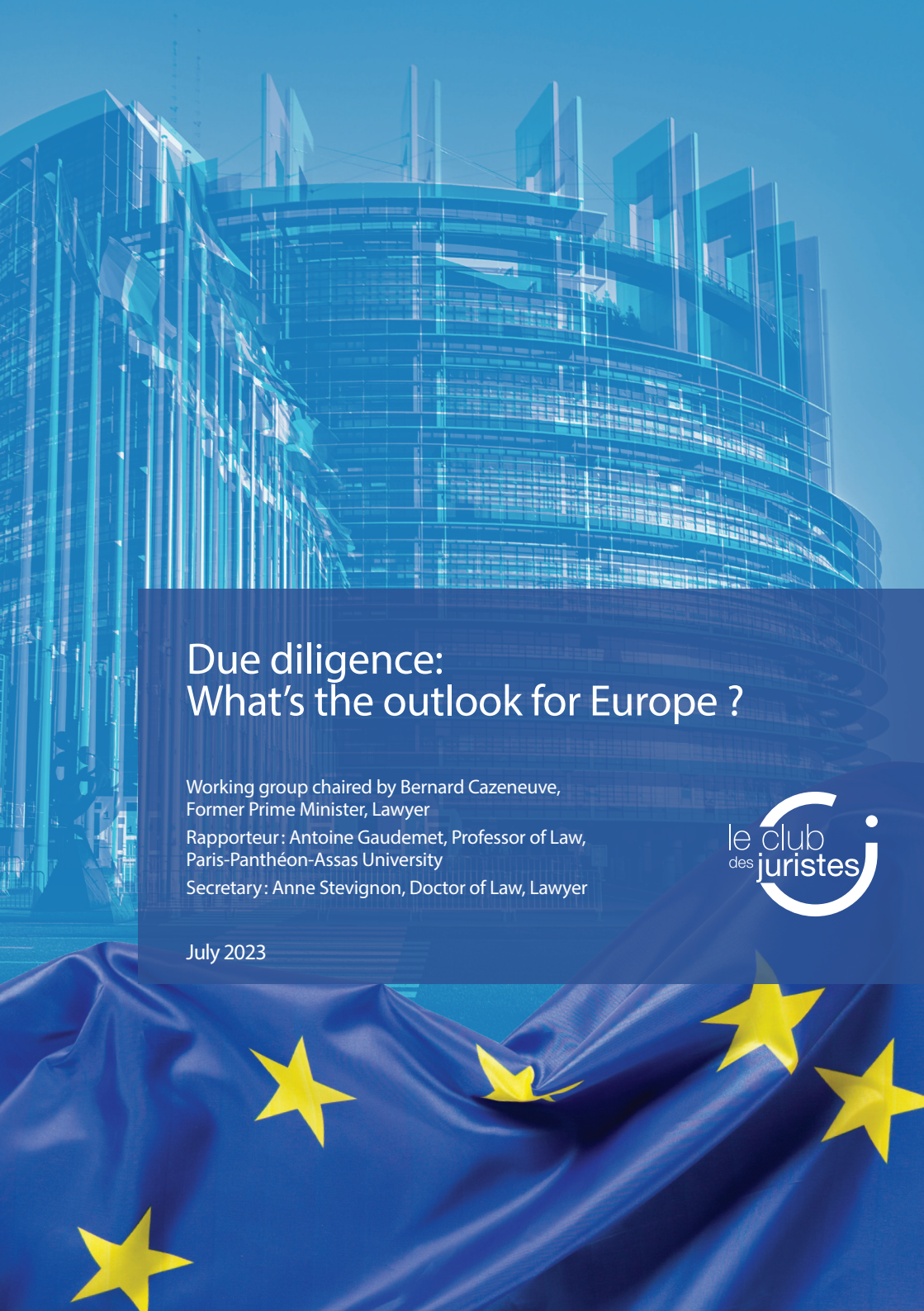

Due diligence: What's the outlook for Europe ?

Working group chaired by Bernard Cazeneuve, Former Prime Minister, Lawyer

Rapporteur : Antoine Gaudemet, Professor of Law, Paris-Panthéon-Assas University

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le club des juristes

July 2023

LE CLUB DES JURISTES
DUE DILIGENCE COMMISSION
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DUE DILIGENCE COMMISSION

July 2023

SUMMARY OF EXCHANGES AND FORMULATION OF RECOMMENDATIONS

In line with the UN[1] and OECD[2] Guiding Principles, France has been a pioneer in the field of due diligence, and the Law adopted on 27 March 2017[3] has prompted many European States to consider the issue[4]:

- in the Netherlands, a law on forced labour was adopted in 2019[5];
- in Germany, a general law on due diligence in supply chains was adopted in 2021 and came into force on 1 January 2023[6];
- in Norway, a consumer protection law was adopted in 2020 on due diligence in relation to human rights;
- in Switzerland, a law on forced labour and the supply of minerals from conflict zones is being adopted;
- in Spain, a draft law on due diligence duty is under consideration.

Legislation imposing a duty of due diligence on companies is also multiplying beyond the borders of the European Union: a U.S. law of 23 December 2021[7] prohibits imports of products linked to the forced labour of Uyghurs in China.

In this context, the adoption of a text of general application at European level seems essential in order to ensure the harmonisation of existing or pending legislation. The importance of aligning public policies in this area was highlighted in particular at the Ministerial Meeting on Responsible Business Conduct, co-chaired by France and the United States on 14 and 15 February 2023[8].

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1. UN Guiding Principles on Business and Human Rights adopted in 2011, unanimously endorsed by the UN Human Rights Council (resolution 17/4), known as the Ruggie Principles.
2. OECD Guidelines for Multinational Enterprises of 2011, revised in 2018: see OECD, OECD Due Diligence Guidance for Responsible Business Conduct (2018).
3. Law No. 2017-399 of 27 March 2017 on the duty of due diligence for parent companies and companies placing orders.
4. A law dealing with due diligence issues was adopted earlier in the United Kingdom: the Modern Slavery Act of 2015.
5. Netherlands Child Labour Due Diligence Act of 14 May 2019.
6. German Law of 11 June 2021 on the due diligence of companies in supply chains (Lieferkettensorgfaltspflichtengesetz), promulgated on 22 July 2021.
7. Uyghur Forced Labor Prevention Act, Public Law No: 117-78 (12/23/2021).
8. See Declaration on Promoting and Enabling Responsible Business Conduct in the Global Economy, 15 Feb. 2023 (https://legalinstruments.oecd.org/fr/instruments/OECD-LEGAL-0489, accessed on 3 June 2023): ***We*** *(...) note that policy coherence at the national and international level can foster alignment and harmonisation of industry, government, and multi- stakeholder sustainability initiatives with international RBC standards. A smart mix of government approaches and measures, which may include mandatory as well as voluntary approaches and capacity building and other support measures, are relevant in this regard".*

Following the adoption of a European Parliament resolution on 10 March 2021,[9] the Commission presented to the European Parliament and the Council on 23 February 2022 a proposal for a Directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937. On 1 December 2022, the Industry Ministers of the 27 Member States of the European Union adopted a common position on this proposal[10] reflecting the consensus of the Member States on the text. The European Parliament's Committee on Legal Affairs (JURI), whose rapporteur is Ms Lara Wolters, adopted its position on 25 April 2023. The Parliament voted in plenary session on 1 June[11] and negotiations with the Commission and Council are expected to begin in the summer.

In the European debate on the emergence of legislation on the duty of due diligence, the implementation of the French Law on the duty of due diligence for companies placing orders provides essential feedback. A review of this will first be made (Part I), before examining the contours of future European legislation (Part II). Observations and recommendations will be made throughout the analysis.

9. EP, Res., 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability, 2020/2129 (INL) and the attached proposal for a Directive.

10. General approach of the Council of the European Union, Interinstitutional file 2022/0051 (COD).

11. Amendments adopted by the European Parliament on 1 June 2023 on the proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (P9_TA(2023)0209).
(https://www.europarl.europa.eu/doceo/document/TA-9-2023-0209_EN.html, accessed on 3 June 2023).

CONTENTS

PART I

REVIEW OF THE APPLICATION OF THE FRENCH LAW

The Law of 27 March 2017, which was adopted despite the unfavourable opinion of the government, was the subject of parliamentary debates lasting almost two years. While it has enabled a set of good practices to emerge with respect to the exercise of reasonable due diligence in value chains, its implementation raises difficulties that will be identified and should be addressed. These difficulties will also need to be taken into account when transposing the Directive once it is adopted.

I. ADVANCES MADE POSSIBLE BY THE FRENCH LAW ON THE DUTY OF DUE DILIGENCE

In the course of our interviews, several of the people we spoke to pointed out that the application of the French Law has had a generally positive effect on the conduct of companies. Purely voluntary approaches, which were the only ones in existence until the Law was passed, had not been enough to prevent severe violations of human rights and the environment. The Law of 27 March 2017 has led companies to systematise processes that were previously restricted to certain sectors, gradually enabling the due diligence approach to spread. It has also had the effect of mobilising many stakeholders around the issue of due diligence, overall raising the level of knowledge and practice among the stakeholders concerned. French companies subject to the Law have entered into a number of international framework agreements to implement their duty of due diligence.

The Law of 27 March 2017 has also had indirect effects. It has helped to raise awareness of supply chain due diligence among many small and medium-sized businesses which do not fall within its scope[12].

II. INCENTIVES AND SUPPORT TO BE STRENGTHENED

In general, some of the people we spoke to felt that companies could be given more incentives to implement the Law. Some referred to the introduction of tax incentives, the award of public contracts[13], and preferential treatment for companies which are particularly exemplary in terms of due diligence.

Financial support could also be provided – through official development assistance, for example – to increase the effectiveness of the Law. For example, the French Development Agency should take a critical look at the countries and sectors in which its companies are most exposed and provide them with funding to support the development of fair work and the strengthening of human rights in all sectors and countries.

12. For a study which sought to highlight this finding, see PWC-Orse-BPIFrance, 'CSR - Suppliers have their say', Jan. 2020.

13. From this point of view, Law No 2021-1104 of 22 August 2021 'Climate and Resilience' provided a negative incentive: companies which do not comply with the obligation to draw up a due diligence plan containing the measures provided for in Article L. 225-102-4 may be excluded from the procurement procedure (Article L. 2141-7-1 of the Code of Public Procurement).

Coordination between companies and public support for development thus appears necessary.

III. A DEBATABLE SCOPE OF APPLICATION

Article L. 225-102-4 I, para. 1 of the French Commercial Code refers to '*any company which, at the close of two consecutive financial years, employs at least five thousand employees itself and in its direct or indirect subsidiaries whose registered office is located on French territory, or at least ten thousand employees itself and in its direct or indirect subsidiaries whose registered office is located in France or abroad, drawing up a plan of due diligence and implementing it effectively*'.

Several points may be made about the scope of application.

First, the inclusion of this article in Chapter V ('Public limited liability companies') of Part II of Book II of the French Commercial Code has given rise to some uncertainty over the types of companies covered, in particular as regards simplified joint stock companies (*sociétés par actions simplifiées* - SAS). Some private limited liability companies (*sociétés à responsabilité limité* - SARLs) also exceed the employee thresholds provided for in the Law of 27 March 2017. The Dubost-Potier report, published on 24 February 2022, recommended that '*the duty of due diligence, at both the French and European levels, be applied to all companies exceeding the thresholds for liability, irrespective of their legal form*'[14].

OBSERVATION 1
The types of companies subject to the Law on the duty of due diligence should be clarified.

Secondly, the application of the French Law on due diligence is subject only to the number of employees exceeding a minimum threshold. It has been pointed out that other criteria, such as the level of turnover, as in the proposal for a Directive (see below, p. 22), could be used given that certain companies presenting risks are not covered by the legislation. This was proposed in the Dubost-Potier report mentioned above. One recommendation was to '*lower the thresholds of employees above which a company is subject to the duty of due diligence and introduce a new criterion for being subject to the duty of due diligence linked to turnover, as an alternative to the criterion of the number of employees*' [15].

14. C. Dubost and D. Potier, Information Report No. 5124, on the Assessment of the Law of 27 March 2017 on the duty of due diligence for parent companies and companies placing orders, Recommendation 4.
15. C. Dubost and D. Potier, Information Report No. 5124 mentioned above, Recommendation 5.

Lastly, the exact list of companies subject to the Law on the duty of due diligence is not known, a fact which some of the people we spoke to regretted. It is estimated that 250 to 280 companies are directly affected. While drawing up an exhaustive list appears complex, since no authority has all the information needed to determine whether companies have met the thresholds, companies subject to the Law on the duty of due diligence could be asked to make a voluntary declaration. Such a declaration could be collected by an entity and published for all to see.

OBSERVATION 2
In order to remedy the difficulty of precisely identifying companies subject to the Law on the duty of due diligence, they could be required to make a public declaration.

IV. INSUFFICIENT STAKEHOLDER CONSULTATION

Article L. 225-102-4 of the French Commercial Code states that '*the plan is intended to be drawn up in association with the company's stakeholders, where appropriate in the context of multi-stakeholder initiatives within sectors or at local level*'.

The Law of 27 March 2017 therefore does not make this association mandatory – the due diligence plan is only '*intended*' to be drawn up in consultation with stakeholders. Only the mechanism for alerting and collecting reports on risks must be '*drawn up in consultation with the representative trade union organisations in the company*'.

It was found that stakeholders, in particular trade unions and civil society, were insufficiently consulted when the due diligence plan was drawn up. A university report submitted to the International Labour Office in 2019 on the first plans adopted by companies criticised, in particular, the practices of French companies subject to the Law on the duty of due diligence in this respect [16],even though an improvement has been noted in the last two years.

Conversely, companies appear to have encountered difficulties in identifying relevant stakeholders to involve them in drawing up due diligence plans at group or operational level. This issue also arises in the context of the proposal for a Directive (see below, on the notion of "potentially impacted" stakeholder, p. 40).

In this respect, the Dubost-Potier report recommended that '*the involvement of stakeholders in the drawing up of the due diligence plan*

16.https://www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/---ilo-paris/documents/meetingdocument/wcms732938.pdf

should be made compulsory, leaving it to the regulatory authority to specify how they are to be involved, for example by setting up a stakeholder committee based on the model of the mission committee provided under the 'PACTE' law for mission-based companies' [17].

In any event, insofar as the plan must be constructed jointly with the stakeholders, they must acquire a good knowledge of the due diligence obligations laid down by the Law of 27 March 2017. Training has been carried out by trade unions for their members. It would also seem that stakeholders within the company need to be trained. As regards the fight against corruption, the Law of 9 December 2016 known as 'Sapin 2', which is similar in certain respects to the Law on the duty of due diligence, also required the companies concerned to implement '*a training scheme for managers and staff most exposed to the risks of corruption and influence peddling*' [18].

OBSERVATION 3
Stakeholders must acquire a good knowledge of the due diligence obligations laid down by the Law of 27 March 2017 in order to be able to participate in drawing up the due diligence plan. In particular, companies should be encouraged to train their employees on the issues of due diligence in the value chain.

V. LEGAL UNCERTAINTY FOR COMPANIES

It has been pointed out on several occasions that the Law of 27 March 2017 creates legal uncertainty for companies. The absence of an implementing decree, despite the fact that it was provided for by the Law, of guidelines and of a supervisory mechanism, which has been repeatedly emphasised, leaves room for judicial interpretation: it is thus up to the judge to clarify the concepts enshrined in the law and to set the contours of the duty of due diligence.

