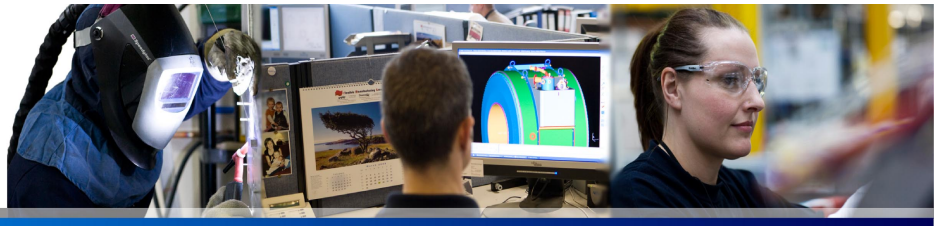

# CORPORATE SUSTAINABILITY DUE DILIGENCE

Wednesday 26 April 2023

18h30 – 20h00 Roundtable
Warsaw Room, Renaissance Hotel
19, Rue du Parnasse, 1050 Brussels

## WELCOME & INTRODUCTION BY THE CHAIR

Antony Fell, EUROPEAN FORUM FOR MANUFACTURING, Secretary General

Good evening and a very warm welcome to the European manufacturers to this Roundtable debate, to the Social Partners represented here today and to the MEPs.

And a very warm welcome also to the European Commission who will open this evening's discussion on Corporate Sustainability Due Diligence.

Zsofia Kerecsen, EUROPEAN COMMISSION, DG JUST, Team Leader Corporate Governance Team

Explaining the Commission's Corporate Sustainability Due Diligence Proposal

Political Context: Sustainability Transition.

- Despite all the difficulties that we experienced in the last years, the European Commission is committed to deliver on the transition (in its green and social dimensions)
- COVID and the energy crisis only underscore the need for a more sustainable value creation and resilient value chains

Sustainable Businesses Are More Competitive
The economic evidence is clear: a review of more than 2000 studies concludes that companies that integrate social and environmental considerations tend to perform better, be more competitive, more resilient, more innovative.

Environmentally sustainable manufacturing processes result in cost savings, operational efficiency, innovation, new revenue opportunities. Studies show how profitable low carbon investments are (typically yield cost savings in excess of the initial investment at an average profit of €17 per tonne of $CO_2$) and they pay back in short time.

Economic evidence covers all sectors: including the financial sector, financial investment, etc.
Economic evidence is the same in all contexts, including the COVID crisis

CS3D - Rationale of the Commission Proposal

- Due Diligence Duty
  - Inspired from existing voluntary framework (UNGPs, OECD)
  - Legal certainty/ legal clarity (important for businesses) – the voluntary framework is not always clear, sometimes contradictory, different standards in different sectorial guidelines
  - "Cause and contribute to, directly linked with " involvement framework terms are not legal liability terms

- Full Value Chain Approach
  - Most adverse impacts are at the level of indirect business relationships
  - In some sectors, the downstream value chain is more important than the upstream (finance, construction, shipbuilding)
  - Use phase (company can control the impact of the intended use of its products, in finance the clients or investee companies may cause adverse impacts)

- Role Of Finance
  Liability
  - Companies are already today brought before courts for adverse impacts in their value chains
  - Legal certainty and harmonised liability regimes are important for companies

  Main principles of the Commission proposal:

Liability should not exclude value chain impacts but there should be limitations

- On the one hand companies should not be made liable for hams that they could not have prevented with reasonable measures
- On the other hand, liability in the value chain should not be excluded where the company could generate change in the value chain with reasonable measures, including at the level of direct or indirect value chain partners
- Difference between direct and indirect value chain partners is sometimes artificial: in the Rana Plaza disaster, tier 1 and tier 2 suppliers were sitting in the same building which collapsed

- Directors' Duties
  - Due diligence is a corporate management tool, directors are the natural subjects of the obligation for putting it in place
  - sustainability should be embedded in corporate strategies, it should not be a matter e.g. for the legal department. The strategy is also the responsibility of directors.
  - remuneration: evidence shows that in today's remuneration schemes short-term financial performance indicators dominate. For meaningful change, the incentives of the management should be aligned with sustainability objectives, such as climate change in the proposal
  - duty of care:
    - not new, today's laws (France)/CG codes/ jurisprudence already require consideration of stakeholder interests and the impacts of the company in directors' decisions
    - fiduciary duties have been clarified for investors in the same way
    - there are different standards and fragmentation across Europe, which is not good for companies

- Minimum Harmonisation:
  - Framework rules
  - Sectorial rules go beyond the general due diligence obligation (REACH, Environmental Liability Directive)
  - It is not expected that MS would transpose differently but it should not be excluded for certain specific issues
  - On some issues achieving maximum ambition is unlikely (sanctions, liability)
  - Some issues are already better protected under sectorial law (occupational health and safety in Europe)

IMPLICATIONS FOR MANUFACTURING

Henna VIRKKUNEN MEP (EPP, Finland), Industry, Research & Energy Committee

- As we know, the long-term aim of the Corporate Sustainability Due Diligence Directive is good: to promote sustainable and responsible business conduct and protect human rights and the environment.
- However, we must avoid legislation that leads to a senseless bureaucratic burden for European companies, especially for SMEs.
- The Commission's proposal risks affecting almost every company in the EU.

- All SMEs in the value chain will be affected by this new obligation and a trickle-down effect from larger companies

- It is important to make sure that due diligence is for companies and obligation for certain measures to follow, not an obligation of results. While undertakings should check whether they act responsibly and mitigate risks, it is still the responsibility of States to actually combat human rights violations and change the situation on the ground.

- We need to remember the competitiveness of the EU in everything we do. The full harmonisation of this legislation is therefore important. Otherwise, different regimes in different Member States will fragment the Single Market adding bureaucratic hurdles for companies.

