had already ruled as unconstitutional sanctions provided for by the French law of 2017 as based on breaches of obligations that were insufficiently defined in clear and precise terms.

- **f) established business relationship**

The term “established business relationship” does not adequately specify what the requirements are for a business relationship to be deemed as such, hence allowing room for interpretation. The term creates legal uncertainty particularly with regards to regulated financial undertakings and even more so in the case of credit institutions, whereby it is unsure whether a given credit provider/bank would be considered to be part of a client’s value chain.

It remains unclear according to which temporal discretion the characteristic of a certain duration is fulfilled and at what point activities are considered insignificant or incidental in for the value chain. There is a need to define de minimis limits here e.g., on the basis of the annual purchasing volume. Accordingly, the argumentation of recital 20 is not comprehensible from the point of view of the commercial sector, according to which all business relationships of the direct established business partner are also considered established. Even if an intensive business relationship with a business partner has existed for several years, this does not result in any accountability for its further business relationships.

Companies operate in complex supply chains, often with thousands of business partners, and will face considerable difficulties in categorising their suppliers or deciding where respective due diligence obligations are to be observed. The definition should be drafted in a way that covers direct partners only[4].

[4] Under the Proposal, an “established business relationship” can be a direct or indirect business relationship, which is indeed a different approach from the one under the French law n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre”. It should be noted that in virtue of the French law of 2017, the application of the text concern the activity of the company and of those controlled by it within the meaning of II of Article L.233-16 of the French Commercial Code, directly or indirectly,

The inclusion of definition(s) for the terms “contractor”, “sub-contractor” and “commercial agreement” could provide more certainty in this regard.

- **g) value chain**

The use of the term “value chain” is problematic because it brings under the scope cross-connections and activities that are not only directly linked to sourcing and producing the goods. Since companies generally have no or only very limited influence in the extraction of raw materials and the actual use and disposal of a product, the requirement to check the value chain for risks over the life cycle of a product cannot be met in practice. The use of the term also carries the risk of systemic distortion due to the increased demand information as it is passed along the supply chain in the form of orders. The term should be replaced by “supply chain” line with the German and the French experience.

- **h) independent third-party verification**

Parties involved in the verification process are crucial to check compliance with the due diligence requirements and are accountable for assuring the quality and reliability of the information however the Proposal abstains from considering the responsibility they may carry in the event of wrongdoing, instead giving an impression of a safeguard.

Chambers reiterate the lack of available auditors that are able to extend their monitoring efforts to a number of non-certified, and difficult-to-control small-scale operations in various regions of the world. There is also a potential risk of market concentration which tends to result in higher compliance costs especially for SMEs.

- **q) appropriate measure**

It remains unclear which measures are to be considered appropriate and how the company can reasonably ascertain its “influence”. What is reasonable will only be assessed in retrospect by control authorities and court in individual case decisions and there is hardly any guidance for companies when it comes to estimating and managing risks. The definition of suitable measures to fulfil the due diligence obligations must also include the limits of data protection and competition law.

The following definitions are also oddly unspecific, often differ from those included in existing regulations, and require extensive substantiation:

- **i) severe adverse impact** (Indicators of scale and scope are absent. Clear link with existing guidelines is necessary)

- **n) stakeholders** (Conceivably via a legitimate interest, following the OECD definition)

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as well as the activities of subcontractors or suppliers with which it has an established commercial relationship (and therefore a direct one). The legislator has specified that these measures apply only to the part of the activity of these subcontractors and suppliers that is related to the relationship with the group concerned.

- **Article 4 Due Diligence**

Chambers believe that due diligence can only be properly exerted to the companies' own activities and the subsequent first tier of upstream partners in accordance with fit-for-purpose guidelines for European companies. Furthermore, questions of how compliance with various due diligence obligations are yet to be answered (e.g., will order confirmations be sufficient? Under what conditions is good faith protection given? What about the level of detail required for the due diligence plan?) in addition to the extension of the administrative burden. In spite of the far-reaching due diligence obligations imposed, companies have not been given certainty as to whether their plan is compliant or not, which is certainly counter-productive.