Five years after the adoption of the Law, these contours are still not precisely defined. The first decisions concerned jurisdiction [19]. The Law of 22 December 2021 on confidence in the judiciary, by conferring exclusive jurisdiction on the Paris ordinary court (*Tribunal judiciaire de Paris*) to hear cases on the duty of due diligence, clarified the jurisdiction for disputes based on Articles L. 225-102-4 and L. 225-102-5 of the French Commercial Code [20]. This attribution of jurisdiction is to be welcomed inasmuch as it will contribute to the accelerated

17. C. Dubost and D. Potier, Information Report No. 5124 mentioned above, Recommendation 3.
18. See Article 17, II, 6° of Law No 2016-1691 of 9 December 2016 on transparency, the fight against corruption and the modernisation of economic life.
19. Cass. com. 15 Dec. 2021, No 21-11.882, *Bull.* IV, forthcoming, D. 2022. News 7, *Rev. sociétés* 2022. 173, note A. Reygrobellet, *JCP E* 2022. 1067, note B. Dondero, *Dr. sociétés* 2022, No 30, note J.-F. Hamelin.
20. Law No 2021-1729, 22 Dec. 2021, Art. 56, OJ 23 Dec., C. organ. jud., new Art. 211-21.

development of this case law, even if the question of training judges in issues of due diligence remains. Two interim orders were recently made by the Tribunal judiciaire de Paris on 28 February 2023 in a case between several non-profit making associations and TotalEnergies SE[21]: although the judges did not rule on the merits of the case, they also noted that '*the content of these due diligence measures remains general, it being noted that the decree provided for in the abovementioned provisions, which could provide details of the content of these due diligence measures, has not yet been published*'[22].

To date, Article L. 225-102-4 of the French Commercial Code contains both vague concepts and insufficiently defined obligations.

1. Vague concepts

Several key concepts of the provisions are involved.

a) The concept of a 'severe violation'

The concept of a "*severe violation*"[23] of human rights and the environment implies an assessment by the judge. As pointed out in the Dubost-Potier report[24], this concept refers indirectly to the UN Guiding Principles on Business and Human Rights adopted by the UN Human Rights Council in June 2011, known as the Ruggie Principles, the characteristics of a severe violation being explained in the commentary to Principle No 14[25]. In addition, the preparatory work had expressly relied on these principles, as well as the OECD Guidelines for Multinational Enterprises[26]. However, uncertainty about the scope of the risks and violations covered by the Law has been highlighted on several occasions.

In particular, a difficulty of interpretation was mentioned during our interviews: whether or not the risks and violations generated by greenhouse gas emissions on the climate should be included in the scope of the duty of due diligence.

There seems to be a need to clarify two types of climate change risks. In the first place, as regards adapting to climate change, physical climate risks can be a source of violation of human rights, as well as the health and safety of individuals – for example, in the event of

21. TJ Paris, interim applications, 28 Feb. 2023, RG 22/53942; 22/53943.
22. Abovementioned Decisions, p. 18.
23. The due diligence plan shall include 'reasonable due diligence measures designed to identify risks and prevent **severe violations** of human rights and fundamental freedoms, the health and safety of individuals and the environment resulting from the activities of the company' and the other companies referred to (Article L. 225-102-4 I para. 3 C. com.).
24. C. Dubost and D. Potier, Information Report No. 5124 mentioned above, p. 35 s.
25. UN High Commissioner for Human Rights, The Corporate Responsibility to Respect Human Rights, An Interpretative Guide, 2012.
26. Draft Law No. 2578, 11 Feb. 2015, p. 4; Report No. 2628 of the Legal Committee of the National Assembly, p. 31 and p. 49.

abnormal extreme weather events; these risks fall within the scope of a company's duty of due diligence. Secondly, with regard to mitigating climate change, the company's own activities are likely to represent a risk in terms of the worsening of the greenhouse effect resulting from greenhouse gas emissions, and as such may possibly fall within the scope of the due diligence plan and its implementation.

As regards this second category of risks, which in practice is often included in due diligence plans, the question has been raised before the French courts, particularly in the context of a dispute which began in 2020[27] and has not yet been decided (on the issue of climate change, see below on Article 15 of the proposal for a Directive, p. 45).

OBSERVATION 4
In the interests of legal certainty, it is important to clarify whether the risks and violations resulting from greenhouse gas emissions are included within the scope of the duty of due diligence.

b) The concept of an established business relationship

The concept of an 'established business relationship'[28] has been the subject of much debate in France and Europe since the Commission adopted it in its proposal for a Directive (see below, p. 30). There is still uncertainty about the scope of the suppliers and subcontractors subject to the risk assessment.

The concept of 'established business relationship' stems from Article L. 442-1 (formerly L. 442-6) of the French Commercial Code[29], but uncertainty remains as to the approach to be taken in the context of the Law on the duty of due diligence.

Some companies take a restrictive approach to this concept, taking the view that only direct suppliers are covered by the scope of the Law, a view which is disputed in particular by non-governmental organisations (NGOs) and trade unions.

27. On January 28, 2020, several associations and communities brought a claim against Total (now TotalEnergies) before the Nanterre ordinary court on the basis of Article L. 225-102-4 of the French Commercial Code and Article 1252 of the French Civil Code. The applicants complained in particular that the company had failed to take appropriate measures to prevent the climate risks generated by greenhouse gas emissions resulting from its activities. By an order issued on 11 February 2021 (No 20/00915), the Nanterre court accepted jurisdiction, an order which was upheld on appeal (CA Versailles, 18 Nov. 2021, No 21/01661). While the question of jurisdiction has since been decided by the legislature (Article L. 211-21 COJ), no decision has been issued on the merits.

28. Companies subject to the obligation of due diligence must identify the risks arising from the 'activities of the company and those of the companies controlled by it within the meaning of Article L. 233-16 II, directly or indirectly, and from the activities of subcontractors or suppliers with which an **established business relationship** is maintained, where those activities are linked to that relationship' (Article L. 225-102-4 I para. 3 C. com.).

29. See Conseil. Const. No 2017-750 DC of 23 March 2017: the Constitutional Council held that 'on the one hand, while some of the concepts used by the legislature are, for the reasons set out above, insufficiently precise to enable a breach to be defined which would justify a sanction having the nature of a punishment, they are not, however, unintelligible. On the other hand, the concept of 'established business relationship' in the contested provisions, which is already used in Articles L. 420-2 and L. 442-6 of the French Commercial Code, is sufficiently precise' (Recital 22).

The Dubost-Potier report, which notes that '*initial court decisions have tended to interpret the concept of an established business relationship restrictively*', recommends that a broader definition of the concept of an established business relationship be preferred,[30] in line with the understanding of the concept of a '*business relationship*' used in the UN and OECD Guiding Principles and in other European texts. In its General approach published on 1 December 2022, the Council of the European Union preferred to replace this concept with the term '*business partner*'[31].

Pending the transposition of the Directive, and whatever terminology is ultimately adopted, the concept of an established business relationship should be clarified as soon as possible, in order to put an end to the legal uncertainty surrounding the scope of the duty of due diligence incumbent on companies placing orders.

OBSERVATION 5
Pending the transposition of the European Directive, the concept of 'established business relationship' should be clarified as soon as possible.

2. Obligations imposed by the Law insufficiently precise

a) The level of detail of risk mapping

First, there is uncertainty about the level of detail expected in the due diligence plans that are subject to the publication obligation. The Law of 27 March 2017 provides that due diligence plans must include '*a risk mapping intended to identify, analyse and prioritise risks*'.

There is indeed a discrepancy between what is expected by stakeholders and the level of information provided by companies.

Some of the people we spoke to also regretted the fact that the French legislature did not adopt a risk-based approach to risk mapping and pointed to a lack of realism since completeness in this area is not achievable for most of the multinationals covered by the law.

In this respect, the Dubost-Potier report recommends drawing on the UN Principles and the OECD Guidelines[32], which make it possible to prioritise, respectively, the relative severity of the impact on human rights and the severity of the company's actual and potential adverse impacts.

30. C. Dubost and D. Potier, Information Report No. 5124 mentioned above, Recommendation 2: '... As regards the application of French law, while the initial court decisions have tended to interpret the concept of established business relationship restrictively, a decree in the Conseil d'État should be issued to give a broader definition'.
31. General approach of the Council of the European Union, 1 Dec 2022, pt. 17.
32. C. Dubost and D. Potier, Information Report No. 5124 mentioned above, p. 59.

Similarly, it seems desirable to specify that, while the identification of risks in the mapping should be as precise as possible, the company placing orders must prioritise the risks of the most severe violations of human rights, the health and safety of individuals and the environment, in line with the so-called "risk-based" approach adopted in the OECD Guidelines and as recommended in the fight against money laundering and corruption.

OBSERVATION 6
The risk mapping included in the due diligence plan should include the risks of violations of human rights, the health and safety of individuals and the environment, prioritised according to their severity and the likelihood of their occurrence, particularly in relation to the sector and countries covered by the value chain.

b) Expected due diligence measures and their effective implementation

The companies covered by the Law are then expected to include in the due diligence plan '*appropriate measures to mitigate risks or prevent severe violations*' and '*a mechanism for monitoring the measures implemented and assessing their effectiveness*'.

It has been pointed out, in this respect, that companies are faced with the lack of a common benchmark. There are no indicators for measuring the performance of actions put in place, as there are for non-financial performance. Indeed, the exercise of due diligence does not lend itself to this, since the appropriate due diligence measures cannot be standardised for all the companies concerned.

On the other hand, companies have every interest in cooperating in order to make progress in their due diligence approach and take concerted action with suppliers, following the example of the 'Initiative for compliance and sustainability' (ICS), which is an international industry initiative aimed at improving working conditions along the global supply chains of its member retailers and brands[33].

OBSERVATION 7
Companies are encouraged to take part in industry initiatives, in particular by pooling knowledge and sharing information.

33. The ICS brings together 67 retail brands in the economic sectors of textiles, footwear, electronics, food and furnishings.

c) Clarification is awaited of the relationship between the non-financial performance declaration and the due diligence plan

The relationship between the non-financial performance declaration (*déclaration de performance extra-financière* - 'DPEF') and the due diligence plan has not been clarified by the legislature.

European Directive 2014/95/EU[34], known as the 'NFRD'[35], which was transposed into French law by an Order of 19 July 2017 and clarified by a Decree of 9 August 2017[36], provides for a non-financial reporting obligation for certain major groups.

Some companies have chosen to offer a "unified" version of their non-financial performance and their duty of due diligence, while others make a clear distinction between them. Most companies also refer to items included in the non-financial performance declaration. While the information provided may overlap, the objective pursued is nonetheless distinct.

The relationship between reporting obligations and due diligence obligations is likely to be clarified at the European level, as the NFRD Directive has just been amended by the CSRD Directive[37] (see below, p. 23).

OBSERVATION 8
Companies are expected to make a clearer distinction between their obligations under their non-financial performance declaration and their duty of due diligence.

34. Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.
35. Non-financial reporting directive.
36. Decree No. 2017-1265 of 9 August 2017 for the application of Order No. 2017-1180 of 19 July 2017 on the publication of non-financial information by certain large undertakings and certain groups of undertakings.
37. Directive (EU) 2022/2464 of 14 December 2022 known as the CSRD (Corporate Sustainability Reporting Directive). It will gradually enter into force from 1 January 2024.

• • • •

In conclusion, all the uncertainties referred to result in legal uncertainty for companies and a risk of misuse of the system. It has been pointed out that the major companies that are leaders in their sector appear to date as prime targets for litigation, with varying degrees of media coverage, even when their due diligence policies are advanced. Some regretted that the procedure provided for under the French Law gave NGOs too important a role. In this respect, several of the people we spoke to called for the creation of a supervisory authority, possibly with a support role, as is planned at the German or European level (see below, p. 49). Pending a reform of the legal framework applicable to companies with regard to due diligence as a result of the transposition of the forthcoming EU Directive, and in order to address this situation of litigation risk inflation, an improvement in the dialogue between the company and its stakeholders seems particularly desirable in order to address the difficulties of transparency which companies face.

SUMMARY OF OBSERVATIONS:

- **OBSERVATION 1 :** The types of companies subject to the Law on the duty of due diligence should be clarified.

- **OBSERVATION 2 :** In order to remedy the difficulty of precisely identifying companies subject to the Law on the duty of due diligence, they could be required to make a public declaration.

- **OBSERVATION 3 :** Stakeholders must acquire a good knowledge of the due diligence obligations laid down by the Law of 27 March 2017 in order to be able to participate in drawing up the due diligence plan. In particular, companies should be encouraged to train their employees in the issues of due diligence in the value chain.

- **OBSERVATION 4 :** In the interests of legal certainty, it is important to clarify whether the risks and violations resulting from greenhouse gas emissions are included within the scope of the duty of due diligence.

- **OBSERVATION 5 :** Pending the transposition of the European Directive, the concept of 'established business relationship' should be clarified as soon as possible.

- **OBSERVATION 6 :** The risk mapping included in the due diligence plan should include risks of violations of human rights, the health and safety of individuals and the environment, prioritised according to their severity and the likelihood of their occurrence, particularly in relation to the sector and countries covered by the value chain.

- **OBSERVATION 7 :** Companies are encouraged to take part in industry initiatives, in particular by pooling knowledge and sharing information.

- **OBSERVATION 8 :** Companies are expected to make a clearer distinction between their obligations under their non-financial performance declaration and their duty of due diligence. Companies are expected to make a clearer distinction between their obligations under their non-financial performance declaration and their duty of due diligence.

PART 2

THE PROPOSAL FOR A EUROPEAN DIRECTIVE ON CORPORATE SUSTAINABILITY DUE DILIGENCE

The need to harmonise the due diligence framework was emphasised by several of the people we spoke to and the approach was welcomed by the companies interviewed. Many laws on due diligence in relation to violations of human rights and the environment in the value chain have been adopted recently or are in the process of being adopted (see above, p. 3). Even though these laws are all more or less inspired by the duty of "due diligence" as laid down in the UN and OECD Principles, the multiplication of these laws leads to a fragmentation of the rules, generating significant costs for large companies as supply chains are closely connected. Faced with this fragmentation, some stakeholders are currently seeking to develop a "common core" that would broadly cover all legislation relating to due diligence. For this reason, the European initiative announced in 2020 to harmonise corporate due diligence obligations was generally welcomed.

In its proposal for a Directive published on 23 February 2022, the Commission justified the adoption of such legislation with regard to the internal market on the basis of Articles 50 and 114 of the Treaty on the Functioning of the European Union (TFEU), which respectively empower the Union to act to achieve freedom of establishment in a given activity and to provide for the adoption of measures for the approximation of provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market[38]. The Commission considers that significantly different due diligence requirements between Member States create fragmentation of the internal market, which is likely to lead to unequal conditions of competition between undertakings within that market[39]. The proposal for a Directive thus aims to prevent and remove these obstacles to free movement and distortions of competition.

The Commission has chosen to propose a Directive which, as it is not directly applicable, will have to be transposed by the Member States, necessarily leading to differences in transposition which, as has been pointed out, is a source of legal uncertainty. However, given the low level of harmonisation of company law between the different Member States, this was probably the only possible option.

It was also noted that the obligations contained in the proposed Directive will not enter into force until 2025, or even 2027 for companies operating in sensitive sectors. This period could be further extended: the Council of the European Union recommends, in its General approach, delaying the application of the provisions by one year from the expiry

38. *"Article 50(1) TFEU and in particular Article 50(2)(g) TFEU provide for the EU competence to act in order to attain freedom of establishment as regards a particular activity", while "Article 114 TFEU provides for the adoption of measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market. The Union legislature may have recourse to Article 114 TFEU in particular where disparities between national rules are such as to obstruct the fundamental freedoms or create distortions of competition and thus have a direct effect on the functioning of the internal market."*

39. Proposal for a Directive mentioned above, pp. 12-15.

of the transposition period[40]. In the view of some of the people we spoke to, this delay is too long, given the urgency of the climate and human rights situation. There is also a risk of a proliferation of national legislation pending the transposition of this Directive, with the disadvantages already mentioned of the fragmentation of the law applicable to multinationals. The Commission points out, however, that this delay will allow companies that will be subject to this new legislation to prepare themselves. It therefore seems desirable not to delay the adoption of this text: the deadlines set out in the European Commission's proposal seem sufficient.

I. SCOPE

Article 2 of the proposal for a Directive[41] defines its scope and sets out the criteria for determining which companies are subject to the Directive. These criteria are based on the number of employees and the net worldwide turnover of EU companies, as well as on the net turnover generated in the Union by companies from non-EU countries.

Within the European Union, it covers companies which have 500 employees with a turnover of EUR 150 million (Group 1) and companies which have more than 250 employees with a turnover of EUR 40 million, 50% of which comes from sectors identified as being at risk, explicitly targeting the textile, agricultural and mineral resource sectors (Group 2). The Dubost-Potier report, published on 24 February 2022, also called for a double threshold to be set[42].