- We have long demanded better regulation from the Commission: one-in one-out principle and competitiveness check. We need to make sure that new legislation does not lead to red tape and competitive disadvantage for our companies. I am afraid that this directive will make it harder for SMEs to operate and might result in job losses and reduced investment.

- The EPP has worked hard in the negotiations to improve the compromise with for example, the following goals:
    - a clear risk-based approach where companies focus on those business relationships where risks are likely and severe, based on risk factors (sector, location, size)
    - Scope ideally 1000 employees, no SMEs, protect SMEs in case of involvement outside of scope (transition times on the compromise)
    - Same obligations for non-EU companies operating in the EU Single Market
    - Alignment with international standards (OECD and caps UNGPs)

- These points are reflected in the JURI compromises, but many challenges still remain for the Plenary and Trilogs

- Finally, I would like to thank the European Forum for Manufacturing for organising this roundtable and having us all here gathered for an important cause. Let us work together to create a more favourable business environment and promote sustainable practices, without hampering growth and innovation.

Pedro Oliveira, BUSINESSEUROPE, Director for Legal Affairs

European business remains largely supportive of the proposed directive on corporate sustainability due diligence (CS3D). We appreciate the efforts by all those involved in both the Council and more recently in the European Parliament to reach a reasonable final compromise.
This framework will be one of the most impactful pieces of legislation on European business in decades which is why it is essential to make sure the future rules are effective, proportionate and give little room to impractical legal uncertainty and fragmentation.

We are asking both co-legislators take in to account the key suggestions below:

- Full harmonisation is essential to avoid fragmentation of the EU single market and ensure a level playing field. This can be achieved in the proposal by using, for instance, an "internal market clause". Companies need 1 not 27 different due diligence frameworks.

- Focusing on all aspects within the whole value chain is neither manageable nor realistic. Supply chains alone can comprise multiple tiers with hundreds or thousands of locations, product lines and entities. Companies should be able to prioritize the most salient risks and have the freedom to take appropriate actions to cease, prevent or mitigate identified adverse impacts in accordance with a risk-based approach. The absence of such an approach could also lead to counter-productive disengagement from value chains.

- Regulating directors' duties is unnecessary to reach the objectives of the proposal and does not belong in a due diligence framework. It will have negative side-effects, e.g. interfering with national company law systems and creating legal uncertainty, without added value to the ability of companies to apply effective due diligence.

- The list of norms/conventions in the Annex is too far reaching and generates legal uncertainty. Most of the norms in the annex are only applicable to states and not legal private entities like companies. To be workable, this list should be reviewed and shortened.

- Legal liability provisions need to be balanced and truly incorporate the widely accepted principle that due diligence is first and foremost an obligation of means and that companies cannot be made liable for damages they have not caused or directly contributed to, intentionally or negligently.

- Support measures and tools are needed to allow for a better implementation of the directive by companies ranging from: Clear and timely guidance; more emphasis given to multi-stakeholder and industry initiatives to support companies' due diligence efforts; recognition of group due diligence as means of compliance.

Margarida MARQUES MEP (S&D, Portugal), Vice Chair Budgets Committee & International Trade Committee

It is known that since the European Commission proposal for a directive for businesses to ensure their value chains are free from environmental and human rights abuse, Parliament's position about how far the law should go in holding the companies operating in the EU responsible for the practice and their suppliers practice has not been unequivocal. Far from it as we can see from the votes in committees namely the INTA committee.

Since yesterday's vote in JURI, the leading committee in the European Parliament, we have a broad European Parliament [EP] consensual position.

The Commission proposal for a Directive on Corporate Sustainability Due Diligence, aiming at fostering sustainable and responsible corporate behaviour throughout global value chains had, in our view, the shortcoming of not creating a mandatory due diligence mechanism.

The Parliament had long been calling for voluntary guidance on due diligence to be replaced with mandatory EU-wide rules that apply to the entire value chain of companies.

In our view, unfortunately, the Commission proposal also moved away from the UN and OECD framework. Parliament's aim is to return to best practice.

Within the framework of the INTA competencies, our main goals were to broaden the company scope, by lowering the applicability thresholds, in line with the EP legislative report of March 2021, and covering other high-risk sectors.

We have now extended the application of the new rules, compared to the Commission proposal, to include EU-based companies with more than 250 employees and a worldwide turnover higher than €40 million, [as well as parent companies with over 500 employees and a worldwide turnover higher than €150 million]. The rules would also apply to non-EU companies with a turnover higher than €150 million if at least €40 million was generated in the EU.

Another INTA priority was to ensure adequate definitions of 'value chain' (which should cover all business relationships, upstream and downstream of, yet in a proportionate manner) and 'stakeholders' (which should be clearer and broader, covering a wide range of potentially affected people), among other terms.

Now according to the EP, firms would be obliged to identify, and where necessary prevent, and or mitigate the negative impact of their activities, including that of their business partners, on human rights and the environment.

This includes child labour, slavery, labour exploitation, pollution, environmental degradation and biodiversity loss.

Companies would also be required to evaluate the value-chain partners when carrying out their 'due diligence'. This should include not only suppliers, but also activities related to sale, distribution and transport.

Another one of our priorities was ending actual adverse impacts. Now, Parliament has agreed that adverse impact would have to be mitigated and remedied by adapting the company's business model, providing support to SMEs or seeking contractual assurances.

Once the Parliament adopts its mandate in the Plenary, possibly in June, we will be in a position to enter the negotiations with the Council on the final text of the legislation.

These are my comments on the due diligence proposal. Before I stop, I would like to remember that other political initiatives in the pipeline also have an impact on sustainable development:

- the Sovereignty Fund
- the Carbon Border Adjustment Mechanism [CBAM]
- the revision of Competitiveness and State Aid Regulation.