European lawmakers must understand that the proposal is not a silver bullet and expectations on its outcome should be reassessed given its questionable feasibility or efficiency. The EU should avoid the perception that the Directive will automatically lead to a ground-breaking shift in the corporate conduct across the world if such due diligence efforts are disengaged from the actions undertaken by other stakeholders e.g., states, NGOs, and even consumers. It seems as though the proposal aims to shift responsibility totally towards private companies, which also explains the fact that governments or public institutions are out of scope.

- **Article 5 Integrating due diligence into companies' policies**

The Proposal is vague as regards a key point this being the form, content and placement of the due diligence statement to be published by the in-scope companies.

It is important to clarify the above considering that the legal consequences attached to the due diligence policy and/or statement in question may vary.

Since the code of conduct contains rules and principles of a specific company and is an integral part of specific company guidelines, it can be assumed that indirectly affected companies, such as SMEs, will be confront with different codes, the compliance with which, however, they should all contractually assure. Chambers would appreciate model rules and principles to be developed in order to reduce the bureaucratic burden in the context of contractual cascading.

Company groups should be able to demonstrate compliance on a consolidated basis.

- **Article 6 Identifying actual and potential adverse impacts**

Chambers consider that the contents of the due diligence process are vaguely described and fall short of adequately describing the onerous nature of the task itself. The due diligence process demands that a company sets its strategy, code of conduct and methods of verification into a written policy. In addition to establishing the risk and the financial capability required, companies will have to ensure that their partners abide by such process and investigate the veracity of the information which, in the case of international supply chains, can be a time-consuming and resource-intensive task.

Furthermore, the affected company is dependent on information from the immediately preceding and – if such company is not the last supply chain actor – the immediately succeeding supply chain link, in order to fulfil the information request. However, it might not be possible to obtain this information without disclosing critical trade secrets to foreign partners.

Stakeholder consultations should only be carried out if they are necessary and purposeful.

From the point of view of industry, it should be examined to what extent countries that already participate in the EU's Generalised System of Preferences or have entered into relevant commitments in EU trade agreements with sustainability chapters can be excluded from the scope of the Directive.

With regards to regulated financial undertakings, it is worth noting that these are required to assess the risk of an actual and potential adverse impact arising while providing credit, loan or other financial service only prior to providing their services, indicating that any such entities are exempt from periodically (or at least once every 12 months) monitoring such risks posed by their clients.

In this context, the Directive provides that the identification of actual and potential adverse impacts should be based on "quantitative and qualitative information". Recital (30) does not seem sufficient for the purpose of clarifying to what kind of information Article 6 refers to. It should be noted as well that the Corporate Sustainable Reporting Directive also contains references to this type of information, which makes it even more difficult for companies to have guidance on how the relevant identification, being a crucial part of the whole due diligence exercise, should be made in practice. For this reason, Chambers believe that standards must be developed by the Commission as soon as possible in order to facilitate the exercise of identification for the companies. Clarifications are necessary regarding the interplay between the standards to be developed under the Corporate Sustainable Reporting Directive and the information that the companies are required to use in order to fulfil their obligations under Article 6 of the Directive.

- **Article 7 Preventing potential adverse impacts**

Chambers believe that the proposal overly restricts entrepreneurial freedom and freedom of contract. Member States are allowed to provide for the availability of an option to terminate the business relationship in contracts governed by their laws, if a risk cannot be realistically assessed by means of the risk analysis or if a risk is identified but cannot be remedied.

A premature termination of an agreement could lead to several other legal implications which, unless adequately addressed by Member States, will create an uneven playing field between companies and their partners with whom they have an established business relationship. It could also lead to a more precarious situation with less scrupulous companies occupying the business field in developing and emerging markets.

Sudden suspension and/or termination of a business relationship would also have impact of a company, forcing it to find suitable alternatives in a relatively short period of time and may lead to a substantial number of jobs being made redundant due to the interruption of operations.