40. General approach of the Council of the European Union, 1 Dec. 2022, pt 14: "The compromise text also includes a phase-in clause and a 1-year *vacatio legis* period between the end of the transposition period and the application of the rules of the proposed Directive (Article 30) in order to ensure proportionality of the newly introduced rules as advocated for by many delegations".

41. Article 2 of the Commission proposal for a Directive provides that: '*This Directive shall apply to companies which are formed in accordance with the legislation of a Member State and which fulfil one of the following conditions:*

(a) the company had more than 500 employees on average and had a net worldwide turnover of more than EUR 150 million in the last financial year for which annual financial statements have been prepared;

(b) the company did not reach the thresholds under point (a), but had more than 250 employees on average and had a net worldwide turnover of more than EUR 40 million in the last financial year for which annual financial statements have been prepared, provided that at least 50 % of this net turnover was generated in one or more of the following sectors:

(i) the manufacture of textiles, leather and related products (including footwear), and the wholesale trade of textiles, clothing and footwear;

(ii) agriculture, forestry, fisheries (including aquaculture), the manufacture of food products, and the wholesale trade of agricultural raw materials, live animals, wood, food, and beverages;

(iii) the extraction of mineral resources regardless from where they are extracted (including crude petroleum, natural gas, coal, lignite, metals and metal ores, as well as all other, non-metallic minerals and quarry products), the manufacture of basic metal products, other non-metallic mineral products and fabricated metal products (except machinery and equipment), and the wholesale trade of mineral resources, basic and intermediate mineral products (including metals and metal ores, construction materials, fuels, chemicals and other intermediate products).'

42. See C. Dubost and D. Potier, Information Report No. 5124, mentioned above, Recommendation 5: "Reduce the thresholds of employees above which a company is subject to the duty of due diligence and introduce a new criterion of liability to the duty of due diligence linked to turnover, as an alternative to that of the number of employees".

The scope of the proposal for a Directive is broader than that provided by the French Law. All companies, regardless of their legal form, are covered. The impact assessment carried out by the Commission estimates the number of European companies covered at 13,000[43], which represents around 50% of the total turnover in the European Union.

However, there was some criticism of the scope of the proposed Directive. For some, it would be too narrow. The Directive would exclude too many companies – around 90 % of European companies. In addition, it was pointed out that Article 2 does not resolve the difficulty of identifying precisely the number of companies covered by the scheme, a difficulty already highlighted in relation to the French Law. Others felt that the thresholds referred to of 500 employees for companies in Group 1 and 250 for those in Group 2 would be too low, given that in the French Law the threshold is set at 5,000 employees and, in the German law, at 1,000 employees.

In its general approach, the Council of the European Union proposes a step-by-step approach, with the Directive's rules applying initially – three years after the Directive comes into force – to large companies with more than 1,000 employees and net worldwide turnover of more than EUR 300 million, or to companies from non-EU countries generating more than EUR 300 million in net turnover in the EU. But the thresholds would be lowered four years after the Directive comes into force.

The European Parliament, for its part, has opted in favour of lowering the thresholds to cover companies employing more than 250 people and with a turnover exceeding EUR 40 million in Europe and EUR 150 million worldwide[44].

By comparison, the recent CSRD Directive adopted on 14 December 2022 on corporate sustainability reporting covers, in particular, European companies that meet at least two of the following criteria: more than 250 employees, EUR 40 million of turnover and a balance sheet total of EUR 20 million[45].

While, in general, it seems appropriate to align as far as possible the various compliance obligations to which companies are subject, the alignment of the thresholds between the CSRD and the CSDD is not necessarily required, since due diligence obligations are more stringent than reporting obligations. In any event, it would be possible to assess the relevance of the application thresholds set out in the Directive on due diligence after initial feedback. As it stands, the proposed Directive

43. Proposal for a Directive mentioned above, Impact Assessment, p. 19.

44. Amendments 89 and 90.

45. Dir. (EU) 2022/2464 of the EP and Council, 14 Dec. 2022 amending Regulation (EU) No 537/2014 and Directives 2004/109/EC, 2006/43/EC and 2013/34/EU as regards corporate sustainability reporting, Article 5 on transposition.

provides for the possibility of such a review, no later than seven years after the date on which the Directive comes into force.

RECOMMENDATION 1
To assess the relevance of the application thresholds set out in Article 2 of the Directive after initial feedback.

As regards the identification of the so-called "risk" sectors, the Commission's proposal for a Directive lists a number of sectors in Article 2. A list set out in an Annex could be used to identify these sectors more precisely, in accordance with the wishes of the Council of the European Union[46].

The list of risk sectors could also be extended. In particular, in the construction sector (building, public works, infrastructure) where human rights violations are often found, only certain activities such as the supply of building materials have been included in this list.

RECOMMENDATION 2
Regarding the identification of the so-called "risk" sectors in Article 2, to publish a more detailed annex and include the entire construction sector.

The financial sector is not fully covered by the proposal for a Directive on due diligence. The text provides for a narrow definition of the value chain for this sector[47], and Article 6(3) provides that '*when companies referred to... provide credit, loan or other financial services, identification of actual and potential adverse human rights impacts and adverse environmental impacts shall be carried out only before providing that service*'.

Several of the people we spoke to regretted this choice. Trade unions have seen positive developments in practice following the publication of specific OECD guidelines for the financial sector[48].

On this particular point, the Council of the European Union, in its general approach published on 1 December 2022, proposes, in response to the concerns of certain delegations, to leave it to each Member State to

46. General approach of the Council of the European Union, 1 Dec 2022, pt. 15: "To further clarify the scope of the proposed Directive, the list of high-risk sectors (Article 2(1)(b)) was supplemented with a new Annex (Annex II) containing the NACE codes corresponding to the listed sectors".

47. Article 3(h): ' *As regards regulated financial undertakings providing loan, credit, or other financial services, 'value chain' with respect to the provision of these specific services shall only include the activities of the clients receiving such loan, credit, and other financial services and of other companies belonging to the same group whose activities are linked to the contract in question. The value chain of such regulated financial undertakings does not cover SMEs receiving a loan, credit, financing, insurance or reinsurance of such entities.*' See also. Recital 19.

48. See OECD, Responsible Business Conduct for Institutional Investors (2017); OECD, Due Diligence for Responsible Corporate Lending and Securities Underwriting (2019); OECD, Responsible business conduct due diligence for project and asset finance transactions (2022).

decide, when transposing the Directive, whether or not to include the provision of financial services by regulated financial undertakings[49] and, in any event, to cover only a limited number of financial services and to exclude '*investment activities because of their specificities*'[50]. In addition, the Council proposes, inter alia, that '*if the Member State decides to apply the Directive to the provision of financial services by regulated financial undertakings, they should be required to identify the adverse impacts in the operations of their business partners only before providing the financial service*'[51] and that they can under no circumstances be required to temporarily suspend or terminate the business relationship[52].

Conversely, the European Parliament, which voted on 1 June 2023, ruled out any option being left to Member States in this area. It was in favour of a broader definition of the value chain, including in particular the activities of customers who benefit directly from the services provided by financial undertakings[53], and this definition could be further extended as a result of the introduction of a review clause in this regard[54]. The Parliament also introduced a specific article on investment activities[55]. As regards the identification of adverse impacts by financial stakeholders, the Parliament proposes that this should take place not only before the provision of the financial service but also before each substantial financial operation and, if notified of possible risks, during the provision of the financial service[56].

While it is true that many regulations are specifically applicable to the financial sector, which may explain such an exemption, it has been pointed out that this compromise appears to fall short of current practice and of the UN and OECD Guiding Principles, on which the proposal for a Directive is directly based. Indeed, these international standards concern all sectors without distinction, just as the French Law of 27 March 2017 does not exclude any sector. The exception in question was also identified as problematic in so far as banks are part of the value chain (or 'chain of activities', see below, p. 31) of the companies covered by the scheme. In any event, this exception removes

49. General approach of the Council of the European Union, 1 Dec 2022, pt. 20.

50. General approach of the Council of the European Union, 1 Dec 2022, pt. 21 and 22: '21. As regards the definition of regulated financial undertakings that would fall under the scope of the proposed Directive, the compromise text leaves out of the scope financial products (i.e. alternative investment funds (AIFs) and undertakings for collective investment in transferable securities (UCITS)). Member States were provided with an option not to apply the proposed Directive to pension institutions that are considered to be social security schemes under applicable EU law. 22. The definition of chain of activities in respect to regulated financial undertakings was amended to ensure clarity regarding the provision of which financial services should be covered, if the Member State decides to apply the Directive to the provision of such financial services, while leaving out investment activities because of their specificities. If the Member State does not decide to apply the Directive to the provision of the financial services by regulated financial undertakings (to cover the downstream part of the chain of activities), the chain of activities for regulated financial undertakings should be the same as for the rest of the companies from different economic sectors."

51. General approach of the Council of the European Union, 1 Dec 2022, pt. 23.

52. General approach of the Council of the European Union, 1 Dec 2022, pt. 24.

53. Amendment 117.

54. Amendment 323.

55. Article 8a introduced by amendment 203.

56. Amendment 153.

part of the harmonising nature of the Directive, which was intended to restrict the exercise of divergent options by the Member States.

Ultimately, if the exclusion of the financial sector were to be confirmed at the end of the European three-way talks, it would reveal that the Directive is not in line with the desire expressed by the European institutions to adopt a text reflecting best standards of in terms of due diligence. It therefore seems desirable not to make any exceptions for the financial sector.

RECOMMENDATION 3
Not to leave the choice to Member States whether or not to apply the Directive to the provision of financial services by regulated financial undertakings. If such an option is nevertheless chosen, not to adopt a narrow definition of the chain of 'value' or 'activities' in Article 3.

Lastly, the approach taken to identifying companies subject to the duty of due diligence – by legal entity and not consolidated – was criticised. As a result, a parent company that does not meet the threshold requirements will not be subject to the duty of due diligence, whereas its subsidiaries will be if they meet the criteria. Depending on how groups are organised, several group entities would therefore be subject to the due diligence obligations. However, it was pointed out that subsidiaries would not have the human resources to implement the obligations laid down in the proposal for a Directive, such as the establishment of an internal complaints handling procedure. This approach would ultimately differ from that adopted in the Corporate Sustainability Reporting Directive (CSRD)[57], which provides for reporting exemptions for subsidiaries. Ultimately, some believe that a consolidated approach based on the French model, or at least a partially consolidated approach, would be more satisfactory. The parent company would thus ensure that due diligence was carried out by its subsidiaries. The Council of the European Union, in its general approach published on 1 December 2022, invites the Commission to assess whether the individual approach should be changed in favour of a consolidated approach[58].

RECOMMENDATION 4
In Article 2 on the scope, which sets thresholds for employees and turnover for designating the companies concerned, to adopt a consolidated rather than an entity-based approach.

57. See Directive (EU) 2022/2464 of 14 December 2022 ("CSRD") mentioned above. Article 19a on "Sustainability reporting" provides in point 9 that: 'Provided that the conditions set out in the second subparagraph of this paragraph are met, an undertaking which is a subsidiary undertaking shall be exempted from the obligations set out in paragraphs 1 to 4 of this Article ('the exempt subsidiary undertaking') if such undertaking and its subsidiary undertakings are included in the consolidated management report of a parent undertaking, drawn up in accordance with Articles 29 and 29a....'.
58. General approach of the Council of the European Union, 1 Dec 2022, pt. 16.

II. THE CONTENT OF THE DUTY OF DUE DILIGENCE

Under the terms of Article 4 of the proposal for a Directive, companies must implement the duty of due diligence in relation to human rights and the environment by taking measures based on the due diligence methodology established by the OECD[59], namely:

- integrating due diligence into their policies in accordance with Article 5;
- identifying actual or potential adverse impacts in accordance with Article 6;
- preventing and mitigating potential adverse impacts, and bringing to an end and minimising actual adverse impacts in accordance with Articles 7 and 8;
- establishing and maintaining a complaints procedure in accordance with Article 9;
- monitoring the effectiveness of their due diligence policy and measures in accordance with Article 10;
- publicly communicating on due diligence in accordance with Article 11.

A. Identifying actual and potential adverse impacts (Article 6)

Companies will have to *'identify actual and potential adverse human rights impacts and adverse environmental impacts arising from their own operations or those of their subsidiaries and, where related to their value chains, from their established business relationships'; the concept of an established business relationship is defined as 'a business relationship, whether direct or indirect, 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 ancillary part of the value chain'*[60].

1. Risk mapping

The proposal does not provide that companies covered by the Directive will be required to draw up a due diligence 'plan', as provided for in the French Law, but to '*conduct due diligence*'[61], integrated into the company's '*policies*', which is intended to be implemented on an ongoing basis by the company and which is likely to evolve over time in order to adapt

59. See Due Diligence Guide for Responsible Business Conduct, OECD, 2018.

60. Article 3(g): '*established business relationship*'.

61. Article 4: 'Member States shall ensure that companies conduct human rights and environmental due diligence as laid down in Articles 5 to 11 ('due diligence') by carrying out the following actions:
(a) integrating due diligence into their policies in accordance with Article 5;
(b) identifying actual or potential adverse impacts in accordance with Article 6;
(c) preventing and mitigating potential adverse impacts, and bringing actual adverse impacts to an end and minimising their extent in accordance with Articles 7 and 8;
(d) establishing and maintaining a complaints procedure in accordance with Article 9;
(e) monitoring the effectiveness of their due diligence policy and measures in accordance with Article 10;
(f) publicly communicating on due diligence in accordance with Article 11. (Emphasis added)

to changing circumstances and risks. What is expected of companies should, however, be specified in order to address the pitfalls identified in the implementation of the French Law. An indicative list of the issues to be addressed in the due diligence strategy, echoing the conventions cited in the Annexes, would be helpful for educational purposes, although these guidelines should not be reduced to tick-boxes.

The proposal provides, in any event, that companies will have to carry out a mapping of actual and potential adverse impacts, but without giving any formal indication. As sanctions are incurred, it goes without saying that the mapping will be subject to scrutiny, which means that it will need to be formalised.

There is also no mention of any prioritisation between the adverse impacts that the company is responsible for identifying. It would be appropriate to refer to a methodology for identifying actual and potential adverse impacts as proposed by the UN Guiding Principles or the OECD Guidelines, which encourage the prioritisation of adverse impacts according to, on the one hand, the severity of the impacts on human rights and the environment and, on the other hand, the likelihood of such adverse impacts occurring.

RECOMMENDATION 5
To specify that as part of the identification of adverse impacts provided for in Article 6, companies are required to draw up a risk map that includes actual and potential adverse human rights impacts and adverse environmental impacts prioritised by the company according to their severity and the likelihood of their occurrence.

2. The concept of adverse impact and the scope of the Annex

As a preliminary point, it should be noted that the use of the expression '*adverse impacts*', rather than '*infringements*', was criticised. This is, however, the vocabulary used by the OECD Principles and Guidelines, which seems appropriate in view of the objective of harmonising the obligations on multinational enterprises.

A difficulty was highlighted by many of the people we spoke to regarding the definition of 'actual' and 'potential' adverse impacts. The proposal for a Directive defines the adverse effects on the environment[62] and human rights[63] by the violation of prohibitions, obligations, or rights arising from international reference texts and conventions listed in an

62. Article 3(c): '*an adverse impact on the environment resulting from the violation of one of the prohibitions and obligations pursuant to the international environmental conventions listed in the Annex, Part II*'.

63. Article 3(d): "*adverse human rights impact: an adverse impact on protected persons resulting from the violation of one of the rights or prohibitions listed in the Annex, Part I Section 1, as enshrined in the international conventions listed in the Annex, Part I Section 2.*"

Annex, divided into two parts. Human rights are dealt with in two stages: by defining a set of human rights and listing a set of conventions.

Several criticisms were made with regard to this Annex.

