FRANCE INVEST
Investors for growth

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**France Invest's comments on the European Commission's Proposal for a Directive on Corporate Sustainability Due Diligence**

France Invest welcomes the Commission's proposal for a Directive on Corporate Sustainability Due Diligence.

As AIFMs managing AIFs, our members call for clarification regarding the application of the thresholds set out in the proposed Directive. Further, our members may take up the role of directors in the companies they support. In this respect, we are highly concerned by a potential increase in the liability of directors. Also, we do not see the need for linking their variable remuneration to climate change objectives.

Our members are also concerned by some of the rules included in the proposed Directive aimed at the companies they invest in (mostly SMEs). For instance, the list of "high-risk" sectors should be specified. In our opinion, the obligation to identify and address human rights and environmental adverse impacts should be limited to the most prominent and actual impacts. In addition, obligations should be limited to direct relationships in the upstream part of the value chain. Last, the scope of persons who may submit complaints should be limited to persons who are concerned about severe adverse human rights or environmental impacts with respect to their own operations and to trade unions and organisations which have legitimate concerns.

From a more general standpoint, we would like to kindly highlight the need for the new rules to articulate smoothly with other existing EU pieces of legislation.

Finally, we would like to mention that, as a member of Invest Europe, France Invest contributed to the development of Invest Europe's comments, which we share and support.

## I. General comments

- **France Invest welcomes the introduction of an EU framework for corporate sustainability due diligence**

France Invest welcomes the Commission's proposal for a Directive on Corporate Sustainability Due Diligence and the development of an EU legal framework for corporate due diligence to address adverse impacts on human rights and environmental issues.

**Corporate sustainability is relevant for our members at two different levels:**

- **as AIFMs managing AIFs and, potentially, as directors of the companies they support;**

- **at the level of the companies they support (SMEs)**.

**We support the Commission's aim to improve corporate sustainability and legal certainty, avoid fragmentation of the Single market and ensure a level playing field for market players**. This will also contribute to the quality of EU companies, their reputation and brand image, as well as to the attractiveness of hiring processes, better control of the production chain, the strengthening of commercial relations with subcontractors and suppliers. In addition, it will help to meet the expectations of employees, customers and shareholders.

This being said, **the introduction of an EU framework for corporate sustainability due diligence should not increase administrative costs and procedural burden, penalise smaller companies with fewer resources, or place responsibility on EU companies for damages that they cannot control**.

- **France Invest's members have been committed to sustainability issues for long**

French venture capital and private equity players are strongly committed to promoting Environmental, Social and Governance (ESG) factors[1] and are well aware of the importance of taking such considerations onboard.

Our members have a fiduciary duty and act in the best interest of investors and strive to meet their demands in terms of ESG considerations. In order to improve their ESG dialogue with investors, France Invest published a number of recommendations to harmonize ESG questionnaires according to a number of principles established by UN PRI and TCFD, among others[2]. Thus, a common repository (definitions and due diligence questionnaire) was adopted and made available to both parties.

France Invest's ESG Committee was launched in 2009. It was renamed "Sustainability" in January 2022 and now counts around 40 members. In its "First Approaches to ESG reporting and due diligence" guide, published in September 2014, the Association issued initial recommendations on integrating ESG issues into the investment process. Today, an increasing number of its members are integrating ESG issues into their investment decisions and business practices and their support for companies.

They have taken numerous initiatives in this respect, sometimes ahead of international organisations. For example, the Climate Initiative (iC20) was launched by 5 French private equity funds at the COP21 in 2015, under the banner "2020 Carbon Initiative", which turned into the International Climate Initiative when it was adopted by the PRI in 2018, becoming an international reference[3].

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[1] https://www.franceinvest.eu/en/news-france-invest/act-for-sustainable-growth
[2] https://www.franceinvest.eu/wp-content/uploads/Rapports-guides/ESG/France-Invest-Commission-ESG-GT5_Projet-de-recommandation-18-octobre-2019.pdf
[3] https://www.franceinvest.eu/wp-content/uploads/Rapports-guides/Act-for-Sustainable-Development-2010-2030.pdf

**In France, self-regulation plays a central role with regards ESG considerations in the venture capital and private equity sector**:

- Upon joining France Invest, its members have to sign the Charter of Commitments for Investors in Growth, which sets out 16 commitments that address economic, social and human, environmental and good governance issues.
- They also have to comply with France Invest's Code of Ethics.
- Progress has recently been made on sharing the value created between shareholders and employees (please refer to France Invest's guide on "Sharing value creation between shareholders and employees") and on promoting gender parity in positions of responsibility (please refer to France Invest's Charter on Gender Equality), both in asset management companies and in the companies they support.
- The Association thus promotes the adoption of governance best practice among its members and the companies they support.