- **Article 8 Bringing actual adverse impacts to an end**

Article 8(4) is inconclusive and makes little sense in economic practice. Encouraging indirect contracting parties to conclude contracts directly could lead to the intermediate link being forced out of the supply chain, beyond the obvious contradiction with competition law. Direct partners should be deemed as essential part of the supply chain for obtaining a given product. Bypassing the direct partner does not preclude companies from facing challenges due to the potential lack of resources and tools otherwise offered by the former.

Hence, whilst the proposal does not oblige companies to do so, it implicitly constraints companies to take on additional responsibilities, possibly the entire operation, previously borne by the direct partner who is excluded from the supply chain.

The same argument applies to Article 7(3) and the mandatory cost-bearing obligation for verification by independent third parties represent a disproportionate violation of the parties' contractual freedom.

It should also be considered that a temporary suspension and/or termination of a business relationship may constitute a breach of contract under relevant statutory provisions and may give rise to claims for damages. This would have to be considered at the time of the conclusion of the contract and may prove to be problematic in case of old contracts and contracts to which the law of a third country is applicable.

Financial support for SMEs is highly welcome but it should not come at the expense of in-scope companies who may in turn avoid carrying out businesses with the former, knowing that establishing a business relationship with SMEs translate to added responsibilities for the companies.

An exception to the rule is provided with regards to regulatory financial undertakings which provide credit, loan, or other financial services. The proposal establishes that these companies shall not be required to terminate the credit, loan, or other financial service contract where this is reasonably expected to cause substantial prejudice to the entity to whom that service is provided. The inclusion of this exception seems to contradict Article 6(3) which clearly establishes that such undertakings are only required to carry out due diligence prior to the provision of a given service. Eurochambres supports the precision that the relation should not be terminated in that case, however the above contradictions seem to validate the reproach that the text contains a series of important inconsistencies.

In conclusion, the temporary suspension or termination of business relationships is not in line with the EU Charter of Fundamental Rights. As explained above, third-country competitors may continue to trade with problematic regions and the disengagement of EU companies from those regions will most probably lead to lesser protections from victims on the long-term and of course loss of market power for in scope companies, not to mention repercussions on product offers, etc. Eurochambres strongly urges the co-legislators to take this aspect into due consideration.

- **Article 9 Complaints procedure**

Whilst the set-up of a complaint procedure is positive, the process put in place raises the question as to who will ultimately determine whether a given complaint is unfounded or otherwise.

Another issue is that access granted to such a broad scope of persons, could lead to unreasonable solicitations of companies. The confidentiality or sensitive nature of certain documents/information issue should be also properly addressed considering that materials having become available to complainants through the procedure.

The costs of implementation of a well-functioning, safe, secure and effective mechanism (note also §4 i.e., meeting with company's representatives at "appropriate level") are also expected to be high.

Chambers believe that a complaints procedure is excessive where unions and NGOs are allowed to intervene. This should be rejected above all because of the associated risk of overburdening companies. It would make sense to follow the mediation procedure of the OECD guidelines.

- **Article 10 Monitoring**

Eurochambres considers that in-scope companies will be required to firstly assess their operational model and then re-model the internal company structure to allow for the functioning of a risk department, in addition to the substantial resources needed to ensure the smooth running of the risk assessment at least once every 12 months. This monitoring obligation imposed on businesses will inevitably lead to an increase of the costs linked to running such risk assessment function in order to ensure compliance.

Another factor which merits further attention by lawmakers is the feasibility of monitoring and following-up on third country entities within the supply chain. Whilst qualitative and quantitative indicators provide a general idea of the partners' operations, the proposal fails to consider the fact that these would be provided for by the partners themselves, creating a conflict of interest.

- **Article 11 Communicating**

The interplay with the Corporate Sustainable Reporting Directive needs to be clarified and streamlined, in particular the content and timeframe of the delegated acts.