We cannot speak of an internal market level playing field. This has implications internally and externally as Pedro said.

Lorenzo Livraghi, ORGALIM - Europe's Technology Industries, Senior Adviser Trade and Legal

- The industries Orgalim represents are comprised of 770,000 innovative companies (mostly SMEs and microbusinesses) spanning the mechanical engineering, electrical engineering, electronics, ICT and metal technology branches, with eleven million direct employees. They constitute Europe's largest manufacturing branch.

- As manufacturers of high-tech products with thousands of components and complex international value chains, our industries have a big responsibility to engage with business partners and promote high environmental and human rights standards.

- For this reason, we fundamentally share the underlying objectives of the Corporate Sustainability Due Diligence Directive. But on the other hand, we are concerned about the way such objectives have been translated into obligations for companies that are unmanageable to a significant extent.

- Our industries are currently going through a complex process of diversification and de-risking of supply chains, to secure a stable and reliable supply of raw materials and adapt to a more volatile and uncertain international environment. This is an essential pre-condition for our companies to scale up manufacturing of clean technologies in the EU, to support the EU's net zero ambition.

- Other pieces of EU legislation already finalised will impact on our industries' ability to do so. This is the case of CBAM, which will considerably increase the costs of key raw materials like steel and aluminium and result in an overall loss of competitiveness of our industries vis-à-vis third country economic operators.

- It is therefore imperative that the CS3D does not further compromise the ability of Europe's technology manufacturers to build stable and reliable supply chains.

- In this respect, we see an issue with the obligation to conduct due diligence throughout the whole value chain. This is unprecedented, if we consider that all the existing mandatory due diligence frameworks at national level do not go beyond tier 1 upstream suppliers. And this is already a considerable challenge, given that companies in our industries often have tens of thousands direct suppliers.

- Therefore, while we appreciate recent efforts to limit the scope of due diligence obligations on the downstream side and to allow companies to prioritise adverse impacts, we still believe that due diligence obligations covering the whole value chain are not workable in practice for companies.

- Also, it is imperative to keep SMEs out of the direct scope of the proposal, although they would be indirectly impacted anyway. SMEs simply do not have the resources to comply with the obligations arising from the CS3D.

- Finally, I wanted to comment on two further elements of the Directive:
  - First, the implications of Article 22 on civil liability are extremely far-reaching for companies.

    We appreciate the efforts made by the co-legislators to make Article 22 more in line with the principle that companies should only be liable for adverse impacts that they directly

cause or contribute to. But there is a need for further refinement to clarify that companies should be liable only if they failed to comply with the CS3D intentionally or due to gross negligence, to make sure that the article is at least in line with the widely accepted principle that liability should have fault as a prerequisite.

- Second, regulating directors' duties is unnecessary to reach the objectives of the proposal and does not belong in a due diligence framework.

  The provisions of Article 25 and 26 will have negative side-effects, e.g. interfering with national company law systems and creating legal uncertainty, without added value to the ability of companies to conduct due diligence.

Vincenzo Belletti, CECIMO – European Association of the Machine Tool Industries & Related Manufacturing Technologies, Director of EU Affairs

CECIMO supports the development of an EU due diligence framework. However, we need to ensure that it does not further jeopardise the competitiveness of European companies.

We need clear, workable rules at EU level that do not contradict or overlap with the other sustainability legislation, and we need a framework that can truly enable and guide businesses in taking necessary steps towards more sustainable supply chains.

We had recently the opportunity to discuss this issue with different stakeholders (industry, trade union, , national and European policymakers) with the members of the Industrial Forum Task Force 5 on advanced manufacturing. I can say without doubt, that this was one of the most difficult point to mediate and where we had to make an extra effort to reach an agreement for a joint recommendation.

Among the issues that we tackled I can mention:

- The importance to consider sectoral specificities in the advanced manufacturing sector, where supply chains are often highly complex and difficult to monitor, especially beyond companies' direct contractual relationships with suppliers.
- Public authorities should play a proactive role in supporting companies to implement their due diligence legal obligations.
- Adopt a risk-based approach to due diligence as provided by international standards such as the OECD Guidelines for Multinational Enterprises

With the vote of the JURI Committee yesterday we are now in a crucial phase of the legislative process.

We have seen that the proposal does not include European SMEs, and that they ask to take a proportionate approach when dealing with publicly listed small and medium-sized undertakings and high-risk small and medium-sized as they may need less extensive and formalised due diligence processes. However, we cannot imagine that there will be no repercussions on the SMEs in the complex value chain of big companies.

We also support the JURI Committee request to the European Commission to prepare guidelines that should ensure clarity and consistencies among the practices of undertakings. Clear guidance needs to be adopted and made available before rules enter into effect to help companies comply with and national authorities to enforce the legislation.

Finally, the problem we see in this Directive is that it seems to be asking EU corporations to know every aspect of their value chain and solve complex dynamics embedded in the economic, industrial, cultural aspect of different countries.

Policymakers need to focus on what is realistically achievable and consider that companies want to be a part of the solution to achieve more sustainable supply chains.

Many companies are already taking big steps responsibilities to improve their supply chain.

Therefore, we hope to see a shift towards a policy framework that is less punitive and more solution-oriented approach and recognising the role that companies can play as positive promoters and facilitators for sustainable transition.

Gert Meylemans, EUROBAT, Director Communications and Stewardship

EUROBAT is the leading association for European automotive and industrial battery manufacturers, covering all battery technologies, and has more than 50 members. The members and staff work with all policymakers, industry stakeholders, NGOs and media to highlight the important role batteries play for decarbonised mobility and energy systems as well as all other numerous applications.