**French venture capital and private equity players take ESG considerations into account at each stage of the investment's process**: from the purchase's phase of the portfolio company, during the holding period and, finally, during the divestment phase of the undertaking. One of the specificities of venture capital and private equity funds consists in supporting portfolio companies throughout a holding period, which is on average 5 or even 7 years. It is during this holding period that ESG actions can be carried out and monitored.

**Most companies supported by our members design corporate governance structures that hold management to account and incentivise long term value creation**. In companies backed by private investors, governance aims to establish a trust-based relationship between shareholders and company managers. Indeed, value creation is conditional upon ensuring equitable direct relationships between shareholders and managers. Shareholder value is an inherently long-term concept as, per definition, shareholders are long term investors.

- **We welcome a phased implementation of the new rules and a full application of the proportionality principle**

The proposed Directive will add to the requirements weighing both on our members and the companies they invest in.

In this context, we appreciate the additional time granted to smaller market players to comply with the new rules, through a phased implementation. Indeed, in a context of (post) health crisis, companies - in particular small companies - may be fragile and should not be overburden by additional obligations. They should be given some time to recover before they can adapt to and comply with the new requirements.

In addition, we support a full application of the proportionality principle, for instance through the introduction of thresholds or lighter requirements for smaller companies. In any case, **a duty of**

**care in terms of sustainability must remain a voluntary act for SMEs** so as not to penalize them given their lesser resources.

It should be noted that, even if SMEs are not directly in the scope of the Directive, they will be indirectly impacted by the new rules: SMEs included in a value chain will be mechanically affected and thus have to report at the request of their partners. In this context, we call for supporting measures for SMEs to be more clearly defined. Most importantly, we would like to make clear that lighter requirements also apply to SMEs backed by private equity and venture capital funds.

- **We call for a smooth articulation with existing pieces of legislation**

We understand that, with the proposed Directive, the Commission aims at streamlining the regulatory framework for due diligence applicable in the EU and we fully support this objective. It should be noted that our members already comply with a number of rules in this respect, may they be legislative or not. We would like to insist on the need for a consistent articulation of these different rules.

In relation to environment and climate, specific legislation has already been adopted at EU level and will be reinforced by the measures set out in the EU Green Deal. Examples of existing and future legislation include the European sustainable finance package - containing in particular the Taxonomy Regulation, the Sustainable Finance Disclosure Regulation and the Corporate Sustainability Reporting Directive.

More specifically, it should be underlined that **our members are regulated under the AIFMD, which includes provisions on remunerations and investors' ESG preferences**.

Further, we understand that the proposed Directive will not replace existing mechanisms available at national level. We would like to recall here the main pieces of legislation currently in place in France:

- law 2017-399 of 27 March 2017 "loi relative au devoir de vigilance" sets out horizontal due diligence rules for large companies[4];
- the PACTE law, which was introduced in 2019, requires that all French companies are managed in line with their corporate interest, while taking into account social and environmental issues related to their activities. French companies, on a voluntary basis, may introduce in their by-laws a statement on their purpose ("raison d'être") and describe the values they adopt and for which they will allocate resources. Their "raison d'être" is the expression of what is essential to fulfil their corporate purpose and may include public-interest values. French companies may also register as so-called mission businesses ("sociétés de mission");
- law 2012-104 of 22 August 2021 "loi Climat et Resilience" introduced new offences and sanctions in relation to the environment and considers ecocide as an aggravating factor.

[4] The French Parliament published an evaluation report on the implementation of the existing French corporate duty of vigilance law on 24 February 2022 (one day after the release of the Commission's proposed Directive).

Furthermore, as described above, existing practices and self-regulation already contribute to taking ESG interests into account.

- **Legal uncertainty should be reduced**

In its current form, the Commission's proposal is extensive in terms of scope (for instance, SMEs will be indirectly impacted through a trickledown effect), obligations (relating to potential impacts and covering activities upstream and downstream in the value chain) and responsibilities (in particular, the scope of persons who may submit complaints is broad and the civil liability of administrators is extremely large).

This far-reaching approach creates excessive legal insecurity for market players. Cause-effect relationships should be clearly established in order to ensure more certainty.

## II. Detailed comments

- **Article 1: due diligence obligations regarding human rights and environmental adverse impacts**

The proposed Directive addresses negative impacts on human rights (child labour, forced labour, etc.) and environmental damage (deforestation, pollution, toxic exposure, etc.). We would like to underline that identifying and addressing actual and potential human rights and environmental adverse impacts should be limited to <u>the most prominent</u> and <u>actual</u> impacts. Indeed, including potential impacts would create an excessive legal uncertainty for market participants.