In addition, the Directive does not elaborate on the exact content or form of the statement, or whether it should include the due diligence policy of Article 5, together with any other element. The exact placement of the statement (or the due diligence policy and other plan foreseen by the Directive) is not provided for either. **Depending on the answers to the foregoing questions, legal consequences attached may be different.**

- **Article 12 Model contractual clauses**

The Commission's commitment to a mode business-friendly approach is welcomed but it would need to be put in more concrete terms:

- there must be a mandatory timetable to ensure that the guidance documents are published before the Directive is applicable. Practicable implementation periods must be provided.
- the involvement of relevant business representatives should be mandatory.
- removal of liability/penalties if the model contractual clauses are used as intended.

- **Article 13 Guidelines**

The issuance of guidelines must be formulated as an obligation instead of an optional provision, and under concrete terms regarding its timeline and stakeholders' involvement.

- **Article 14 Accompanying measures**

It is questionable whether and to what extent the measures addressed offer effective protection against the passing on of obligations to SMEs. The measures need to be strengthened and made more specific in order to sufficiently mitigate the indirect effects on SMEs. As previously mentioned, and considering that SMEs have limited resources, Member States must be obliged to grant financial support to them in addition to any other support measure in place.

Clarification on the measures e.g., for data sharing portals is needed (who provides the data, who collects the information, who audits it, who pays for the project, who maintains the portals, etc.).

Regarding industry regulations and multi-stakeholder initiatives, a commitment regarding their legal strength and a concrete timetable are needed. An assessment of the initiatives should be made not only by the companies themselves but by a public body. **There must be a presumption of compliance if the company adheres to these standards**.

- **Article 15 Combating climate change**

It is unrealistic to expect that in-scope companies will be able to not only quantify their impact on climate change but also of its supply chain partners, and whether these impacts breach the long list of human rights and environment conventions mentioned in the Annex.

Whilst Chambers appreciate that no liability is envisaged in the event that a company fails to meet its carbon emissions reduction plan or to revise it, the abundance of laws, treaties and conventions will inevitably require the engagement of rather costly legal and environmental expertise. Such expertise might not be available in smaller jurisdictions thus the Commission needs to circle back and explain how the level playing field can be guaranteed.

Furthermore, **the implementation of Article 15 would be more easily attained if there is an interplay with the Taxonomy Regulation, with the latter requiring entities captured by it to submit declarations on their climate change impact and mitigation**. The Commission needs to ensure the coordination of reporting requirements under the Taxonomy regulation and the CSDDD so that companies can reduce overlaps and unnecessary burdens.

It is furthermore unworkable to impose onto companies to make directors' remuneration partially contingent on compliance with the CSDDD. This issue is already dealt by the Shareholder Rights Directive and any sudden change will affect regulated and listed entities process of recruiting non-executive directors. In particular, the Shareholders Rights Directive II already contains rules on pay in listed companies, clearly stating that remuneration policy must contribute to the company's business strategy and long-term interests and sustainability and must explain how it does so. This is a good balance which is even being strengthened by national corporate governance codes around the substance of executive remuneration. With the increase of responsibility in such recruitment process, such entities will incur in additional costs.

- **Article 16 Authorised representative**

The **article does not ensure the enforceability** and tangibility of third country companies.

- **Article 17 and 18 Supervisory Authorities and their powers**

According to the draft proposal, **EU multinationals or companies with subsidiaries in different Member States will be exposed to different applicable regimes and different responsible authorities** due to the text's minimum harmonisation nature.

On another note, the competence of the supervisory authorities is limited to "supervise compliance with the obligations laid down in national provisions adopted pursuant to Articles 6 to 11 and Article 15(1) and (2)" and not the corporate governance obligations in Article 25 and 26, whilst "substantiated concerns" under Article 19 can be lodged with regard to any of the provisions transposing the Directive. In addition, the powers are generally "related to compliance with the obligations set out in this Directive". This important inconsistency should be clarified.