Apart from the formal presentation of the Annex, which divides human rights into two categories, the list of texts referred to in it appears incomplete. As regards social rights, the proposal for a Directive merely cites the eight fundamental conventions of the International Labour Organisation (ILO). Other conventions, such as the one on harassment, could also be cited. The list of instruments covered therefore appears insufficient and a link with the *acquis communautaire* could be established. It was also pointed out that Directives on the protection of employees and the 2019 Declaration on Health and Safety at Work are missing. Nor is there any reference to the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charter of the Council of Europe, or the European Charter of Fundamental Rights. The environmental list was also found to be incomplete. In this respect, the Council of the European Union has added a number of texts[64].

Some of the people we spoke to were concerned about the Annex's lack of completeness, fearing that it would result in a restrictive interpretation of human rights[65]. However, the existence of a 'catch-all' clause which states that the list in the Annex is not exhaustive was also noted[66].

On the other hand, it was pointed out that the list is long, with the texts cited themselves referring to principles, which does not allow a clear understanding of the human and environmental rights protected by the due diligence duty. The reference to standards which are exclusively European in origin and application, for companies whose conduct must be assessed in countries not covered by such rules, is also not without its difficulties. The inclusion of conventions that have not all been ratified has also been criticised. In this respect, the Council of the European Union decided to reduce the list in Annex 1 to cover '*only those international instruments that were ratified by all Member States*'[67]. However, it did not go back on the "*the so-called 'catch-all' clause in the Commission's proposal (...) in order to safeguard the indivisibility of human rights*", even though it was clarified.

64. Annex, Part 2, No 13 et seq.: Convention Concerning the Protection of the World Cultural and Natural Heritage of 16 November 1972; Convention of 2 February 1971 on Wetlands of International Importance, especially as Waterfowl Habitat (Ramsar Convention); International Convention for the Prevention of Pollution from Ships of 2 November 1973; United Nations Convention on the Law of the Sea of 10 December 1982.

65. See also A. Danis-Fatôme, 'Civil liability in the proposal for a European Due Diligence Directive', D, 2022, p. 1107.

66. See Preamble, Recital 25: '*In 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*'.

67. General approach, pt. 34.

The reference to this Annex should ensure the applicability and effectiveness of the Directive and its monitoring, bearing in mind that the Annex could be supplemented in the event of a review. The inclusion of these standards in the Annex would be likely to prevent the courts and the authorities from having to monitor due diligence measures that have no objective benchmarks and no defined scope. Ultimately, while the existence of an Annex appears to be helpful from an educational point of view in identifying the items of due diligence, the interviews carried out highlight the difficulty of determining its content, which appears to be a source of legal uncertainty for companies responsible for identifying actual or potential adverse impacts before preventing, mitigating or bringing an end to them. It therefore seems even more important to specify that these impacts can be prioritised according to their severity and the likelihood of their occurrence.

3. The concepts of 'established' and 'well-established' business relationships

The proposal for a Directive adopts the concept of an established business relationship[68], which is a business relationship that some consider to be very broad. The proposal is based here on the French Law of 27 March 2017. This choice was regretted by some: the concept is vague, which is problematic since, as in the French Law, it creates legal uncertainty (see above, p. 14). Others fear that this concept will be interpreted restrictively in order to reduce the scope of the due diligence obligations.

As regards the concept of 'well-established' business relationship[69], it was pointed out that it refers to subjective elements which are difficult to assess. Moreover, if the due diligence duty only applies to long-term relationships (12 months or more, for example), this could encourage companies to establish short-term relationships artificially in order to avoid any obligation. Some fear that the upstream part of the value chain will thereby be squeezed out.

A change of terminology would make it possible to avoid any difficulty of interpretation at the European level concerning a concept which is unknown, or little known, in the other Member States of the European Union and which is itself undefined to date in France in the absence of established case law on the subject.

68. Article 3(f): *"business relationship" means: a relationship with a contractor, subcontractor or any other legal entities ("partner")*
(i) with whom the company has a commercial agreement or to whom the company provides financing, insurance or reinsurance; or
(ii) that performs business operations related to the products or services of the company for or on behalf of the company

69. *Article 3(g): "established business relationship": 'a business relationship, whether direct or indirect, 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 ancillary part of the value chain'.*

It was pointed out that the term '*business relationship*', borrowed from the OECD Principles which are known to all Member States, could conveniently be used in the European legislation. The Council of the European Union, for its part, chose in its general approach to delete the concepts of '*established*' and '*well-established*' business relationships in favour of the terms 'business relationship' and '*business partner*'.

4. The scope of the 'value chain' or 'chain of activities'

It follows from the definition in Article 3[70] that the Commission's proposal for a Directive adopts a comprehensive approach to the '*value chain*'.

This approach was generally welcomed since, as has been pointed out, human rights violations and environmental damage generally do not occur at the first level of the supply chain. In view of the uncertainty of the French courts' interpretation of the concepts, the Dubost-Potier report also called for European legislation to adopt a comprehensive approach to the value chain[71].

Some, however, stressed the lack of clarity of the definition adopted in the proposal for a Directive and were concerned about the extension of the due diligence duty to indirect relationships, as traceability is often difficult to establish beyond level 3 or 4 of the upstream chain.

In the event that a complete approach to the value chain is adopted, it would nevertheless be advisable to specify what is expected of companies subject to the Directive in terms of traceability. The introduction of a criterion for determining what is reasonably expected of a company in terms of traceability would be welcome.

The proposal for a Directive appears to include the downstream chain, in line with the requirements of the OECD Guidelines and the UN Guiding Principles on Business and Human Rights. Some of the people we spoke to pointed out that it is not easy to control the downstream part of the value chain and recommended adherence to collaborative initiatives (such as the ICS[72], RMI, cobalt[73] and RBA[74]) or principles to improve standards. Others saw virtue in the downstream approach, even if the exercise of due diligence must remain reasonable.

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70. Article 3(h): "*Value chain" means: "activities related to the production of goods or the provision of services by a company, including the development of the product or the service and the use and disposal of the product as well as the related activities of upstream and downstream established business relationships of the company. As regards companies within the meaning of point (a)(iv), 'value chain' with respect to the provision of these specific services shall only include the activities of the clients receiving such loan, credit and other financial services and of other companies belonging to the same group whose activities are linked to the contract in question. The value chain of such regulated financial undertakings does not cover SMEs receiving loan, credit, financing, insurance or reinsurance of such entities.*'
71. C. Dubost and D. Potier, Information Report No. 5124 mentioned above, Recommendation 6: 'Regardless of the terminology used, ensure that the scope of future European regulation includes, in the duty of due diligence, the entire value chain of companies placing orders when there is a business relationship. (...)'.
72. Initiative for Compliance and Sustainability.
73. Responsible Mineral Initiative.
74. Responsible Business Alliance.

In its general approach, the Council of the European Union chose to replace the term '*value chain*' with that of '*chain of activities*', '*by leaving out the phase of use of the company's products or provision of services entirely*'[75]. An exemption for products being subject to export control (i.e. dual-use items and weaponry) was added in relation to the distribution, transport, storage and disposal of such products[76]. It was noted that the concept of '*chain of activities*' is unknown and differs from that of '*supply chain*'; according to the Article 3 definition as set out in the general approach, part of the downstream chain, apart from the actual use of the product, would continue to fall within the scope of the due diligence duty[77].

The European Parliament, for its part, opted in favour of the concept of 'value chain', covering not only the supply chain but also the sale, distribution, transport, storage and waste management of products and services[78].

5. The approach to due diligence

The proposal for a Directive is silent on the due diligence approach adopted, while the UN and OECD Guiding Principles adopt a risk-based approach. Like the approach adopted in anti-corruption and anti-money laundering legislation, the efforts made by the company should be adapted according to the nature of the risk. As set out in the OECD Guide: '*Due diligence is risk-based. The measures that an enterprise takes to conduct due diligence should be commensurate to the severity and likelihood of the adverse impact. When the likelihood and severity of an adverse impact is high, then due diligence should be more extensive. Due diligence should also be adapted to the nature of the adverse impact on RBC issues, such as human rights, the environment, and corruption (...)*'[79].

Such an approach implies that the higher the risk, the greater the effort required, and vice versa. Companies must prioritise the risks they identify and address in the supply chain according to the sector in which they operate, the product, the geographical risk and the track record of the business partner.

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75. General approach of the Council of the European Union mentioned above, pt. 19.

76. Ibid.

77. See Article 3(g): "Chain of activities": (i) activities of a company's upstream business partners related to the production of goods or the provision of services by the company, including the design, extraction, manufacture, transport, storage and supply of raw materials, products or parts of the products and development of the product or the service, and
(ii) activities of the company's downstream business partners related to the distribution, transport, storage and disposal of the product, including the dismantling, recycling, composting or landfilling, where the business partners carry out those activities for the company or on behalf of the company, excluding the disposal of the product by consumers and distribution, transport, storage and disposal of the product being subject to the export control under Regulation (EU) 2021/821 of the European Parliament and of the Council or the export control relating to weapons, munition or war materials, after the export of the product is authorised. (...)'.

78. Amendments 114, 115 and 116.

79. OECD Due Diligence Guidance for Responsible Business Conduct, 2018, p. 17.

Such an approach implies that not all problems on the value chain will be addressed, which was regretted by some to the extent that services regarded as ancillary are subcontracted under conditions that create potential human rights abuses. However, a comprehensive approach to due diligence did not appear realistic in the eyes of most of the people we spoke to. The company should therefore be more clearly able to prioritise actual or potential risks according to their severity and the likelihood of their occurrence. This was the position adopted by the European Parliament on 1 June 2023 [80].

According to UN Guiding Principle No 19, the extent of a company's obligations depends on the strength of the causal link:
'*Where a business enterprise **causes or may cause** an adverse human rights impact, it should take the necessary steps to cease or prevent the impact. Where a business enterprise **contributes or may contribute** to an adverse human rights impact, it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible. Leverage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of an entity that causes a harm.*
*Where a business enterprise has not contributed to an adverse human rights impact, but that impact is nevertheless **directly linked to its operations**, products or services by its business relationship with another entity, the situation is more complex. Among the factors that will enter into the determination of the appropriate action in such situations are the enterprise's leverage over the entity concerned, how crucial the relationship is to the enterprise, the severity of the abuse, and whether terminating the relationship with the entity itself would have adverse human rights consequences*.'

In the current text, only Group 2 companies operating in high impact sectors are required to identify actual or potential severe adverse impacts corresponding to the sector in question in order to avoid placing an unnecessary burden on them (see Recital 31 [81]). A similar obligation should therefore apply to Group 1 companies.

RECOMMENDATION 6
To clarify that the Directive adopts a risk-based approach to the exercise of due diligence. It would be helpful for the European text explicitly to reflect the distinction made in UN Guiding Principle 19 between causing, contributing to or being linked to an adverse impact on human rights or the environment.

80. Article 8b, amendment 204.
81. Recital 31: '*In order to avoid undue burden on the smaller companies operating in high-impact sectors which are covered by this Directive, those companies should only be obliged to identify those actual or potential severe adverse impacts that are relevant to the respective sector*.'

Guidelines will be helpful to clarify the level of detail expected in the identification of adverse impacts. The adoption of such guidelines by the Commission is envisaged in the proposal for a Directive[82]. Instead, these guidelines should come from the future network of national regulators, placed under the authority of the European Commission.

RECOMMENDATION 7
In order to clarify the level of detail expected in the identification of adverse impacts, to adopt, as provided for in Article 13, guidelines which will emanate from the network of national authorities placed under the authority of the European Commission and ensure a link with the OECD and the Office of the UN High Commissioner for Human Rights for the development of such guidelines.

B. Prevention of potential adverse impacts and removal of actual adverse impacts (Articles 7 and 8)

Companies must adopt measures to prevent and mitigate potential adverse impacts (Article 7) and measures to bring to an end or, failing that, minimise actual adverse impacts (Article 8).

1. Measures to implement the due diligence duty

The text of the proposal for a Directive mentions several types of measures expected to implement the due diligence duty and in particular refers to the obtaining of contractual assurances whereby partners are obliged to comply with codes of conduct[83]. It is specified that companies must ensure compliance with these assurances by referring in particular to appropriate industry initiatives or verification by an independent third party[84].

82. Article 13: '*In order to provide support to companies or to Member State authorities on how companies should fulfil their due diligence obligations, the Commission, in consultation with Member States and stakeholders, the European Union Agency for Fundamental Rights, the European Environment Agency, and where appropriate with international bodies having expertise in due diligence, may issue guidelines, including for specific sectors or specific adverse impacts*.'

83. Article 7(2)(b): 'Companies shall be required to take the following actions, where relevant: (...) seek contractual assurances from a business partner with whom it has a direct business relationship that it will ensure compliance with the company's code of conduct and, as necessary, a prevention action plan, including by seeking corresponding contractual assurances from its partners, to the extent that their activities are part of the company's value chain (contractual cascading). When such contractual assurances are obtained, paragraph 4 shall apply'.

84. Article 7(4): 'The contractual assurances or the contract shall be accompanied by the appropriate measures to verify compliance. For the purposes of verifying compliance, the company may refer to suitable industry initiatives or independent third-party verification.' See also: Article 14(4): 'Companies may rely on industry schemes and multi-stakeholder initiatives to support the implementation of their obligations referred to in Articles 5 to 11 of this Directive to the extent that such schemes and initiatives are appropriate to support the fulfilment of those obligations.'

Companies subject to the due diligence duty are thus expressly invited, as part of the measures to prevent adverse impacts, to seek contractual assurances from their business partners. It is even envisaged that the guidelines referred to would be used '*to define non-binding model contractual clauses which companies may use when applying the cascading obligation in their value chain*' [85].

Many concerns were expressed in this regard. For some, the proposal for a Directive seemed more often than not to 'limit' the exercise of the due diligence duty to a mere contractualisation of 'sustainable purchasing' clauses. The temptation could be great for companies just to hide behind contractual assurances obtained from their business partners. Ultimately, some feared that the proposal for a Directive will simply impose an obligation of compliance on companies placing orders and that the obligations of due diligence will be shifted to subcontractors.

However, the due diligence duty cannot be limited to a 'tick-box' exercise. An effective due diligence approach must not be the sole responsibility of the legal and compliance director; it involves many exchanges between departments (purchasing, HR, CSR, legal, country managers, audit, finance, general management).

The proposal also prescribes risk management mechanisms, including the use of audits, the effectiveness of which was considered insufficient by some insofar as it has happened, as in the Rana Plaza tragedy, that audits do not sufficiently, if at all, alert companies placing orders to the existence of violations of human rights and the environment. While the carrying out of a social and environmental audit of subcontractors is an approach that should be encouraged, such an audit should not necessarily be considered sufficient to meet the due diligence obligations, since it is important to define and implement an associated action plan.

The reference to industry initiatives [86] was generally welcomed. This type of initiative, which, like the ICS (Initiative for Compliance and Sustainability), makes it possible to establish traceability in the production of many consumer goods and to raise standards collectively in production plants, was recognised as an efficient method of implementing due diligence.

However, it was regretted that the proposal for a Directive remains silent on other types of tools that have proven to be effective, in particular international framework agreements drawn up by trade

85. Commission proposal for a Directive, explanatory memorandum, p. 20; see Article 12: 'In order to provide support to companies to facilitate their compliance with Article 7(2), point (b) and Article 8(3), point (c), the Commission shall adopt guidance about voluntary model contract clauses'.

86. An industry initiative is defined as 'a combination of voluntary value chain due diligence procedures, tools and mechanisms, including independent third-party verifications, designed and overseen by governments, industry associations or groupings of interested organisations' (Article 3(k).

unions that are conducive to social dialogue. For example, a framework agreement between QDVC, Vinci and IBB (Building and Wood Workers' International[87]), signed at the end of 2017 on working conditions, migration, employment and in connection with their subcontracting on the group's construction sites in Qatar, was cited several times as an example. It should be mentioned in the Preamble to the Directive that such a tool is likely to make it possible to prevent infringements of the social rights of workers.

RECOMMENDATION 8
As part of the measures for implementing the due diligence duty detailed in Article 7, to make clear that the inclusion of contractual clauses and the carrying out of audits are only some of the tools for implementing the due diligence duty. To mention, in the Preamble to the Directive, the role of international framework agreements in preventing infringements of the social rights of workers.