When the public consultation on CS3DD was published by the EU Commission back in 2020, EUROBAT confirmed that it welcomed the proposal for a Corporate Sustainable Due Diligence Directive and acknowledged its full support for the harmonisation of human rights and environmental due diligence obligations in the EU and abroad. In this sense, we are committed to implementing the most sustainable pathway in order to achieve a climate-neutral European Union by 2050.

However, there were a few points in the proposal that we wanted to address:

- There is a clear issue of proportionality and the fear of creating excessive administrative and financial burdens. For the battery sector, the main legislation that should apply should be the Batteries Regulation, which seemingly will be approved by June of this year.

  This is product legislation covering the whole battery life-cycle, from mining to recycling.

  Developing new horizontal legislation – lex generalis – that will introduce different requirements and initiatives in regard to activities or risks that might not be covered in the Batteries Regulation, leaves the industry in a potentially vulnerable situation. In this sense, two different pieces of legislation will be covering the due diligence activities of battery manufacturers: first, under the product-specific Batteries Regulation (Art. 39 of the EC proposal) and then under the CS3DD, which will create complementary requirements at a company level.

  Moreover, we would like to express our support for the industry schemes as we previously did with the Batteries Regulation. The recognition of such a great instrument is of paramount importance for the industry to ensure efficiency and effectiveness, when complying with upcoming requirements.

  In order to avoid overlaps or inconsistencies, the development of industry schemes must refrain from formulating any new additional standards to address the new requirements of

the CS3D proposal. Otherwise, a scenario with overlapping pieces of legislation would create inconsistencies that might hinder the growth of the battery market and, therefore, endanger the competitiveness of the EU industry and the electrification of the transport, energy, and industrial sectors

- Contrary to this, the industry requires the removal of barriers and legislative overlaps in order to support the necessary development of the battery industry to achieve the EU's climate goals.

  In particular, coherence with the Batteries Regulation should be ensured, above all for raw materials used for batteries but also for other applications, to avoid the same raw materials need to comply with two different regulatory regimes depending on the final application. At the same time, it will be fundamental to ensure harmonisation with international instruments (ie. OECD Guidelines) and with national legislation, to avoid legislative misalignments outside and inside the EU.

- Similarly, the explanatory memorandum of this proposal foresees the introduction value chain due diligence related to raw materials that are not covered in the Batteries Regulation. Having several pieces of legislation covering different raw materials (this CS3D proposal, the Conflict Minerals Regulation, the Batteries Regulation...), the battery industry advocates for a proportioned risk-based due diligence that avoids any possible loophole.

- Furthermore, a too broad expansion of the scope of the due diligence obligations for raw materials going into battery manufacturing, could put the battery industry at a competitive disadvantage vis-à-vis international competitors because of disproportionate additional administrative burdens, adding further economic and administrative pressure on the battery industry.

Tomislav SOKOL MEP (EPP, Croatia), Internal Market & Consumers Protection Committee

- It took a long time for the European Commission to propose the Corporate Sustainability Due Diligence Directive. This is precisely because it is an extremely complex legal matter. It aims to foster sustainable and responsible corporate behaviour in these challenging geopolitical times.

- Of course, we should welcome the noble goal that this Directive aims to achieve, which is the respect of human rights on the one hand, such as ensuring that products created by forced child labour do not circulate on the single market, but also responsible environmental behaviour on the other. However, it is also pivotal to ensure the competitiveness of the European economy and enable our entrepreneurs to compete globally. And without a doubt, these are processes that must take place simultaneously.

- That is why all unnecessary administrative barriers that are set up, especially for small and medium-sized enterprises, which are the backbone of the European economy, should be avoided.

- In addition to this concrete piece of legislation, in the European Parliament we are working in parallel on several other important files. One of them is the one on artificial intelligence, on which the vote has been postponed precisely due to additional administrative barriers imposed to entrepreneurs.

- In this way, we will not be able to encourage innovation. One gets the impression that no matter how hard we try, we do not manage to cut red tape in a sufficient manner. Furthermore, from the perspective of the Internal Market and Consumer Protection Committee, it is important to ensure a level playing field. That is why I welcome the European Parliament's initiative to include a Single Market clause in the Sustainability Due Diligence Directive, which will ensure that the single market continues to be stimulating for entrepreneurs and protective for consumers.

Fabian Fechner, MIELE, Representative EU Office Brussels

APPLiA is the trade association representing home appliance manufacturers in Europe. Its membership includes 24 Direct Members who are leading global companies in the sector, many of the brand names you will be familiar with in your own homes, including the one I represent. We also have 26 National Associations across Europe.

Our sector welcomes the Commission's proposal on Corporate Sustainability Due Diligence. We acknowledge that companies have a responsibility to consider social, environmental and human rights issues alongside their economic and financial performance.

APPLiA members have been committed for a long time to develop increasingly energy efficient and environmentally sustainable appliances. Such improvements are a proof of the already significant contributions of the sector to the EU climate and environmental targets.

At the same time, European companies are world leaders in monitoring human rights and environmental compliance in their supply chains. As Miele, for example, we have been certifying all our suppliers to the international social and labour standard SA8000 since 2008 and we are regularly monitoring and auditing all our business partners along the supply chain.

While companies based in Europe are already struggling with the extremely difficult economic conditions and the implementation of national rules on the same matter – such as the German Supply Chain Due Diligence Act - the planned EU directive - especially in the current state of the compromise negotiations in the European Parliament - entails a considerable bureaucratic burden.

In the light of current practice and experience from the sector in this field, we would like to share the following recommendations:

- Maximum Harmonisation

  Maximum harmonisation is necessary to protect the internal market and not to fragment it with different rules. Otherwise, companies operating throughout Europe would be confronted with a plethora of different regulations for their various suppliers, which would further increase bureaucracy. In addition, harmonisation creates legal certainty for companies and thus facilitates global trade. It is important that a provision is included that requires Member States not to go beyond what is foreseen in the Directive.