- **Article 19 Substantiated concerns**

Chambers doubt that allowing every natural and legal person the possibility to submit "substantiated concerns" to the supervisory authority is an effective solution. **A legitimate interest and direct concern should be demonstrated** however the Proposal abstains from identifying factors to analyse such concerns. In any case, it should be ensured that the Proposal helps to avoid long, costly and potentially frivolous lawsuits.

Another question which merits further attention relates to any such decisions may be appealed or whether companies receiving complaints shall determine the outcome of the matter within a given timeframe. Accordingly, Article 19(5) granting the power of appeal to any person with legitimate interest in accordance with national law should not be the only condition for appeal, and paragraphs (1) and (5) should be aligned in this respect.

- **Article 20 Sanctions**

Chambers believe that companies that do not behave responsibly should be punished according to a system of preventive measures that should include actions to ensure that compliance is restored within the shortest timeframe and potentially a temporary product withdrawal mechanism.

Pecuniary sanctions should be available to punish repeated offenders. But **in order to avoid excessive discrepancies within the Single Market, it is necessary that the substantive norms that could be violated are clearly defined**. Furthermore, the Proposal should establish whether the company's turnover considered in the global one (including sectors which are not deemed to be high-impact) or whether the sanction is based solely on the turnover generated through high-impact sectors. Part of the funds obtained from such fines should be partially dedicated to assist the companies in implementing corrective measures towards achieving a more responsible business conduct.

Finally, **lawmakers should consider that turnover is not necessarily a metric** which is consistent amongst all market operators given that different revenue, liquidity and profitability ratios are directly contingent on the peculiarity of a given supply chain.

- **Article 21 European Network of Supervisory Authorities**

The application of **the "once-only principle" is required in order to reduce administrative burdens.** The European Supervisory Authorities must design their information exchange in such a way that companies do not have to repeatedly provide the relevant information to different authorities.

- **Article 22 Civil Liability**

On a preliminary note, **it is not clear why a new civil liability regime allowing for damages to be collected by claimants for violations under the Directive is appropriate, considering the importance of the violations in question and the need for an effective tool allowing for real change of conduct and not monetary compensation granted *ex post*** to victims.

Article 22 contains a series of issues that reflect, in general, the inconsistencies and insufficiencies of the Directive as appearing throughout the text. In particular, the terminology used is imprecise, thus **causing legal uncertainty**. **Vague key notions conditioning the civil liability regime raise the issue of legality as well**, and the important freedom left to **Member States to provide for rules regarding important issues, such as burden of proof, may add to the fragmentation risk** of the Single Market. It would have been preferable to introduce an instrument allowing for real harmonisation, at least on a few key issues where divergencies among Member States should not be allowed at first.

As far as the crucial issue of the burden of proof is concerned more particularly, the Directive does not seem to address it. Since the liability provisions are not harmonised and considering the plethora of possible conditions for applicability/based on causality, lawmakers must adopt a reasonable and fair approach and reject any attempt to revert the burden of proof to companies.

Chambers welcome that companies, in principle, cannot be held liable if they seek contractual assurances from business partners with whom they have an indirect relationship and that such subject company takes appropriate measures to verify its business partner(s) compliance with its code of conduct. For more legal certainty, Article 22(2)'s reference to "unless it was unreasonable" should be removed. **Chambers further support the introduction of the same exemption for direct partners as well.**

As regards the criteria to be met in order for these exemptions to be applicable, the obligation to achieve compliance with the company's code of conduct will not be always possible, therefore the exemptions from liability should be all set out around this element.

In addition, the Directive does not expressly indicate the point at which in-scope companies could be held liable for the inadequacies that may exist within the business partner(s)' operations when it comes to human rights and environmental aspects, but considering the "value chain" approach for due diligence obligations, it seems that all "partners" (as all these specific terms are currently defined in the Directive) are covered. **Chambers strongly suggest limiting liability to tier 1 operations** eliminate the possibility for companies to be held liable for the failings of the business partner(s) in lower levels of the supply chain. This is particularly true given that companies rely on the verification methods provided by their partners.