We therefore suggest clarifying paragraph 1 as follows:

> *This Directive lays down rules:*
> *(a) On obligations for companies regarding actual* ***~~and potential~~ severe*** *human rights adverse impacts and environmental adverse impacts, with respect to their own operations, the operations of their subsidiaries, and the value chain operations carried out by entities with whim the company has an established business relationship; and*
> *(b) On liability for violations of the obligations mentioned above.*

Furthermore, an exemption should be introduced for financial holdings which invest in companies, as the latter would be caught in the large definition of "subsidiaries". In the absence of such an exemption, financial holdings would have to identify, prevent and terminate adverse impacts in a very large number of companies.

- **Article 2: scope**

The scope of the proposed Directive is quite broad and defined by the following thresholds:

- More than 500 employees and turnover over 150 million euros; or

- More than 250 employees and turnover of over 40 million euros with at least 50% generated in a “high-risk” sector.

As explained previously, we welcome that SMEs are kept out of the scope of the proposed Directive. However, they will be indirectly impacted by the new rules through a trickledown effect: **SMEs included in a value chain will be mechanically affected and compelled to report at the request of their partners**.

It is of utmost importance that the voluntary nature of non-financial reporting is preserved through proportionate and simplified standards and the actions in terms of sustainability developed by SMEs are promoted in an appropriate manner.

Furthermore, smaller companies operating in “high-risk” sectors fall in the scope of the proposed Directive. The list of such sectors is not specific enough and should be specified by using NACE codes or customs nomenclature, for example.

- **Article 3: Definitions**

- **Article 3 (a): company**

We understand that AIFM and managers of EuVECAs, EuSEFs and ELTIFs are in the scope of the proposed Directive, as well as AIFs. However, it should be noted that AIFs do not have any employees and do not generate any turnover. Therefore, **it would be useful to clarify how the thresholds set out in article 3 will apply to AIFs.**

- **Article 3 (f): established business relationship**

It should be noted that the definition of established business relationship implies legal uncertainty for partner companies, as it is assessed at the discretion of the company in the scope of the proposed Directive**.**

**In any case, we believe that the duty of due diligence should focus on the activities on which companies have a reasonable level of control** i.e. the company’s own operations, the activities of the companies it controls and of its first-tier contractors and suppliers.

We therefore propose rewording article 3 (f) as follows:

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| *“‘established business relationship’ means a **direct** 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”;* |

- **Article 3 (g): value chain**

We believe that it is not appropriate to cover the whole value chain (upstream and downstream), as this would disproportionately expose companies to liability, for acts over which they have no control, including for how their products are used. It should be noted that companies in the distribution chain are not necessarily contractually tied with the company subject to the obligation of due diligence. Companies should not be held responsible for decisions and behaviour of third parties (e.g. suppliers and/or subcontractors) along the whole value chain. In other words, **we suggest restricting due diligence obligations to direct relationships in the upstream part of the value chain**.

We therefore propose rewording article 3 (g) as follows:

> *"'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* ***downstream activities*** *~~of upstream and downstream~~* ***with first tier*** *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* ***direct*** *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".*

More specifically, with respect to AIFMs and AIFs, we very much welcome:
- the limitation of their value chain to activities of the clients receiving their services, and
- the exclusion from their value chain of SMEs receiving their services.

- **Article 3 (n): stakeholders**

In our view, the proposed definition of stakeholders is too broad. Certain stakeholders' interests will necessarily be contradictory with others and balancing the interests of all stakeholders may prove practically challenging, if not impossible. In particular, we find it very worrying that it is unclear whether stakeholders' interests would be weighted equally with those of shareholders and, if so, how directors are expected to resolve conflicts between various stakeholders and shareholder constituencies.

Last, considering "stakeholders whose rights or interests could be affected by the products, services and operations of the company, its subsidiaries and its business relationships" places a wide and heavy burden on companies and is hardly possible in practice.

We suggest rewording this provision as follows:

> *"stakeholders whose rights or interests ~~could be~~* ***are severely*** *affected by the products, services and operations of the company, its subsidiaries and its business relationships"*

We would like to draw the attention of the Commission that the proposed mechanisms are mainly aimed at large groups. Smaller companies are often in contact with various stakeholders on a local and informal basis rather than through actual contracts.

- **Article 3 (o): directors**

The proposed definition is too broad and should be clarified, as it could result in the liability of directors falling in the wrong place. As explained previously, one of the cornerstones of our industry is the active investment, where venture capital and private equity managers provide not only capital to businesses, but also take up an active role as directors of the boards of these companies, in order to provide active and long-term hands-on support such as business expertise, knowledge and network, helping the investee businesses thrive, grow and expand.