- Group Privilege

  With regard to groups of companies, the responsibility for due diligence needs to be defined more precisely. The current text seems to indicate that the requirements of the Directive should be set at the company level rather than at group level. Therefore, the proposal must have a group perspective. This should include companies under unified control, also in absence of a common parent company.

- Civil Liability

  Companies cannot be prosecuted for misconduct outside their direct sphere of influence and not for the behaviour (actions and omissions) of independent third parties. The envisaged civil liability should therefore be limited in scope as envisaged by the Council. Thus, a company should only be held liable for damage caused by itself and not for damage caused by business partners. In addition, there must be intent or negligence.

- Supply Chain

  APPLiA supports that companies need to identify human rights violations or environmental risks, along their supply chain. Yet, the inclusion of all downstream business relationships will be technically not feasible and difficult to monitor due to the value chain's complexity. Companies cannot control their customers' usage of their products even if they can give instructions. Therefore, the scope of application should - comparable to the German Supply Chain Due Diligence Act - be primarily limited to direct suppliers in the supply chain. Plans for a due diligence obligation of European companies for the entire value chain (upstream and downstream) fail to recognise the limited influence that European companies can exert.

APPLiA members are committed to contribute to the compliance of due diligence requirements on human rights and environmental protection, and as such we can only support the Commission proposal. But first, it is necessary to reinforce the legal certainty and reduce the administrative burden for companies.

Luc Triangle, industriAll European Trade Union, Secretary General

IndustriAll Europe and its affiliated trade union organisations commit to promote a vision of responsible business conducts, which include three intertwined components:

- Transparency
  industriAll Europe welcomes the new steps made towards mandatory corporate reporting through the newly adopted Corporate Sustainability Reporting Directive (Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting)

- Democracy
  industriAll Europe advocates for a stakeholder-oriented approach of corporate governance which secures that workers have a say in all decisions affecting them, from the shopfloor to

the boardroom, and that directors' duties include the defense of the interests of people and the planet.

- Accountability: industriAll Europe calls for mandatory due diligence!

  Building on existing international standards (UN Guiding Principles and OECD guidelines), industriAll Europe understands due diligence as: the process through which a company can identify, prevent, mitigate and cease actual and potential adverse impacts on human beings and the environment, caused by its own activities or as a result of its business relationships (e.g. subsidiaries, downstream and upstream subcontractors, suppliers), and account for how these impacts are addressed.

  In line with the positions defended by the European trade union movement, industriAll Europe calls for a European Directive on mandatory human rights (including workers' and trade union rights) and environmental obligations due diligence based on the following core components:
  - Scope: all companies whose central management is established in Europe, or which are active in the European Union, and regardless of a headquarter's country of origin, size, sector, operational context, ownership, legal forms and structure, must be covered by the Directive. The Directive would thus also apply to SMEs, though a dedicated support scheme should be developed to assist them in designing and managing their due diligence plans.
  - Covered operations: due diligence requirements should cover all companies' operations, independently of their size, including their own activities, the operations of their subsidiaries and controlled undertakings, and their business relationships, including their whole upstream and downstream supply and subcontracting chains, franchise and contract management, within and outside the EU. As a prerequisite, supply chain transparency should be included through an obligation for public disclosure about details of supply chains.

- Type of Assessed Risks

  Due diligence plans must assess risks affecting local communities, workers and their trade unions, as well as the environment, in line with internationally recognised human rights, including ILO fundamental workers' and trade union rights.

  Reference must indeed be made to high- level international standards, instead of (too often low-standard) national legal frameworks.

  Compliance with environmental norms, social rights, workers' rights (incl. freedom of association, health and safety, rights to be informed, consulted and take part in corporate decision-making), trade union rights (incl. rights to collective bargaining on wage and working conditions, rights to take industrial action), obligations regarding anti-corruption, tax fraud and money laundering, must be checked as part of the due diligence mapping exercise.

  Mapping must rely on accurate, detailed and comparable data (using internationally recognised reporting standards), and be made available to the public.

- Trade Unions' Involvement

  Workers and their representatives from the parent company and companies along its supply chain (subsidiaries, downstream/upstream subcontractors and suppliers) must be involved in all stages of the due diligence process, at both local, national, European and global levels. Cross-border social dialogue/industrial relations has a key role to play in

ensuring the effective implementation of international instruments in this domain and along supply chains.

Practically, this implies involving local, national, European and global trade union representatives and works councils in the design (risk mapping), the implementation (regular monitoring), and the reporting (alert mechanism) of due diligence plans. 'Involving' specially refers to not just being informed, but being consulted on and co-designing due diligence plans, including the right for trade unions, at the relevant level, to negotiate the due diligence process with the company.

- Sanctions and Liability

Effective, proportionate and dissuasive sanctions must be foreseen, from administrative enforcement, in the event of a breach of the due diligence duty, on the one hand (i.e. lack of mapping, assessment and prevention of risks) to liability, in the event of a breach of the remediation duty, on the other hand (i.e. lack of action to cease damages incurred, including abroad).

Sanctions should be of a financial, administrative and procedural nature (including exclusion from public procurement and public funding). Both civil and criminal liabilities must be introduced, without prejudice to joint and several liability frameworks. Monitoring will be essential, with trade union involvement, and a competent EU authority should be given this responsibility to ensure independence.

Enforcement Mechanisms and Grievance Procedure:

Early alert mechanisms must be put in place in the company, in consultation with trade union representatives. The protection of whistle-blowers against retaliation must be secured. Enforcement must also be performed by public authorities which should be entrusted to investigate potential infringements and impose sanctions. Victims and organisations representing them (including trade unions) must have a direct access to justice in their own country and in the country where the parent/controlling/contracting company is based. Interim proceedings must be foreseen to halt the violation of rights until the court decides on the case. Burden of proof (of violation of rights) must rest on the company.