Vicarious liability should also be excluded. Liability with regard to indirect suppliers must be eliminated in its entirety and companies cannot be charged for potential damages in their supply chain if they did not cause these damages, could not reasonably know about them, or if they took the appropriate measures to prevent and remediate them. Legal requirements should not inadvertently lead to situations where companies are held liable precisely because they took reasonable due diligence actions.

There is a need to clarify how the liability rules relate to claims between the individual parties in particular joint and several liability and recourse claims along the supply chain.

The provisions for pursuing claims must be consistent with the international legal framework. It should be noted that both the place of jurisdiction and the state where the company is based, must be applicable. **Even though rendering the Directive "public policy" which should -in theory- apply in all cases and fori, Article 22(5) is unfortunately legally impracticable**: mandatory application of the provisions of the Directive can only be provided for in national law. The application of the legal provisions one state cannot be effectively mandated by the law of another member state.

Finally, lawsuits are very damaging to a company's reputation, regardless of the outcome of the proceedings, and are often exacerbated due to the actions of the media. They can also easily be weaponised by foreign economic competitors. Lawmakers can avoid excessive judicial activism in the EU with clearly defined boundaries based on clear, legal justifiability and according to the rule of law.

- **Article 24 Public Support**

While doubting whether such a provision is proportionate (i.e., additional sanctions inflicted upon the same company for the same violation), Chambers believe that it will be a disproportionate effort for companies to actively prove they are compliant. The respective funding body should verify this itself, if necessary, or specify it in the terms and conditions. Again, **the terms of the article being vague** (e.g., no specific procedure is foreseen, such as right to appeal the decision, etc.), **transposition may lead to further fragmentation and, consequently, forum shopping.**

- **Article 25 and 26 Directors' duty of care and setting up and overseeing due diligence**

First of all, whilst we understand that the Directive could not provide for such directors' duties and associated liability as regards directors of in-scope non-EU companies, Chambers cannot consider the relevant provisions as proportionate or in line with the level playing field; they are indeed disadvantageous towards the management of the in-scope EU companies and should therefore be appropriately revisited.

In particular, the obligation to act in the best interest of the company is part of the fiduciary duties of directors towards the company and directors are accountable to the shareholders, hence any claims for mismanagement and breach of their duty of care can be made against them by the company and the shareholders under certain conditions. In addition, the above does not preclude ESG aspects from being integrated into the business strategy and operations. **Under Article 25 of the Directive, any "stakeholder" will be entitled to initiate an action for mismanagement against directors; this constitutes on the one hand, interference in national corporate law which is neither appropriate nor proportionate to achieve the goal of promoting more corporate sustainability.**

Moreover, the obligations are too broad especially when considering that the timeline of a corporate long-term strategy devised to increase business value often does not match the timeline of a long-term sustainability strategy because estimates on the consequences and effects of environmental actions are based less on accurate forecasts and more on political decisions.

On the other hand, Article 26 imposes upon directors the **obligation to take into due consideration stakeholders' input**; considering that **such stakeholders' input is already collected during and for the purposes of implementation of due diligence obligations**, **Article 26 need be revised to reflect that.**

In conclusion, **Chambers call for an educational approach rather than punitive approach towards directors of EU companies, taking into account their challenging but also pivotal role in promoting sustainable management. Examples of good practices in difficult and problematic environments should be provided as support to directors, guiding them during their due diligence exercise.**

- **Article 30 Transposition**

When the Directive comes into force, **a practicable timetable is required** i.e., *vacatio legis*. Given its minimum harmonisation nature, **Member States will transpose the Directive at different times, increasing the fragmentation** of the Single Market at least at an early stage. Companies need sufficient lead time to develop and implement their due diligence plans, and unless accompanying measures are not already in place upon expiration of the transposition period, the foreseen timetable is not realistic. It is interesting to highlight here that **companies subject to existing national frameworks still struggle with developing their due diligence plans** as they are faced with real difficulties to fully identify relevant risks; this reality should be duly considered by the co-legislators.

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