Lastly, the proposed Directive provides that a company which has not been able to avoid or mitigate a risk may enter into a contract with an indirect partner with a view to ensuring compliance with the company's Code of Conduct or the implementation of a prevention action plan[88]. It was pointed out that it is not easy to conclude such a contract: companies can, in practice, rarely enter into a written agreement with suppliers above subcontracting level 1. The Directive could specify an alternative which would consist of using an independent and qualified third party responsible for collecting data along the supply chain to improve its traceability.

RECOMMENDATION 9
Under Article 7, where it is impossible to conclude a contract with an indirect partner, to specify that companies may also use an independent and qualified third party responsible for collecting data along the supply chain to improve its traceability.

2. The end of the business relationship

Articles 7 and 8 state that '*Member States shall provide for the availability of an option to terminate the business relationship in contracts governed by their laws*'. As regards potential adverse impacts that could not be prevented or adequately mitigated, '*the company shall be required*

87. Building and Wood Workers' International.

88. Article 7 (3) provides that "*as regards potential adverse impacts that could not be prevemted or adequately mitigated by the measures in paragraph 2, the company may seek to conclude a contract with a partner with whom it has an indirect relationship, with a view to achieving compliance with the company's code of conduct or a prevention action plan. When such a contract is concluded, paragraph 4 shall apply*'.

to refrain from entering into new or extending existing relations with the partner in connection with which the impact has arisen'.

The OECD Guidelines provide for a gradation of contractual sanctions, with the termination of the contractual relationship as a last resort. Indeed, paragraph 21 states that '*the Guidelines recognise that there are practical limitations on the ability of enterprises to effect change in the behaviour of their suppliers.* (...)'. Paragraph 22 provides that '*Appropriate responses with regard to the business relationship may include continuation of the relationship with the supplier throughout the course of risk mitigation efforts; temporary suspension of the relationship while pursuing ongoing risk mitigation; or, as a last resort, disengagement with the supplier either after failed attempts at mitigation, or where the enterprise deems mitigation not feasible, or because of the severity of the adverse impact.* ***The enterprise should also take into account potential social and economic adverse impacts related to the decision to disengage***.'

Thus, in the eyes of several of the people we spoke to, such a gradation of sanctions must be maintained within the future Directive, with the termination of the business relationship as a last resort. In practice, this means avoiding the banning of certain regions of the world and raising standards wherever it seems necessary.

RECOMMENDATION 10
In Articles 7 and 8, to clarify the gradation of the applicable penalties, the termination of contractual relationships being an option of last resort and whose possible adverse consequences on individuals must be taken into account in the choice of a decision to disengage.

c. Complaints procedure (Article 9)

Under the terms of Article 9, companies will have to provide for a fairly open complaints procedure[89] for people who '*have legitimate concerns regarding actual or potential adverse human rights impacts and adverse environmental impacts with respect to their own operations, the operations of their subsidiaries and their value chains*'.

The complaints mechanism is intended to provide a forum for discussion with stakeholders (on their role, see below, p. 40).

The question was raised whether this mechanism for collecting complaints may, at the time of transposition, be confused with the

89. Article 9(2) provides that complaints may be lodged by: '(a) persons who are affected or have reasonable grounds to believe that they might be affected by an adverse impact;
(b) trade unions or other workers' representatives representing individuals working in the value chain concerned;
(c) civil society organisations active in the areas related to the value chain concerned.'

internal procedure for collecting and processing whistleblowers' reports provided for by the 'Sapin II' Law and as it results from the European Directive on whistleblowers[90], transposed by the Law of 21 March 2022[91].

To date, many French companies have introduced common systems for collecting reports in order to centralise the various reports, which was criticised by some. In this respect, the Dubost-Potier report recommended '*guaranteeing, in law, the distinction between the mechanisms for collecting reports under the 'Sapin II' Law and under the Law on the duty of due diligence and reaffirming third-party access to the mechanism provided for in the Law of 27 March 2017*'[92], on the grounds that the whistleblowing mechanism provided for in the Law of 27 March 2017 must be '*established in consultation with representative trade union organisations*' in the company and that the Law of 27 March 2017 does not specify who the potential users of the whistleblowing mechanism may be, unlike the 'Sapin II' Law. This second distinguishing feature must, however, be put more into perspective, since the transposition of the whistleblowers' Directive, which opens up more broadly the category of potential users of the internal company mechanism for collecting whistleblowers' reports.

When transposing the Directive, the French legislature will therefore have to clarify whether companies will be able to implement a combined system designed to collect both due diligence complaints and whistleblowing reports under the 'Sapin II' Law.

It was also pointed out that Article 9 was a little too succinct compared to the standards set out in the Guidelines. The guidelines envisaged by the Commission could usefully refer to the UN and OECD Guidelines in order to develop good practices in this respect. Article 31 of the UN Guiding Principles sets out a series of criteria to '*ensure that a grievance mechanism is effective in practice*'[93].

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90. EU Directive 2019/1937 of 23 October 2019.

91. Law No 2022-402 of 21 March 2022 and Decree No 2022-1284 of 3 October 2022.

92. Dubost-Potier Report, Recommendation 7, p. 73.

93. UN Principles, 2011, No. 31, pp. 38-39: "Effectiveness test for non-judicial grievance mechanisms: In order to ensure their effectiveness, non-judicial grievance mechanisms should be:
(a) **Legitimate**: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;
(b) **Accessible**: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;
(c) **Predictable**: providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;
(d) **Equitable**: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;
(e) **Transparent**: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake;
(f) **Rights-compatible**: ensuring that outcomes and remedies accord with internationally recognized human rights;
(g) **A source of continuous learning**: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms;
Operational-level mechanisms should also be:
(h) **Based on engagement and dialogue**: consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances'.

Lastly, it was pointed out that the Directive made no mention of vulnerable populations. In this respect, and more generally, the Directive could provide for specific protection from retaliatory measures against people outside the company.

RECOMMENDATION 11
To clarify whether, when transposing the Directive, companies may propose a mixed mechanism for both collecting complaints as envisaged in Article 9 of the Directive on the duty of due diligence and collecting reports as provided for in the arrangements resulting from the transposition of EU Directive 2019/1937 of 23 October 2019. To refer, in the guidelines to be provided by the European Commission (Article 13), to the UN and OECD Guidelines in order to develop good practices regarding the Article 9 complaints procedure. To provide protection from retaliatory measures against people outside the company.

III. SUPPORT MEASURES FOR SMES

The proposal for a Directive envisages, mainly in Article 14, financial support for SMEs in the implementation of due diligence, which was generally welcomed. In France, SMEs are sometimes subject to the duty of due diligence of their client, a large company, without having the human or financial resources to comply with it, whereas the German legislature has conveniently set up a support portal for companies. However, the support measures could be clarified. Beyond financial support, support for companies can take the form of information to identify countries and sectors at risk and places for multi-stakeholder dialogue, as provided by the OECD's National Contact Points for Responsible Business Conduct. The proposal for a Directive envisages the establishment of dedicated websites, platforms or portals. In this respect, it will be important to ensure consistency with the standards and tools developed by the OECD on the deployment of due diligence, on the one hand, and on responsible conduct in global supply chains on the other hand (guides, manuals, alignment of industry initiatives, forums). A significant number of these tools have been developed with the support and financial backing of the European Commission. It will also be necessary to ensure that these measures are effectively implemented.

The Commission's text also provides that the company subject to the Directive will give support to SMEs which have to provide it with the assurances it expects (often via social and environmental compliance audits). Indeed, the proposal for a Directive provides that 'where measures to verify compliance are carried out in relation to SMEs, the company shall bear the cost of the independent third-party verification'

(Articles 7(4)[94] and 8(5)[95]). To date, some have noted that, when this cost is shared, it leads to stronger adherence by SMEs to the due diligence approach.

RECOMMENDATION 12
To specify that the supervisory authorities resulting from the transposition of the Directive could carry out information activities for SMEs (and their clients), drawing particularly on existing standards and tools developed by the OECD and the NCPs on the deployment of responsible business conduct (guides, manuals, alignment, forums). To state the importance of ensuring that support measures are consistent with these tools.

IV. THE ROLE OF STAKEHOLDERS

The OECD[96] and UN Guiding Principles place a strong emphasis on companies' engagement with stakeholders, and the OECD outlines its usefulness and importance throughout all stages of due diligence[97]. Many NCP decisions address the issue of a company's engagement with stakeholders in the exercise of its due diligence.

In the proposal for a Directive, stakeholders are defined in Article 3(n) of the Directive as '*the company's employees, the employees of its subsidiaries, and other individuals, groups, communities or entities whose rights or interests are or could be affected by the products, services and operations of that company, its subsidiaries and its business relationships*'.

This definition is deliberately abstract, in order to allow some flexibility for companies in identifying relevant stakeholders. Companies should be required to consult expert stakeholders on the risks identified in their value chain (or 'chain of activities', see above, p. 31); they should not be required to consult all stakeholders in their value chain.

94. Article 7(4): '*The contractual assurances or the contract shall be accompanied by the appropriate measures to verify compliance. For the purposes of verifying compliance, the company may refer to suitable industry initiatives or independent third-party verification.*
When contractual assurances are obtained from, or a contract is entered into with, an SME, the terms used shall be fair, reasonable and non-discriminatory. Where measures to verify compliance are carried out in relation to SMEs, the company shall bear the cost of the independent third-party verification.'
95. Article 8(5): '*The contractual assurances or the contract shall be accompanied by the appropriate measures to verify compliance. For the purposes of verifying compliance, the company may refer to suitable industry initiatives or independent third-party verification.*
When contractual assurances are obtained from, or a contract is entered into with, an SME, the terms used shall be fair, reasonable and non-discriminatory. Where measures to verify compliance are carried out in relation to SMEs, the company shall bear the costs of the independent third-party verification.'
96. See Recommendation II. A. 14 'Enterprises should engage with relevant stakeholders in order to provide meaningful opportunities for their views to be taken into account in relation to planning and decision making for projects or other activities that may significantly impact local communities'.
97. See, in particular, the OECD Due Diligence Guidance, the Guidance for Meaningful Stakeholder Engagement in the Extractive Sector.

In this respect, it was proposed to limit the definition to stakeholders with a legitimate interest. However, this term would introduce a restriction that could be a source of litigation. It does not therefore seem appropriate to amend this definition: the proposal for a Directive should allow companies some flexibility in identifying relevant stakeholders.

Beyond this definition, it was widely pointed out that the role of stakeholders appears generally insufficient[98], in particular as regards the role of trade unions, which are mentioned in only one article of the Directive.

Stakeholder involvement can be summarised as follows:

- Article 6 provides, where appropriate, for stakeholder consultation to gather information on the company's actual or potential adverse impacts;
- Article 7 provides that, where the preparation and implementation of the prevention action plan is necessary, it shall be drawn up in consultation with the relevant stakeholders to develop due diligence measures;
- Article 8 provides that, where a corrective action plan is required, it may, where appropriate, be drawn up in consultation with stakeholders;
- Article 9 provides that trade unions and other workers' representatives and civil society organisations may lodge complaints with companies.

The role of stakeholders will be examined in each of these cases.

A. In identifying actual or potential adverse impacts

With regard to identifying actual or potential adverse impacts of the company (Article 6), consultation with stakeholders to gather information on actual or potential adverse impacts of the company is optional. The report assessing the Law on due diligence submitted by Dominique Potier and Coralie Dubost proposed, on the contrary, to make it compulsory to involve stakeholders in drawing up the due diligence plan[99]. Such a recommendation seems equally relevant within the Directive.

98. Three other articles of the proposal for a Directive refer to the role of stakeholders, in addition to Articles 6, 7 and 8:
    - Article 13 provides that the Commission may issue guidelines drawn up in consultation with stakeholders;
    - Article 14 provides that the Commission may complement support measures taken by Member States to facilitate joint stakeholder initiatives to help companies fulfil their obligations;
    - Article 26 provides that directors shall put in place and oversee due diligence measures and the due diligence policy taking into account relevant input from stakeholders.

99. Recommendation 3.

RECOMMENDATION 13
To strengthen the role of potentially affected stakeholders by making it mandatory, rather than optional, for them to be consulted when the due diligence strategy is being drawn up. To this end, to delete the words '*where appropriate*' from Article 6.4.

It was also pointed out that the place reserved for trade union organisations appears insufficient in the proposal for a Directive and in particular that it does not give a specific role to workers' organisations and trade unions, nor to European works councils in identifying actual or potential adverse impacts.

This shortcoming needs to be corrected. Article 6 should specify that certain stakeholders, i.e. trade unions and company representatives, must be consulted when the due diligence strategy is drawn up.

RECOMMENDATION 14
To specify in Article 6 that, among the stakeholders, trade union organisations and company representatives must be consulted when the due diligence strategy is being drawn up.

It was also pointed out that the procedures for consulting stakeholders could be clarified to take account of the good practices developed by French companies subject to the Law on the duty of due diligence and thereby avoid the emergence of legal risks. In this respect, the Dubost-Potier report called for '*incentivising the deployment of multi-stakeholder, industry or regional initiatives for the mapping by companies of human rights and environmental risks*'[100] and proposed, inter alia, that a stakeholder committee be set up, drawing on the model of the mission committee provided for under the 'PACTE' Law for mission-based companies.[101]

Without interfering with corporate governance, Article 10 on monitoring the implementation of the company's due diligence exercise could specify that '*where an undertaking has a stakeholder committee, the committee may deal with the monitoring of due diligence measures*'.

RECOMMENDATION 15
To specify in Article 10 that '*where a company has a stakeholder committee, the committee may deal with the monitoring of due diligence measures*'.

100. Recommendation 6.
101. Recommendation 3.

B. In drawing up the prevention action plan and measuring its effectiveness

As regards the drawing up of the prevention action plan, where necessary (Article 7), consultation with stakeholders is required in this context. However, it was pointed out that this article did not require sufficient dialogue with stakeholders. The drafting of the article which requires consultation, however, appears to be sufficiently demanding.

RECOMMENDATION 16
To specify that stakeholders have a role in monitoring the effectiveness of the prevention measures implemented.

C. In drawing up the corrective action plan

Lastly, with regard to drawing up the corrective action plan, where necessary (Article 8), stakeholder consultation is, as in the case of Article 6, left to the discretion of the company. In this context, stakeholder involvement appears to be useful for some measures, but not necessarily for all. The consultation with stakeholders permitted by Article 8 therefore appears satisfactory.

D. In the internal complaints mechanism

Article 9 provides that companies shall adopt a complaints mechanism in the event of legitimate concerns about the actual or potential adverse impacts of their operations, including in the company's value chain. Companies are required to grant this opportunity to persons who are affected or have reasonable grounds to believe that they might be affected by an adverse impact; trade unions and other workers' representatives representing individuals working in the value chain concerned, as well as civil society organisations active in the area concerned.

Article 9 is the only article that mentions the contribution of trade unions in the implementation of due diligence, which was criticised as being reductive.

It was recalled that, to date, four of the formal notices that have received media coverage have been issued by trade unions and concern the following companies: La Poste, Yves Rocher, Teleperformance and McDonald's France. Other formal notices not covered by the media are said to have given rise to a dialogue between the trade unions and the companies concerned. Companies therefore have every interest in engaging with trade union organisations as part of their due diligence, in particular with regard to subsidiaries abroad, but also with French subsidiaries of foreign groups. As matters stand, some fear that dialogue with staff representatives will remain purely formal and amount to no more than information after the event.

Indeed, whereas the French Law on the duty of due diligence recognises a specific role that trade unions can play in setting up the alert mechanism and collecting reports, which must be established '*in consultation with representative trade union organisations*' in the company[102], Article 9 of the proposal for a Directive provides only for workers and trade unions to be informed of ongoing procedures, which some feel is insufficient.

RECOMMENDATION 17
To specify, in the preamble to the Directive, that among the company's stakeholders, trade unions and workers' representatives are stakeholders with whom dialogue must be prioritised in the implementation of due diligence. To specify in Article 9 that consultation with affected stakeholders and/or their representatives, including trade unions and workers' representatives, is mandatory in the design of the complaints mechanism.