(Extract from industriAll Europe position paper "Towards mandatory responsible business conduct" available online in DE EN FR.IndustriAll Europe's reaction to the European Commission's proposal for a directive on HREDD can be found online too.)

Delphine RUDELLI, CEEMET - European Tech & Industry Employers, Director General

Ceemet represents the metal, engineering and technology-based industry employers in Europe, covering sectors such as metal goods, mechanical engineering, electronics, ICT, vehicle and transport manufacturing. Member organisations represent 200,000 companies in Europe, providing over 17 million direct and 35 million indirect jobs. Ceemet is a recognised European social partner at the industrial sector level, promoting global competitiveness for European industry through consultation and social dialogue.

As the EU representative of the employers' organisations of the Metal, Engineering and Technology-based (MET) industries, Ceemet followed closely the institutional work regarding the Corporate Sustainability Due Diligence Directive and the evolution of the legislative process.

Since the last decade, it is undisputed that the EU companies are world-leading in monitoring supply chains' adherence to human rights and environmental protection. Many Ceemet members already include environmental, social, and corporate governance factors in their ongoing due diligence measures and respect international obligations. Moreover, those factors are more and more included in the business strategy of the companies.

Despite this evolution, the European Commission has now proposed the CS3D which, if adopted, will inevitably have a significant impact on the European MET companies. The European MET-based industries are deeply enshrined in the European internal market and our industry relies on efficient global supply chains and a stable market environment. The proposed Directive unfortunately introduces extensive requirements for companies' supply chains that will have the opposite effect. This Directive will have a far-reaching negative effect on the operations and supply chains of European-based companies and thereby will undermine their global competitiveness.

While the proposal contains several critical topics, Ceemet's main concerns are on the following topics:

- Scope
  The CS3D proposal will cause an overwhelming amount of new financial and administrative burden on companies as they will be obliged to carry out due diligence for their entire value chain.

  This is not workable in practice, not even for larger companies, as these companies often have over 100,000 direct suppliers and further upstream suppliers could comprise millions of micro-companies.

  Smaller companies will unfortunately already be indirectly, yet strongly, affected by the Directive and will be unable to implement these extensive requirements following this proposal. These companies will have to shift the majority of their time and resources from their core corporate activities to carrying out these due diligence requirements. It is therefore of key importance that the Directive will only apply to large companies, ie. companies which have at least more than 1000 employees.

- Value Chain
  The requirements to carry out due diligence for the entire value chain is quite simply unworkable. It is unreasonable to require companies to control their value chain as it is not in the hands of companies to control and take legal responsibility for their customers' action. The Directive must ensure that the obligation to carry out due diligence is limited only to the first tier of the companies' supply chain, i.e. with which companies have a direct contractual supplier relationship.

  It is moreover of crucial importance that the obligation to carry out due diligence is limited to the tier-1 suppliers located outside of the EU as a targeted scheme is risk-based and therefore more efficient and effective. There are already very high standards in the EU as regards environment and human rights and also effective systems of control and enforcement in place in the EU Member States. Therefore, it has little to no added value for companies within the EU to carry out due diligence on each other and it will moreover create an enormous amount of administrative burden on them.

- Access to Information
  As it will be extremely difficult to nearly impossible for companies to comply with the very complex and extensive requirements following the proposed Directive, the EU and the Member States need to make efforts to support companies, and notably SMEs, as much as possible by taking measures such as proposing clear and comprehensive guidelines, providing administrative and financial assistance etc.

- Fragmentation
  The proposed Directive unfortunately takes the approach of minimum harmonisation. It leaves a lot of leeway for Member States to impose different requirements that those proposed in the Directive and leaves too much room for Member States to differently interpret the text of the Directive. The proposal therefore entails a major risk of fragmentation of legislation within the EU.

  We cannot end up with companies having to comply with 27 different national due diligence legislations. This is the case for both multinational companies operating in multiple jurisdictions as well as Small and Medium Sized companies.

  Even the strictly national SMEs have business partners all over the European Union and therefore will have to follow all the different national due diligence laws, depending on where their business partner and their supply chain go. Companies that act on the European Single Market need common rules to preserve the competitiveness of European business.

The abovementioned considerations are essential to ensure EU competitiveness and economical sustainability. Ceemet will publish its Chief Economists Report in May 2023 and Ceemet members can observe already the fragile EU competitiveness in a global world. The new Corporate Due Diligence Directive will only contribute to decelerating the EU competitiveness, its innovation capacity and slowing down its productivity.

Ceemet agrees that companies have a responsibility to take social, environmental and human right issues into account in addition to their economic and financial performance. We therefore appreciate the opportunity to participate in the roundtable organised by the European Forum for Manufacturing and discuss a possible way forward with all the stakeholders so that the final agreement maintains the aim of the Directive, while making it workable in practice for EU based companies, and especially for the SMEs.

Ilan de BASSO MEP, (S&D, Sweden), Employment & Social Affairs Committee

A call for a strong Corporate Sustainability Due Diligence Directive (CS3D Directive)

I have worked closely together with the S&D Shadow Rapporteur, Evelyn Regner, in the EMPL committee to strengthen worker's rights and fair competition in the CS3D. I have had the following demands:

- All Stakeholders on Board All relevant stakeholders shall be involved in the process. Trade unions and worker's representatives are not present in the CS3D proposal from the Commission. Therefore, our

group have put forward amendments to make sure the full involvement of trade union and worker's representatives, as well as social partners.

- Stronger Sanctions

  The sanctions provided for shall be effective, proportionate and dissuasive. The Commission proposal provides for a too broad discretion for Member States to decide on the sanctions, which might lead to advantages to companies in countries with the lowest levels of sanctions, thus creating an unlevel playing field between Member States.

- The Scope

  The current proposal by the Commission is too broad and will only apply to companies with more than 500 employees or companies with more than 250 employees in high-risk sectors.

  There should however be no limit on the amount of employees covered by the Directive, as many companies as possible should comply and act accordingly regardless of size. Small and medium sized enterprises constitute a large portion of companies and employees all across Europe. In 2019, 99.9% of all companies in Sweden was comprised of small and medium enterprises. In regards to this, I have proposed a lower limit. More companies must be included and comply with the rules. In the EMPL committee, we widened the scope so more than 250 employees and companies with less than 50 employees in high-risk sectors should also be included.

- Compensation

  The damage a company make cannot be dependent on the size of the company. That would mean a small company that makes massive damage would not have to pay as much as a bigger company. It is important that companies that abuse the climate have the same consequences, regardless of size.

Raphaëlle Hennekinne, DIGITALEUROPE, Director for Sustainability Policy

DIGITALEUROPE is supportive of a common approach and level playing field at EU level on mandatory human rights and environmental due diligence. Companies within the digital technology sector recognise their significant responsibility regarding sustainable corporate behaviour, and thus welcome the European Commission's efforts to foster a resilient economy based on sound corporate governance and sustainable supply chains. The aim should be to introduce an effective legal framework which is practical for companies to comply with and for national authorities to enforce. It would then support the political and strategic ambition of the Union to enact a global level playing field and showcase Europe as a global leader in responsible business conduct which DIGITALEUROPE endorses.

- Decouple the Due Diligence Duty from Liability

  While we support the intention to promote human rights and the safety of workers as well as certain environmental impacts, it is important not to confuse the roles of companies and states. The division of responsibilities between the States responsibility to protect human

rights and company's responsibility to respect human rights must be embedded into any legislative initiative**.**

Any due diligence duty must be based on existing international frameworks specifically the UN Guiding Principles for Business and Human Rights (UNGPs), OECD Guidelines for Multinational (OECD MNE Guidelines) and the ILO Tripartite Declaration.

- Better Address Internal Market Fragmentation

  By allowing Member States (MS) discretion on the implementation (MS can explicitly maintain or adopt legislation which could go further than the Draft Directive), the draft Directive risks divergence and further fragmentation of the Single Market. A set of 27 different requirements for the CS3D would not only be costly and burdensome for companies of all sizes. More importantly, it would also risk undermining the goals of the legislation, at the same time jeopardising the EU's ambition to set a global standard on responsible business conduct.

  In similar EU efforts like the Corporate Sustainability Reporting Directive (CSRD), it was observed that diverging implementation could create issues, which prompted its revision to include measures to harmonise reporting via common standards such as EFRAG. The text should clearly state and identify certain provisions of the Directive where Member States would not be able to introduce legislation that goes beyond what has been agreed at European level (Scope (Art.2), Definitions (Art.3), Due diligence process (Arts. 4-8), Communication (Art. 11), Guidelines (Art.13), Sanctions (Art. 20) and Civil liability (Art. 22).)

- Adopt a Risk-based Approach

  DIGITALEUROPE welcomes the fact that the draft Directive cites proven international standards such as the UNGPs and OECD Guidelines that have been adhered to by states, business, and civil society in addressing risks across supply chains over the more than a decade since their introduction. However, while the Directive cites these standards, it does not fully align with these standards that are in practice today and have proven effective.

  Legislation which is not fully aligned with these international frameworks can work to undermine their effectiveness and even lower the standards many companies already practice.

  Concrete improvements and actual risk prevention regarding human rights and environmental within supply chains call for pragmatic risk-based approaches rather than administrative checklists / compliance / reporting exercises. Prioritization based on salient risks is a proven concept in conducting due diligence and helping business address the most salient risks to people and planet. There should be as little deviation as possible. A risk-based approach needs to be built into the proposed directive that is in line with the international standards (UNGPs and OECD MNE Guidelines).

- Limit Civil Liability to Direct Business Relationships

  Civil liability should be tied to something more than a mere failure to comply with Article 7 and 8. It should be some level of gross negligence or wilful misconduct or wilful omission that results in liability. For example, the OECD Guidelines have a clear distinction between harms "caused or contributed to" and "directly linked to". Moreover the "failed to comply" standard in Article 22 leaves open the possibility that mere negligence in failing to identify an adverse impact would trigger liability. Given the challenges in the current draft Directive

not limiting the scope of due diligence requirements (i.e., no risk-based discretion), along with the full "value chain" approach (which could result in large entities having several thousand suppliers in scope), it would be preferable and more implementable to apply a heightened negligence standard (e.g., gross negligence, or "knowing" violation - party knew or should have known of the failure).

- Recognise Industry Schemes

  Such as the Responsible Business Alliance (RBA) which help companies to comply with and go beyond legal obligations. DIGITALEUROPE welcomes the acknowledgement of industry schemes in the legal text of the draft proposal. However, the legislation needs to go a step further and recognise such schemes.

  We recommend building in a recognition tool to the legal framework like the EU responsible ("conflict") minerals regulation whereby industry schemes apply for formal recognition by the EU. After the applications have been accepted, a risk assessment is undertaken based on OECD methodology and formal acceptance is in the form of an Implementing Act.

  It should be noted that industry schemes should not be used as smoke screen by companies not to undertake due diligence.

- Oversight of Company Boards
  We consider that oversight company boards should be included in the due diligence obligations as it is part of due diligence strategy.

- 13. Article 15 "Environmental due diligence"
  Article 15 is out of place in the legal body of the Proposal. It relates more to an environmental impact measure which is not really adapted to a due diligence framework.