It was also recommended that reference should be made in Article 9 to international framework agreements which provide for mechanisms for alerts and settling collective disputes. The German Law refers to this model, which makes it possible to set up an independent complaints system for several employers.

102. Article L. 225-102-4, 4.4 °C.com.

V. THE ISSUE OF CLIMATE CHANGE

A. The exclusion of climate change from the due diligence duty

The Commission's proposal for a Directive, by only requiring companies to publish a plan to establish how the company is effectively involved in climate change mitigation, seems to exclude climate change mitigation from the scope of due diligence.

However, this was not the option adopted by the European Parliament, which, in its resolution of 10 March 2021 which preceded it[103], defined due diligence as '*a process put in place by an undertaking in order to identify, assess, prevent, mitigate, cease, monitor, communicate, account for, address and remedy the potential and/or actual adverse impacts (...) on the environment, which including the contribution to climate change, (...) in its own operations and its business relationships in the value chain*'[104].

A number of the people we spoke to regretted that the issue of climate change seemed to be excluded from the scope of the due diligence duty and was the subject of a specific regime. It was pointed out that the systems that companies will have to put in place (or have already put in place) to collect information from their suppliers for the exercise of their due diligence could be the same as those they will need to collect information on greenhouse gas emissions. Efficiency would therefore dictate keeping the climate within the scope of due diligence.

It was also noted by the Senate, in a resolution of 1 August 2022 on the proposal for a Directive of the European Commission, that "*the fight against climate change is not included in the annex [to the proposal for a Directive] and therefore falls outside the scope of the due diligence duty, while certain activities undoubtedly have adverse effects on climate matters*"[105]. The Senate then stated that it '*wants a more precise link between the due diligence duty and the fight against climate change*'[106].

The majority of members of this Commission feel that the climate issue should be covered by the due diligence duty. First, it is recognised that climate change is a source of many risks and violations of human rights and the environment[107]. In the 'Affaire du Siècle' case, the Paris Administrative Court (*Tribunal administratif de Paris*) also detailed the

103. Res. EP 2020/2129 (INL), 10 March 2021, with recommendations to the Commission on corporate due diligence and corporate accountability, and the attached proposal for a Directive.

104. Res. EP 2020/2129 (INL), 10 March 2021 mentioned above, Annex, pt. 20.

105. Senate, "European Resolution No 143 on the proposal for a Directive of the European Parliament and of the Council on corporate sustainability due diligence and amending Directive (EU) 2019/1937, COM(2022) 71 final", 1 August 2022, § 148 s.

106. Ibid.

107. See, in particular, the work of the IPCC and in particular: IPCC, AR6 – Summary for Policy Makers (WGII), "Impacts, Adaptation and Vulnerability", Feb. 2022, B.1.2, B.1.3., B.1.4., B.4.3. and B.4.4. See also Human Rights Council, tenth session, Resolution 10/4. Human rights and climate change, 25 March 2009: '*climate-change related impacts have a range of implications, both direct and indirect, for the effective enjoyment of human rights*'; see the latest resolution on this issue dated 14 July 2022 (A/HRC/RES/44/7, p. 2).

extensive damage caused by '*greenhouse gas emissions of anthropogenic origin*' and acknowledged the existence of ecological damage [108]. Insofar as international standards cover the protection of human rights and the environment, it is to be regretted that the proposal for a Directive reserves differentiated treatment for the issue of climate change. Moreover, the OECD considers that '*the impacts of climate change*' are adverse impacts covered by the due diligence duty [109].

Secondly, the climate issue is becoming increasingly important in Europe and beyond and, regardless of the forthcoming interpretation of the French Law of 27 March 2017 on this issue (see above, p. 14), the due diligence duty of companies in this area is coming under scrutiny. The Shell decision of the Court of The Hague issued on 26 May 2021 [110] demonstrates this insofar as the judge relied on a general due diligence duty to order the parent company RDS to reduce both its direct and indirect greenhouse gas emissions by 45% by 2030 compared to 2019 levels. Moreover, the systemic nature of climate change has no bearing on the exercise of a particular company's due diligence duty, insofar as it would be primarily expected to "*minimise the extent of [the] impact*" (Article 8) represented by its greenhouse gas emissions.

Lastly, the importance of addressing the climate issue within the due diligence duty was raised because it legally binds the companies that are subject to it and is subject to administrative and/or judicial control.

However, a minority opinion was expressed to the contrary. Climate change should be treated differently insofar as the due diligence duty is aimed at preventing serious violations of social and environmental standards, as illustrated in the Annex to the draft Directive which lists the international standards that must be complied with. The same legal system would not be suitable for managing the adverse external impact represented by greenhouse gases from lawful activities carried out without breaching any standard. It was also argued that global warming is a global risk that does not result from a specific player but from global anthropogenic emissions. Therefore impact mapping, the entry point for due diligence, would lack some relevance to the climate issue.

However, a minority opinion was expressed to the contrary. Climate change should be treated differently insofar as the due diligence duty is aimed at preventing serious violations of social and environmental standards, as illustrated in the Annex to the draft Directive which lists the international standards that must be complied with. The same legal system would not be suitable for managing the adverse external

108. TA Paris, 4th Section, 1st Chamber, No. 1904967, 1904968, 1904972, 1904976/4-1, 3 February 2021, "L'Affaire du siècle", p. 28, para. 16.

109. OECD, Responsible business conduct due diligence for Project and Asset Finance transactions, Oct. 2022, p. 13.

110. Hague District Court, Trade Team, 26 May 2021, C/09/571932/HA ZA 19-379, *Associations Vereniging Milieudefensie, Greenpeace Netherlands, Actionaid v Royal Dutch Shell.* On that decision, see F.-G. Trébulle, EEI 2021, No 11, comm. 86; A.-M. Ilcheva, *D.* 2021, p. 1968.

impact represented by greenhouse gases from lawful activities carried out without breaching any standard. It was also argued that global warming is a global risk that does not result from a specific player but from global anthropogenic emissions. Therefore impact mapping, the entry point for due diligence, would lack some relevance to the climate issue.

In addition, the climate challenge requires targeted regulation of the economy, reinforced by the Green Deal, including through the greenhouse gas emission allowance trading system, the carbon border adjustment mechanism, the methane emissions Directive, the regulation of motor vehicles, etc. These targeted policies make it possible to act on the entire energy chain, by guiding a shift in energy demand in a less carbon-intensive direction in order to ensure a match between energy supply and demand. This implies both a cost-benefit approach and a gradual approach over time - as illustrated, for example, by the plans to ban the internal combustion engine. Conversely, seeking to establish a company's 'climate liability' in a court on the basis of fault requires establishing the relevant standard of conduct in relation to greenhouse gas emissions, which not all courts consider it legitimate to do.

Thus, in the US case of *Kivalina v ExxonMobil*, the federal courts declined jurisdiction over compensation claims against some 20 oil and energy companies for their greenhouse gas emissions, holding that the setting of an acceptable level of greenhouse gases and the apportionment of the cost of global warming is a decision for the executive and legislative powers; these courts also considered that the question had been preempted by the legislature in the context of the adoption of the Clean Air Act, which provides the Government with opportunities for action in relation to greenhouse gases, in which it was therefore not for the court to interfere[111].

B. The adoption of a transitional plan (Article 15)

Article 15 of the proposed Directive provides that companies will have to publish '*a plan to ensure that the business model and strategy of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C in line with the Paris Agreement*' (§ 1) and, if '*climate change is or should have been identified as a principal risk for, or a principal impact of, the company's operations*', the company will have to include emission reduction targets (§ 2). The plan is therefore designed to assess the company's medium- and long-term climate strategy.

Article 15 was the source of several criticisms.

111. Kivalina v. ExxonMobil Corp., No. 4:08-cv-01138 (N.D. Cal.): US District Court for the Northern District of California, decision of 30 September 2009; US Court of Appeals for the Ninth Circuit, decision of 28 November 2011.

Some of the people we spoke to regretted the lack of precision of this provision. On the one hand, Article 15 was found to be insufficiently precise as to the method to be followed by companies in preparing this plan, which is problematic given that the measurement of greenhouse gas emissions and the assessment of the credibility of the reductions announced are not unified.

For others, the wording of Article 15 was considered too demanding since the text provides that companies will have to adopt '*a plan to ensure that the business model and strategy of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C in line with the Paris Agreement*'. Some called for a reformulation of this article, stating that it is a contribution that must be sought rather than a '*compatibility*' with the transition to a sustainable economy; the term 'ensure' ('*garantir*') was also challenged as being too demanding.

In its general approach, the Council of the European Union stated that it wished to ensure that '*the text of the provision on combating climate change has been aligned as much as possible with the soon-to-be-adopted Corporate Sustainability Reporting Directive (CSRD), including a specific reference to that Directive, in order to avoid problems with its legal interpretation, while avoiding broadening the obligations of companies under this Article*' [112].

Article 15 requires '*a plan, including implementing actions and related financial and investments plans, to ensure that the business model and strategy of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C in line with the Paris Agreement and the objective of achieving climate neutrality by 2050 as established in Regulation (EU) 2021/1119, and where relevant, the exposure of the undertaking to coal-, oil- and gas-related activities, as referred to in Articles 19a(2), point (a)(iii), and 29a(2), point (a)(iii), of Directive 2013/34/EU. 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 particular, the term 'ensure' ('*garantir*') was deleted from Article 15 [113].

The European Parliament also opted on 1 June 2023 in favour of a reference to the CSRD and stated that the transition plan must ensure that the company's business model and strategy are aligned with the EU's 2030 and 2050 targets [114]. It also provided further details on the content of this plan: it should include, if relevant, absolute emission reduction targets for greenhouse gas [115].

112. General approach, pt. 25.
113. General approach, Article 15.
114. Amendment 247.
115. Amendments 253.

Lastly, the question of supervising the appropriateness of the plan required by Article 15 is an acute one. The proposal for a Directive initially stated that plans could be supervised by the national authorities[116]. The position of the Council of the European Union now provides for a limited, purely formal supervision: indeed, the proposed wording of Article 18 states that '*as regards Article 15, Member States shall only require supervisory authorities to supervise that companies have adopted the plan*'. The scope of Article 15 thus appears appreciably diminished. The European Parliament was in favour of maintaining this supervision[117].

RECOMMENDATION 18

A majority consensus was formed to recommend that climate risks be included in the scope of the due diligence duty or, failing that, that the content of the climate strategy be better specified in Article 15 and that the possibility of supervision by the national supervisory authority be reintroduced, which would help to strengthen the effectiveness of Article 15.

However, some members of the Commission considered that the issue of climate change should be dealt with differently and that the definition of the transition plan should be aligned between the CSRD Directive of 14 December 2022 and the CSDD Directive in order to allow the use of standards that will be developed by EFRAG[118] in line with international standards, in particular those developed by the ISSB[119].

VI THE CREATION OF ADMINISTRATIVE SUPERVISORY AUTHORITIES (ARTICLE 17 ET SEQ.)

The proposal to create independent administrative authorities responsible for supervising the application of the due diligence duty was generally considered appropriate, even though some were more favourable to the intervention of an independent third-party body with no supervisory and sanctioning powers, as was the case with regard to non-financial reporting. The creation of these authorities broadens the range of remedies, which should be a guarantee of effectiveness of the Directive. Some pointed out that the supervisory authority would have more time and expertise than a judge to monitor the implementation of the due diligence duty, similar to the controls that may be carried

116. Article 17: '*Each Member State shall designate one or more supervisory authorities to supervise compliance with the obligations laid down in national provisions adopted pursuant to Articles 6 to 11 and Article 15(1) and (2) ('supervisory authority').*'

117. Amendment 257.

118. EFRAG is the European Financial Reporting Advisory Group whose task is to develop standards for the implementation of the CSRD in order to improve the quality, consistency and comparability of information made public in the sustainability report.

119. The International Sustainability Standards Board is a standard-setting body established in 2021 as part of the U.S. IFRS Foundation, whose mandate is to create and develop non-financial reporting standards.

out by other administrative authorities in France (AFA, AMF, etc.). The administrative authority is also intended to enable company practices to be harmonised, improve dialogue between companies and victims and ensure that action is taken quickly. The creation of such an authority is supported in particular by the Dubost-Potier report[120].

However, initial criticism was made concerning the authority's role in supporting and advising companies, which is insufficiently detailed. Moreover, as it stands, the administrative supervisory authorities, which would intervene on their own initiative to supervise a company and upon referral by a third party on the basis of a substantiated report setting out concerns (Article 18), are not invited to play a mediation role, which several of the people we spoke to found regrettable. The Commission leaves it up to the Member States to detail the role of the administrative authority and considers it possible to allow them to conduct mediations along the lines of the OECD's National Contact Points for Responsible Business Conduct.

The Dubost-Potier report also recommended that the authority should support not only companies by supervising the application of due diligence obligations, but also relevant stakeholders. The proposal for a Directive is silent on this last point. The involvement of stakeholders within the administrative authority, and in particular employees, was suggested. For some, stakeholders should be able to be involved in the deliberations of the administrative authority; adversarial debates with victims could also be organised. As this is an administrative supervisory authority with the power to impose sanctions, it seems unusual to involve stakeholders in the decision-making process and it does not seem desirable to include them in the decision-making body. On the other hand, the Directive could specify how stakeholders are to be consulted periodically. Indeed, some national contact points for responsible business conduct include stakeholders in an advisory board. Other administrative authorities, such as the Financial Markets Authority (*Autorité des marchés financiers*), have set up consultative commissions to organise exchanges with stakeholders. It is also possible to draw on the model of the Colleges of the Defender of Rights (*collèges du Défenseur des droits*).[121]

In general, it was pointed out that the text did not sufficiently specify the procedure and that the authority should be required to communicate before imposing a sanction. It was pointed out that the fact that an administrative authority is responsible for the administrative supervision of due diligence obligations is not necessarily a guarantee of transparency. However, the proposal for a Directive clearly reaffirms the

120. Recommendation 8: 'Without prejudice to judicial remedies aimed at rendering companies civilly liable – as is currently the case – or even penalising the most significant breaches of the law, to entrust an administrative authority with tasks relating to:
- monitoring the application of the due diligence duty;
- the support of the companies and stakeholders concerned;
- supervising compliance with legal obligations, provided that this does not lead to a form of approval of due diligence plans to the detriment of litigation.'

121. https://www.defenseurdesdroits.fr/fr/institution/organisation/colleges.

authority's obligation of independence[122] and provides for the publication of decisions containing sanctions related to a breach of the Directive[123].

As regards the authority's powers, opinions differ. Article 18 of the proposal for a Directive states that 'when carrying out their tasks, supervisory authorities shall have at least the following powers:

(a) to order the cessation of infringements of the national provisions adopted pursuant to this Directive, abstention from any repetition of the relevant conduct and, where appropriate, remedial action proportionate to the infringement and necessary to bring it to an end;

(b) to impose pecuniary sanctions in accordance with Article 20; and

(c) to adopt interim measures to avoid the risk of severe and irreparable harm.'

While it was pointed out that the authority would thus have the power to stop infringements quickly, the Potier-Dubost report recommended that the authority should not have the power to impose sanctions (following the example of the NCPs), in contrast to what has been provided for in the German Law on the due diligence duty adopted on 11 June 2021.

Concern was also expressed about the relationship between administrative and judicial remedies. It was stressed that action by the supervisory authority should not prevent recourse to the courts. In this respect, Article 18 expressly states that '*Member States shall ensure that each natural or legal person has the right to an effective judicial remedy against a legally binding decision by a supervisory authority concerning them*'. This possibility guarantees access to the courts in the event of a challenge to the decision of the supervisory authority. However, there is still uncertainty as to whether legal action may be taken against a company which fails to implement its duty of due diligence, if its civil liability is not sought (see below, p. 53). Under French law, Article L. 225-102-4 of the Commercial Code allows a company to be summoned by an ordinary court (*tribunal judiciaire*) to comply with the obligations laid down by the Law on the duty of due diligence, independently of the civil liability action provided for in Article L. 225-102-5 of the Commercial Code. The possible abolition of the preventive mechanism for access to the courts as established by Article L. 225-102-4 of the Commercial Code was regretted by some, since only the authority would then be competent to order the cessation measures detailed in Article 18 of the proposal for a Directive. In this respect, the Parliament proposes to specify in Article 22 on civil liability that applicants may apply for an injunction[124]. Clarification is therefore awaited on a possible option open to natural and legal persons to submit '*substantiated concerns*' (Article 19) to the supervisory authority with a view to conducting

122. Art. 17, (8): 'Member States shall guarantee the independence of the supervisory authorities and shall ensure that they, and all persons working for or who have worked for them and auditors or experts acting on their behalf, exercise their powers impartially, transparently and with due respect for obligations of professional secrecy. In particular, Member States shall ensure that the authority is legally and functionally independent from the companies falling within the scope of this Directive or other market interests, that its staff and the persons responsible for its management are free of conflicts of interest, subject to confidentiality requirements, and that they refrain from any action incompatible with their duties.'