  Article 15 seems to be inconsistent with the stated objectives of the Proposal. While our industry agrees with the importance of the Paris Agreement and we are working at great lengths to put it into practice, these are global objectives and cannot be imposed on individual companies in the form of legal obligations. A suggestion could be that encouraging companies to respect the Paris Agreement could be included in the preamble instead.

In conclusion, the CS3D will not achieve its impact if it does not create a common ambition between EU Member States and if it diverges from the accepted international standards of the UNGPs and OECD Guidelines.

Oliver MOULLIN, AFME - Association for Financial Markets in Europe, Managing Director, Sustainable Finance & General Counsel

AFME represents a broad array of European and global participants in the wholesale financial markets. Its members comprise pan-EU and global banks as well as key regional banks, brokers, law firms, investors and other financial market participants. We advocate stable, competitive, sustainable European financial markets that support economic growth and benefit society.

AFME supports the policy objectives of enhancing due diligence on human rights and environmental impacts proposed in the EU Corporate Sustainability Due Diligence Directive ("CS3DD" or the "Directive"). Our key priority is that the regulation provides a proportionate, risk-based and workable approach and provides a clear, practical and legally certain framework.

It is also important to ensure that the Directive does not create excessive burdens that adversely impact the competitiveness of companies operating in the EU. We have gathered our members' concerns and recommendations in our feedback to the European Commission's proposal and in a paper on the most effective approach for financial institutions. Below, we have summarised our views on selected key issues.

Scope of the value chain

AFME supports the inclusion of financial institutions' upstream supply chain within the scope of the due diligence obligation alongside other sectors, subject to our broader recommendations including to clarify the due diligence and civil liability framework. While this will give rise to implementation challenges, we support the importance of addressing adverse impacts on human rights and the environment in companies' upstream supply chains. We also support a consistent application of the requirements throughout the EU to ensure a level playing field.

All companies (including financial institutions) will face significant challenges with applying the proposed due diligence obligations to their downstream value chains. We have significant concerns with proposals to extend the scope of downstream financial services that would be included in the scope of the Directive.

While the European Parliament position excludes the "use" of products and services for all other sectors, the activities of companies receiving financial services are proposed to be included. This would impact both financial institutions and companies receiving financial services.

Any inclusion of downstream business relationships should be focused on the provision of financing where the inclusion of the services within the legislation is expected to have the greatest impact on safeguarding human rights and the environment. It follows that, for financial institutions, due diligence obligations on their downstream value chain should not cover a scope going beyond the activities of large corporate clients receiving loan or credit services and it should be clear in any event that it does not extend to other services including (but not limited to) trading and investment activities, derivatives, custody, clearing or payment services. The application to these types of financial services has not been adequately considered.

An overly broad approach which is not risk-based nor focused on where financial institutions are able to best support the policy objectives risks creating unworkable, disproportionate and ineffective legislation. It could also adversely impact companies' access to financial services, increase costs and potentially disrupt markets where it is not possible to comply with the requirements.

Challenges arising from extraterritorial scope

It is important to ensure that requirements take a proportionate, risk-based and workable approach for EU companies with international businesses and non-EU companies with EU businesses. The Commission's proposed scope would cover not only large international EU companies (including financial institutions) at group level, but also non-EU companies with cross-border business and/or branches in the EU, requiring both EU and non-EU companies to comply with the EU CS3D requirements throughout their global businesses.

These global businesses are subject to different jurisdictional requirements and the CS3D proposal would cover business with no nexus to the EU. Value chains for the provision of the services would include those entirely contained outside of EU borders, such as the provision of a

loan by a non-EU bank to a non-EU company or a Chinese company selling goods or services to a customer in China. Such extraterritorial application raises concerns around proportionality and is also likely to give rise to enforcement challenges.

To address this while maintaining a level playing field between companies headquartered in the EU and those headquartered outside the EU, we propose that the due diligence requirements should apply only to the value chains of products sold in the EU and services provided in the EU.

When competing for financing business in non-EU regions (particularly emerging markets), EU companies and non-EU headquartered companies with an EU footprint above the revenue threshold will be subject to requirements that would be likely to render them uncompetitive compared with large regional companies not captured by the same requirements. If measures are not coordinated internationally, companies operating in the EU could be rendered less competitive outside the EU against local/regional competitors which are not subject to CS3DD obligations, resulting in market fragmentation and an un-level playing field for firms active in the EU.

Civil liability

The above challenges are compounded by the implications of the strict civil liability regime, according to which financial institutions may be held liable for adverse environmental or social impacts caused by corporate clients or trading counterparties around the world, and the Parliament's proposal according to which some Member States may decide to reverse the burden of proof onto defendants in case of alleged breaches. If firms will be required to assess the risk of potential liability for the actions of the companies they finance, trading counterparties and their subsidiaries, they are likely to avoid dealing with those where the risk is harder to assess or harder to manage, creating additional barriers to financing.

Transition plans

Finally, we support initiatives to support the development of transition plans. However, it is important to ensure that the proposals under Article 15 are compatible with other legal and regulatory requirements, both in the EU and internationally, for example in the context of the European Sustainability Reporting Standards under the CSRD and transition plan requirements in other jurisdictions.

Conclusion

In the context of the upcoming trilogues, it is important to ensure a more risk-based and proportionate approach to the value chain for financial institutions. This is essential to provide a workable due diligence obligation and to avoid disproportionate impacts for companies as users of financial services.

CONCLUDING REMARKS

Antony Fell, EUROPEAN FORUM FOR MANUFACTURING, Secretary General

My thanks to the European Commission, MEPs and European manufacturers for this very useful exchange of views on the draft Corporate Sustainability Due Diligence Directive.

I now formally close this EFM meeting.

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