123. Article 20: 'Member States shall ensure that any decision of the supervisory authorities containing sanctions related to the breach of the provisions of this directive is published'.

124. Amendment 302.

an investigation or applying to the court for an injunction, it being noted that the proposal for a Directive specifies in any event that supervisory authorities may be approached by the competent judicial authorities (Article 18(6)(c)).

In any event, if the administrative authority receives '*substantiated concerns*' (Article 19) from stakeholders, the transposition law should include an obligation to provide the reasoning for the decision adopted, enabling stakeholders to ensure that their requests have been taken into account.

Another concern was the harmonisation of the system of sanctions between the various administrative supervisory authorities within the EU. Article 20 of the proposed Directive states that penalties must be effective, proportionate to the infringements of the obligations contained in the Directive and dissuasive. The assessment of the dissuasive nature of the sanctions is left to the Member States. Some propose that minimum standards be provided for in this area to avoid any legal "dumping". Companies in different European countries fear differing interpretations of the text from one authority to another and suggest the designation of a 'lead authority'. An exchange of best practice should be encouraged within the European network of authorities and, above all, the Commission should play a coordinating role in the network.

Lastly, coordination between this authority and other national authorities responsible for overseeing industry due diligence obligations should be prioritised at the national and European levels with the support of the Commission, in order to ensure the harmonisation of company practices and administrative supervision.

RECOMMENDATION 19

In Article 18, to:

- further specify the functions of the supervisory authority, in particular that the authority may propose that the parties enter into mediation;
- specify how stakeholders will be consulted periodically;
- provide for a separation between the functions of support on the one hand and supervision, mediation and sanctions on the other;
- if stakeholders submit '*substantiated concerns*' (Article 19) to the supervisory authority with a view to conducting an investigation, provision should be made for an obligation to state the reasons for the decision adopted, enabling stakeholders to ensure that their requests have been taken into account;
- provide for an exchange on best practice within the European network of authorities under the leadership and guidance of the European Commission;
- provide for coordination between the various national authorities responsible for supervising both horizontal (CSDDD) and industry due diligence (agricultural and mining commodities) and coordination with the support of the European Commission in order to ensure that practices are harmonised.

One question is left unresolved: how would the functions of the proposed administrative authority be coordinated with those of the National Contact Point for Responsible Business Conduct? The 51 governments that have adhered to the OECD Guidelines for Multinational Enterprises are obliged to establish a National Contact Point ("NCP") which is a government agency or an independent agency responsible for promoting the Guidelines and responsible business conduct and for dealing with 'complaints' in the event of non-compliance within a non-judicial dispute resolution mechanism known as a 'specific instance'. The effective role of the National Contact Point in this area, its expertise in the standards of responsible business conduct and its experience were highlighted on several occasions. The Directive leaves to the Member States the choice of the responsible entity, but at the very least provision should be made for coordination between the NCP and the authority – given that within the European Union only Cyprus and Malta do not have an NCP[125]. This is also provided for in an amendment proposed by the European Parliament[126].

RECOMMENDATION 20
To invite Member States to establish a link between the National Contact Point and the supervisory authority in order to capitalise on the expertise and experience of the NCP and to avoid divergent interpretations.

VII. CIVIL LIABILITY (ARTICLE 22)

In general, some of the people we spoke to pointed out that the proposed European Directive was not directly inspired by the UN Guiding Principles, in particular as regards the third pillar on 'Access to justice' (access to information, time limits for appeals, high costs, burden of proof, etc.).

As regards the liability regime laid down in Article 22 of the proposal for a Directive, companies may be held liable for damages if they have not complied with the obligations laid down solely in Articles 7 and 8 and if, as a result of this failure, an adverse impact that should have been identified, prevented, mitigated, brought to an end or its extent minimised through the appropriate measures laid down in Articles 7 and 8 has occurred and resulted in damage.

With regard to this article, as formulated by the Commission, the other two European institutions, the Council and the European Parliament, have put forward proposals that would substantially amend it.

125. Cyprus and Malta are neither OECD members nor adherents to the Guidelines for Multinational Enterprises.
126. Amendment 262.

On the one hand, the Council of the European Union has provided several clarifications concerning the liability regime. First, the Council has sought to clarify the conditions for civil liability: '*the four conditions that have to be met in order for a company to be held liable – a damage caused to a natural or legal person, a breach of the duty, the causal link between the damage and the breach of the duty and a fault (intention or negligence) – were clarified in the text and the element of fault was included*'[127]. It was pointed out that the distinction drawn between failure to comply with the duty of due diligence and the existence of intentional fault or negligence does not correspond to a distinction usually made in French civil liability law.

The Council of the European Union also stated, in its general approach, that the damage for which compensation may be claimed must be caused to '*a natural or legal person*', which *de facto* excludes compensation for environmental damage permitted under French law since the Biodiversity Law of 8 August 2016[128]. If, at the time of transposition, such a requirement were maintained, it could result in a decline in the protection of the environment by French civil liability law. It is therefore recommended that the limitation of compensation to damage caused to natural or legal persons be withdrawn: it is necessary to ensure that the possibility of seeking compensation for environmental damage remains, in particular for Member States which, like France, already allow this in their national law.

Lastly, the Council removed a ground for exemption from company liability that had been provided for in the European Commission's draft. The text provided that in the event of damage caused by an indirect partner with which the company had a well-established relationship, the company would not be held liable if it had inserted contractual assurances, '*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 to prevent, mitigate, bring to an end or minimise the extent of the adverse impact*'[129]. In this respect, the use of the term '*unreasonable*' has been criticised as giving rise to legal uncertainty and the grounds for exemption have been described as problematic in the specific context of the duty of due diligence. The Council removed '*the safeguard for companies that sought contractual assurances from their indirect business partners after a strong criticism ed of this provision due to its heavy reliance on contractual assurances*'[130]. The European Parliament also adopted an amendment to this effect (see above)[131]. This deletion seems to address the many concerns raised in this respect. In any event, it would be appropriate to clarify that, while the inclusion of contractual assurances can help to prove the proper implementation of the duty of due diligence, it is not sufficient. The assurances included must be accompanied, in particular, by effective

127. General approach, pt. 27.
128. Law No. 2016-1087 of 8 August 2016 for the recovery of biodiversity, nature and landscapes.
129. Article 22(2).
130. General approach, pt. 29.
131. Amendment 300.

measures for the selection of contractual counterparties (such as "Health, Safety and Environment" or HSE qualification criteria) and risk-based control or audit measures.

In addition, the European Parliament has proposed removing the restriction set out in the proposal for a Directive on the scope of corporate liability set out in Article 22: it should be possible for the company to be held liable if it fails to fulfil one of the obligations laid down in the Directive as a whole[132]. In this regard, the European Parliament also proposes to clarify that companies that have participated in industry or multi-stakeholder initiatives, or have used third-party verification or contractual clauses to support the implementation of specific aspects of their due diligence obligations, can still be held liable[133].

The article on civil liability was criticised by some as being too broad in some respects because it appears to hold companies liable for any damage that could have been foreseen and avoided, regardless of the causal link with the damage. This view of civil liability is not based on the prioritisation of risks in the value chain. However, the Commission pointed out that companies are liable as soon as the damage suffered is foreseeable for the company, when it has influence over its suppliers, even when the damage occurs upstream.

It was proposed that the article should be supplemented by providing that the company would be liable not only if it failed to prevent or mitigate the damage, but also if the damage was wholly or partially caused by the company: the company would need to have contributed substantially to the damage that occurred in order to be held liable. Reference should be made to the methodology established by the OECD, which distinguishes the nature of the due diligence measures to be taken (ceasing/preventing, repairing, using its influence) according to the link between the company and the adverse impact (cause, contribution, direct link by a business relationship)[134].

In response to these concerns, the Council of the European Union recalled the requirement of causality and proposed to limit corporate liability in this way: '*A company cannot be held liable if the damage was caused only by its business partners in its chain of activities*[135]', which is not entirely redundant.

Other concerns were expressed regarding the burden of proof in liability litigation: this issue is indeed identified as a major barrier to the effective exercise of the due diligence duty. It was pointed out that most of the difficulties encountered in the implementation of the French Law

132. Amendment 298.

133. Amendment 303.

134. See OECD Due Diligence Guidance for Responsible Business Conduct and in particular Question 80 "What is meant by adverse impacts that are 'caused', 'contributed to' by the enterprise or 'directly linked' to its operations, products or services by a business relationship?" (pages 76-80).

135. Article 22(1).

are linked to an asymmetry of information; most of the information that would make it possible to qualify a company's fault (impact assessments, audits and other information) is held by companies and is not passed on to the public. Neither the publication of the due diligence plan nor the non-financial performance declaration can remedy this asymmetry. It was suggested that one way of remedying this would be to reverse the burden of proof, an option which was adopted by the European Parliament in its resolution of 10 March 2021[136]. Another way to remedy this could be to oblige the companies summoned to produce documents during the proceedings. It would thus be up to the company being sued to provide evidence of the existence of impact assessments, audits and any other documents relevant to demonstrating the proper implementation of the duty of due diligence. In the absence of such production, the court could draw negative inferences. The European Parliament is thus in favour of the courts being able to order a company to disclose evidence where the claimant provides elements substantiating the likelihood of a company's liability[137].

In any event, in the light of the competence of the European Union laid down in Article 81 TFEU[138], it was pointed out that the Member States are free to provide for a more protective evidentiary system for victims.

Lastly, the Council wishes to avoid recourse to punitive damages by including a reference to the '*right to full compensation for the damage*'. The text now states that '*full compensation under this Directive shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages*'[139].

136. Res. EP 2020/2129 (INL), 10 March 2021 mentioned above, Annex, Article 19, 3. 'Member States shall ensure that their liability regime referred to in paragraph 2 is such that undertakings that prove that they took all due care in line with this Directive to avoid the harm in question, or that the harm would have occurred even if all due care had been taken, are not held liable for that harm'.

137. Amendment 302.

138. Article 81 TFEU: "*The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.*'

139. Article 22(2); see also, General Guidance, pt. 28.

RECOMMENDATION 21

As regards the civil liability action provided for in Article 22, to:

- ensure the possibility of obtaining compensation for environmental damage in those Member States where such compensation is available;
- make clear that obtaining contractual assurances from subcontractors is helpful but does not exempt the company placing the order from its civil liability in the event of the subcontractor's default;
- refer to the OECD methodology, which distinguishes between cause/contribution/direct link between the company and the adverse impact in order to determine the type of due diligence measures that the company should take within itself and/or with respect to its business relationships (ceasing, preventing, repairing, using its influence);
- as regards the burden of proof, provide that the companies summoned may be ordered by the court to produce evidence.

VIII. THE EXTRATERRITORIAL SCOPE OF THE TEXT (ARTICLES 2 AND 22)

The proposal for a Directive is extraterritorial in scope insofar as it covers certain companies established in third countries. Article 2 distinguishes between whether the company is established in the European Union or not. For European companies, the proposal sets employee and turnover thresholds (Group 1) and for companies in high impact sectors (Group 2) these two thresholds are lower (see above, p. 22). For non-EU companies, only turnover is used for both groups. This criterion appeared to be the most relevant because it is difficult to quantify the number of employees of these non-European companies[140].

For these non-EU companies, the proposal for a Directive provides that the competent supervisory authority is that of the Member State in which the company has a branch, or in the absence of a branch, that of the State in which the company generates most of its turnover[141]. It was pointed out that this solution is not very satisfactory from an operational point of view. Article 17 allows a company, owing to a change in circumstances leading to it generating most of its turnover in the European Union in another Member State, to submit a duly reasoned request to change the

140. See proposal for a Directive, Recital 24: 'In the absence of a clear and consistent methodology, including in accounting frameworks, to determine the employees of third-country companies, such employee threshold would therefore create legal uncertainty and would be difficult to apply for supervisory authorities'.

141. Art. 17, pt. 3: '*As regards companies referred to in Article 2(2), the competent supervisory authority shall be that of the Member State in which the company has a branch. If the company does not have a branch in any Member State, or has branches located in different Member States, the competent supervisory authority shall be the supervisory authority of the Member State in which the company generated most of its net turnover in the Union in the financial year preceding the last financial year before the date indicated in Article 30 or the date on which the company first fulfils the criteria laid down in Article 2(2), whichever comes last.*'

competent supervisory authority[142]. This leads to uncertainty regarding the competent authority when turnover changes. The rule also creates a risk of forum shopping, since companies can establish their branch in the Member State of their choice.

It was proposed that a national authority should be designated as competent for foreign companies. However, it appears that the most logical criterion is turnover, since the law on due diligence is intended to apply to a company from a non-EU country where a certain turnover is achieved on the European market. This criterion makes it possible to avoid a company setting up its branch in the Member State that it considers to have the lowest due diligence standards.

RECOMMENDATION 22
For non-EU companies, to provide in Article 17 that the competent supervisory authority is that of the State in which the company has generated most of its turnover.

Lastly, Article 22(5)[143] lays down a mandatory civil liability law which aims to derogate from the Rome II Regulation, with the aim of creating a level playing field. This provision is a form of private enforcement[144], as envisaged by the High-level Legal Committee of the Paris Financial Centre (*Haut Comité Juridique de la Place Financière de Paris*)[145]. While some questioned the appropriateness of this mandatory law, which will give jurisdiction to the courts of the European Union, it will make it possible to give a broad scope to the due diligence obligations, guaranteeing the effectiveness of the system. This mandatory law was also criticised for the risk that the territorial application of European law could lead to the exclusion of substantially more protective legislation from being applied. In such a case, which is probably not very frequent, it could be envisaged to leave to the victim the choice of the law most protective of his or her interests.

RECOMMENDATION 23
With regard to the application of the mandatory civil liability law provided for in Article 22, to allow the victim to choose the law that best protects his or her interests.

142. Article 17 pt. 3: '*Companies referred to in Article 2(2) may, on the basis of a change in circumstances leading to it generating most of its turnover in the Union in a different Member State, make a duly reasoned request to change the supervisory authority that is competent to regulate matters covered in this Directive in respect of that company.*'

143. Article 22 para. 5: '*Member States shall 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*'.

144. In the report on extraterritoriality of the High-level Legal Committee (p. 70), private enforcement is seen as one of the ways to put pressure on non-EU companies by making it easier for individuals to challenge the liability of non_EU companies before the courts of the Member States.

145. See Report on extraterritoriality of the High-level Legal Committee, pp. 79-80: "*The choice of extraterritorial scope for the provisions of EU law involves considering how to ensure the effectiveness of the rules imposed on non-EU companies: (...) the fifth option would be for the EU to encourage private enforcement, i.e. court proceedings brought by individuals before ordinary courts. A directive could be envisaged requiring Member States to put in place such a procedure, while leaving it to them to determine how they operate. The system would be accompanied by protection for whistleblowers.*'

IX. THE DUTIES OF DIRECTORS (ARTICLES 25 AND 26)

The proposal for a Directive provides that directors will be responsible for the implementation of supply chain due diligence, and that they will be accountable and liable in this respect, as provided for in the OECD Guidelines.

Article 25, entitled '*Directors' duty of care*', provides that '*Member States shall ensure that, when fulfilling their duty to act in the best interest of the company, directors of companies referred to ... take into account 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*'.

Article 26, on '*Setting up and overseeing due diligence*', provides that '*Member States shall ensure that directors of companies referred to in Article 2(1) are responsible for putting in place and overseeing the due diligence actions referred to in Article 4 and in particular the due diligence policy referred to in Article 5, with due consideration for relevant input from stakeholders and civil society organisations. The directors shall report to the board of directors in that respect.*
Member States shall ensure that directors take steps to adapt the corporate strategy to take into account the actual and potential adverse impacts identified pursuant to Article 6 and any measures taken pursuant to Articles 7 to 9.'

Some of the people we spoke to were in favour of these provisions: due diligence is becoming a governance issue and must now be integrated into the company's strategy. It was pointed out that some boards of directors are still not very involved, which makes it difficult to develop a culture of due diligence within the company.

However, some of the people we spoke to criticised the lack of clarity in Articles 25 and 26. It was pointed out that the definition of '*directors*' mixes executive and non-executive corporate officers[146] without specifying the obligations of each. In addition, Article 25 refers to the concept of '*duty of care*', which is less well known in Europe than in common law countries. Some fear that this article will pave the way for directors to be held liable, which raises questions about the scope of the obligations imposed and the rules governing liability actions.

For its part, the Council of the European Union proposed the deletion of Articles 25 and 26: "*Due to the strong concerns expressed by Member States that considered Article 25 to be an inappropriate interference with national provisions regarding directors' duty of care, and potentially undermining directors' duty to act in the best interest of the company, the provisions have been deleted from the text*"[147].

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146. Article (3): "*director" means:*
(i) any member of the administrative, management or supervisory bodies of a company;
(ii) where they are not members of an administrative, management or supervisory bodies of a company, the chief executive officer and, if such a function exists in a company, the deputy chief executive officer;
(iii) other persons who perform functions similar to those performed under point (i) or (ii); '.

147. General approach, pt. 31.

Similarly, as regards Article 26, it '*was deleted and its main elements were moved to the provision on integrating due diligence into the company's policies and risk management systems (Article 5(3)), taking into account the variety of corporate governance systems and the freedom of companies to regulate their internal matters*'[148].

The European Parliament was also in favour of the deletion of Article 26[149] but at the same time enshrined in Article 15 the obligation for directors to be responsible for ensuring compliance with the obligations laid down for the preparation of the transition plans[150].

However, Article 25 reflected concerns similar to those behind the adoption of the Pacte Law, which introduced a new vision of the role of the company. Article 26 sought to make due diligence a matter for the highest level of decision-making.

It is therefore recommended that these provisions be reinstated, while removing the concept of 'duty of care', which is foreign to continental law, so that boards of directors can take greater responsibility for the due diligence duty.

Failing this, the Directive should invite Member States to adopt provisions requiring directors to take into account '*the consequences of their decisions for sustainability matters, (...) including in the short, medium and long term*' and an obligation to supervise and implement a due diligence strategy.

RECOMMENDATION 24

To maintain the provisions on directors' duties laid down in Articles 25 and 26 of the Commission's proposal by clarifying them, without resorting to the concept of 'duty of care', which is alien to continental law.

Failing this, to invite Member States to adopt provisions requiring directors to take into account '*the consequences of their decisions for sustainability matters, (...) including in the short, medium and long term*' and an obligation to supervise and implement a due diligence strategy.

148. General approach, pt. 32.
149. Amendments 391 and 405.
150. Amendment 256.

X. COORDINATION WITH INDUSTRY REGULATIONS

The explanatory memorandum of the proposal for a Directive refers to 11 different texts in this area and other EU policies that will interact with this text, which is a source of concern for some stakeholders.

The question of how the general rules laid down in the proposal for a Directive will fit in with existing industry rules on due diligence (regulations on tin, tungsten, tantalum and gold from conflict-affected and high-risk areas[151], wood supply, imported deforestation[152], sustainable batteries[153]) and the thematic regulation currently being prepared on forced labour[154], has not been resolved. It is essential to coordinate the tasks and actions of the various national authorities responsible for monitoring all due diligence obligations. The supervisory authority of the CSDDD could play this role at the national level. Coordination at the European level would also be desirable, under the impetus of the European Commission.

On the question whether compliance with industry-specific rules could exclude the operation of the Directive on due diligence, some believe that no industry or thematic regulation can replace the broad scope of the due diligence law, as risk mapping is often complex.

Others consider that coordination by the OECD is necessary to harmonise expectations under the different sets of legislation; the OECD is already working on this through roundtables of policy makers and due diligence forums. The establishment of regimes for the mutual recognition of obligations imposed in the different sets of legislation should be encouraged. Equivalence systems could be adopted.

Ultimately, while it would appear essential to ensure consistency between this proposal and industry and thematic legislation, no industry or thematic regulation could exclude the operation of the Directive on the duty of due diligence.

RECOMMENDATION 25

To clarify the relationship between the general rules set out in the proposal for a Directive and existing industry rules on due diligence. To provide for national coordination of the actions of the authorities responsible for the supervision of general, industry and thematic due diligence obligations, which could be the responsibility of the supervisory authority of the CSDDD, and to provide for European coordination by the Commission.

151. Regulation 2017/821 of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas.

152. Proposal for a Regulation on the making available on the Union market as well as export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010 (COM(2021)0706 – C9-0430/2021 – 2021/0366(COD), adopted by the European Parliament on 19 April 2023.

153. Proposal for a Regulation concerning batteries and waste batteries of 10 December 2020, COM/2020/798 final.

154. Proposal for a Regulation on prohibiting products made with forced labour on the Union market of 14 September 2022, COM(2022) 453.

LIST OF RECOMMENDATIONS

RECOMMENDATION 1
To assess the relevance of the application thresholds set out in Article 2 of the Directive after initial feedback.

RECOMMENDATION 2
Regarding the identification of the so-called "risk" sectors in Article 2, to publish a more detailed annex and include the entire construction sector.

RECOMMENDATION 3
Not to leave the choice to Member States whether or not to apply the Directive to the provision of financial services by regulated financial undertakings. If such an option is nevertheless chosen, not to adopt a narrow definition of the chain of 'value' or 'activities' in Article 3.

RECOMMENDATION 4
In Article 2 on the scope, which sets thresholds for employees and turnover for designating the companies concerned, to adopt a consolidated rather than an entity-based approach.

RECOMMENDATION 5
To specify that as part of the identification of adverse impacts provided for in Article 6, companies are required to draw up a risk map that includes actual and potential adverse human rights impacts and adverse environmental impacts prioritised by the company according to their severity and the likelihood of their occurrence.

RECOMMENDATION 6
To clarify that the Directive adopts a risk-based approach to the exercise of due diligence. It would be helpful for the European text explicitly to reflect the distinction made in UN Guiding Principle 19 between causing, contributing to or being linked to an adverse impact on human rights or the environment.

RECOMMENDATION 7
In order to clarify the level of detail expected in the identification of adverse impacts, to adopt, as provided for in Article 13, guidelines which will emanate from the network of national authorities placed under the authority of the European Commission and ensure a link with the OECD and the Office of the UN High Commissioner for Human Rights for the development of such guidelines.

RECOMMENDATION 8
As part of the measures for implementing the due diligence duty detailed in Article 7, to make clear that the inclusion of contractual clauses and the carrying out of audits are only some of the tools for implementing the due diligence duty. To mention, in the Preamble to the Directive, the role of international framework agreements in preventing infringements of the social rights of workers.

RECOMMENDATION 9
Under Article 7, where it is impossible to conclude a contract with an indirect partner, to specify that companies may also use an independent and qualified third party responsible for collecting data along the supply chain to improve its traceability.

RECOMMENDATION 10
In Articles 7 and 8, to clarify the gradation of the applicable penalties, the termination of contractual relationships being an option of last resort and whose possible adverse consequences on individuals must be taken into account in the choice of a decision to disengage.

RECOMMENDATION 11
To clarify whether, when transposing the Directive, companies may propose a mixed mechanism for both collecting complaints as envisaged in Article 9 of the Directive on the duty of due diligence and collecting reports as provided for in the arrangements resulting from the transposition of EU Directive 2019/1937 of 23 October 2019. To refer, in the guidelines to be provided by the Commission (Article 13), to the UN and OECD Guidelines in order to develop good practices regarding the Article 9 complaints procedure. To provide protection from retaliatory measures against people outside the company.

RECOMMENDATION 12
To specify that the supervisory authorities resulting from the transposition of the Directive could carry out information activities for SMEs (and their clients), drawing particularly on existing standards and tools developed by the OECD and the NCPs on the deployment of responsible business conduct (guides, manuals, alignment, forums). To state the importance of ensuring that support measures are consistent with these tools.

RECOMMENDATION 13
To strengthen the role of potentially affected stakeholders by making it mandatory, rather than optional, for them to be consulted when the due diligence strategy is being drawn up. To this end, to delete the words *'where appropriate'* from Article 6.4.

RECOMMENDATION 14
To specify in Article 6 that, among the stakeholders, trade union organisations and company representatives must be consulted when the due diligence strategy is being drawn up.

RECOMMENDATION 15
To specify in Article 10 that '*where a company has a stakeholder committee, the committee may deal with the monitoring of due diligence measures*'.

RECOMMENDATION 16
To specify that stakeholders have a role in monitoring the effectiveness of the prevention measures implemented.

RECOMMENDATION 17
To specify, in the Preamble to the Directive, that among the company's stakeholders, trade unions and workers' representatives are stakeholders with whom dialogue must be prioritised in the implementation of due diligence. To specify in Article 9 that consultation with affected stakeholders, and/or their representatives, including trade unions and workers' representatives, is mandatory in the design of the complaints mechanism.

RECOMMENDATION 18
A majority consensus was formed to recommend that climate risks be included in the scope of the due diligence duty or, failing that, that the content of the climate strategy be better specified in Article 15 and that the possibility of supervision by the national supervisory authority be reintroduced, which would help to strengthen the effectiveness of Article 15. However, some members of the Commission considered that the issue of climate change should be dealt with differently and that the definition of the transition plan should be aligned between the CSRD Directive of 14 December 2022 and the CSDD Directive with the standards to be developed by EFRAG[155] in line with international standards, in particular those developed by the ISSB[156].

155. EFRAG is the European Advisory Group on Financial Reporting whose task is to develop standards for the implementation of CSRD in order to improve the quality, consistency and comparability of information made public in the sustainability report.

156. The International Sustainability Standards Board is a standard-setting body established in 2021 as part of the U.S. IFRS Foundation, whose mandate is to create and develop non-financial reporting standards.

RECOMMENDATION 19

In Article 18, to:

- further specify the functions of the supervisory authority and in particular that the authority may propose that the parties enter into mediation;
- specify how stakeholders will be consulted periodically;
- provide for a separation between the functions of support on the one hand and supervision, mediation and sanctions on the other;
- if stakeholders submit '*substantiated concerns*' (Article 19) to the supervisory authority with a view to conducting an investigation, provision should be made for an obligation to state the reasons for the decision adopted, enabling stakeholders to ensure that their requests have been taken into account.
- provide for an exchange on best practices within the European network of authorities under the leadership and guidance of the European Commission.
- provide for coordination between the various national authorities responsible for supervising both horizontal vigilance (CSDDD) and industry due diligence (agricultural and mining commodities) and coordination with the support of the European Commission in order to ensure that practices are harmonised.

RECOMMENDATION 20

To invite Member States to establish a link between the National Contact Point and the supervisory authority in order to capitalise on the expertise and experience of the NCP and to avoid divergent interpretations.

RECOMMENDATION 21

As regards the civil liability action provided for in Article 22, to:

- ensure the possibility of obtaining compensation for environmental damage in those Member States where such compensation is available;
- make clear that obtaining contractual assurances from subcontractors is helpful but does not exempt the company placing the order from its civil liability in the event of the subcontractor's default;
- refer to the OECD methodology, which distinguishes between cause/contribution/direct link between the company and the adverse impact in order to determine the type of due diligence measures that the company should take within itself and/or with respect to its business relationships (ceasing, preventing, repairing, using its influence);
- as regards the burden of proof, provide that the companies summoned may be ordered by the court to produce evidence.

RECOMMENDATION 22
For non-EU companies, to provide in Article 17 that the competent supervisory authority is that of the State in which the company has generated most of its turnover.

RECOMMENDATION 23
With regard to the application of the mandatory civil liability law provided for in Article 22, to allow the victim to choose the law that best protects his or her interests.

RECOMMENDATION 24
To maintain the provisions on directors' duties laid down in Articles 25 and 26 of the Commission's proposal by clarifying them, without resorting to the concept of 'duty of care', which is alien to continental law. Failing this, to invite Member States to adopt provisions requiring directors to take into account '*the consequences of their decisions for sustainability matters, (...) including in the short, medium and long term*' and an obligation to supervise and implement a due diligence strategy.

RECOMMENDATION 25
To clarify the relationship between the general rules set out in the proposal for a Directive and existing industry rules on due diligence. To provide for national coordination of the actions of the authorities responsible for the supervision of general, industry and thematic due diligence obligations, which could be the responsibility of the supervisory authority of the CSDSD and to provide for European coordination by the Commission.

APPENDICES

APPENDIX 1

LIST OF PERSONS INTERVIEWED

Laurent Berger, General Secretary of the French trade union CFDT; President of the European Trade Union Confederation

Odile de Brosses, Chief Legal Officer of the French company union AFEP

Lucie Chatelain, Advocacy and Litigation Manager of French NGO Sherpa

Sandra Cossart, executive director of French NGO of Sherpa

Maria-Isabel Cubides, former head ad interim of Globalisation and Human Rights Desk for the International Federation for Human Rights (FIDH)

Elisabeth Gambert, CSR and International Affairs Director of the French Association of Private Enterprises (AFEP)

Tyler Gillard, Chief Strategy Officer of the Responsible Business Alliance, former head of due diligence at the centre for responsible business conduct at OECD

Christina Hajagos-Clausen, Textile and Garment Industry Director at IndustriALL Global Union

Soundous Hassouni, Sustainability Due Diligence Leader of Decathlon

Benjamin Hecker, Chief Legal Officer of Huawei

Christy Hoffman, General Secretary of UNI global union

Carole Hommey, General manager at the international sectoral Initiative for Compliance and Sustainability (ICS)

Francesco Martucci, Professor of Law at Paris-Panthéon-Assas University

Charlotte Michon, Founding Partner of Charlotte Michon Avocat, former general delegate of "Entreprises pour les droits de l'homme"

Pauline Moreau Avila, confederal assistant of Force Ouvrière

Audrey Morin, Chair of MEDEF Compliance and Ethics Committee, Group Compliance Director at Schneider Electric

Maddalena Neglia, Director of Globalisation and Human Rights Desk for the International Federation for Human Rights (FIDH), Board Member of the European Coalition for Corporate Justice

Dominique Potier, Deputy to the French National Assembly

Anthony Ratier, Human Rights, Ethics and SDGs Manager of the UN Global Compact French network

Didier Reynders, European Union Justice Commissioner, former Vice-Prime Minister of Belgium

Bernard Spitz, International and European Department President of MEDEF, President of BSC

Sarah Tesei, CSR Director of Vinci

Bruno Zabala, Head of legal affairs, CSR, Ethics and Corporate Governance at MEDEF

APPENDIX 2

MEMBERS OF THE CLUB DES JURISTES "DUTY OF CARE" COMMISSION

CHAIRMAN
Bernard Cazeneuve, Former Prime Minister, Partner

RAPPORTEUR
Antoine Gaudemet, Professor of Law, Paris-Panthéon-Assas University

MEMBERS
Emmanuel Daoud, Founding Partner, Vigo

Pauline Dufourq, Lawyer, Soulez Larivière & Associés

Fabrice Fages, Doctor of Law, Partner, Latham & Watkins LLP

Aurélien Hamelle, General Counsel, TotalEnergies

Béatrice Parance, Professor of law, Université Paris Dauphine-PSL

Myriam Roussille, Professor of Law, Le Mans University

Pierre Sellal, French Ambassador, Chairman of the Fondation de France, Senior Counsel, August&Debouzy

Maylis Souque, Economic Adviser at the Permanent Representation of France to the OECD, former Secretary-General of the French National Contact Point at the OECD

Julie Vallat, Vice President Human Rights, L'Oréal

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