We therefore suggest amending the definition of directors to be limited to executive directors, to better reflect who has the actual day-to-day responsibility of managing the company:

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

- **Article 6: obligations for companies to identify adverse impacts**

As explained previously, we would like to underline that identifying and addressing actual and potential human rights and environmental adverse impacts should be limited to the most prominent and actual impacts. For instance, we welcome that Article 6 paragraph 2 sets out that smaller companies in "high-risk" sectors should only identify "severe" adverse impacts.

More specifically, regarding financial entities, we welcome the provision in Article 6 paragraph 2 which sets out that financial entities should identify adverse impacts "only before" providing their services, and not periodically as required for other entities.

- **Articles 7 and 8: obligations for companies regarding preventing and terminating adverse impacts**

In our opinion, the obligation to address adverse impacts that should have been identified is difficult to implement in practice. Indeed, it would be difficult for a company to take measure to prevent or mitigate impacts that they have not identified in the first place.

In the same way, the obligation to develop a prevention plan in consultation with affected stakeholders may prove difficult to implement, especially when stakeholders are many and have conflicting interests.

We believe that obliging business partners to respect the company's code of conduct places SMEs in a very uncertain situation of subordination. Moreover, requiring large companies to provide financial support to SMEs risks directing the former towards larger partners for whom they will have no costs to incur.

More specifically, regarding financial entities, we welcome the provisions in article 7 paragraph 6 and article 8 paragraph 7 exempting financial companies from the obligation to terminate the financial service contract when such termination may cause substantial prejudice to the entity receiving the relevant service.

- **Article 9: complaints procedure**

From a general standpoint, it should be ensured that the provisions of the proposed Directive articulate smoothly with the obligations of Whistleblowing Directive 2019/1937. Indeed, some of these provisions are redundant and may be confusing. The wording should be brought in line, for instance by referring to “reports” rather than “complaints” throughout the text of the proposed Directive.

In our opinion, the scope of persons who may submit complaints should be limited to persons who are concerned about **severe** adverse human rights or environmental impacts with respect to their own operations and to trade unions and organisations which have **legitimate concerns**. This would avoid unnecessary bottlenecks arising from the treatment of unfounded complaints in compliance with the relevant procedure in place.

We therefore suggest rewording paragraph 2 as follows:

> *Member States shall ensure that the complaints may be submitted by:*
> *(a) persons who are affected or have reasonable grounds to believe that they ~~might~~ **may** be affected by ~~an~~ **a severe** adverse impact,*
> *(b) trade unions and other workers’ representatives representing individuals working in the value chain concerned **which have legitimate concerns**,*
> *(c) civil society organisations active in the areas related to the value chain concerned **which have legitimate concerns**.*

Furthermore, we believe that companies should only be subject to the obligation to have a procedure in place with regards legitimate concerns and well-founded complaints.

For this reason, we propose clarifying paragraph 3 as follows:

*Member States shall ensure that the companies establish a procedure for dealing with complaints referred to in paragraph 1**,** ~~including a procedure when the company considers the complaint to be unfounded,~~ and inform the relevant workers and trade unions of those procedures. Member States shall ensure that where ~~the complaint~~ **a legitimate concern** is well-founded, the adverse impact that is the subject matter of the complaint is deemed to be identified within the meaning of Article 6.*

- **Article 11: Communication by smaller companies**

The proposed Article 11 would place an annual disclosure obligation on some companies which are exempt from the obligations of Directive 20131/34/UE. In our opinion, SMEs, which do not all have a website in English, should benefit from simplified reporting obligations and appropriate guidelines to help them comply with these requirements.

*"Member States shall ensure that companies that are not subject to reporting requirements under Articles 19a and 29a of Directive 2013/34/EU report on the matters covered by this Directive by publishing on their website an annual statement in a language customary in the sphere of international business. The statement shall be published by 30 April each year, covering the previous calendar year.*

*The Commission shall adopt delegated acts in accordance with Article 28 concerning the content and criteria for such reporting under paragraph 1, specifying information on the description of due diligence, potential and actual adverse impacts and actions taken on those.*

***The Commission shall develop simplified reporting obligations applicable to companies referred to in Article 2(1), point (b), and Article 2(2), point (b) of this Directive, and, no later than one year after the entry into force of this Directive, provide guidelines to support them in fulfilling their obligations.**"*

- **Articles 12, 13 and 14: development of model clauses, guidelines and accompanying measures**

We welcome the development of model clauses as long as they remain voluntary. It should also be ensured that accompanying measures are practical and efficient. In addition, any financial support from Member States should not generate an unlevel playing field for companies in the EU.

It would be useful to have these clauses, guidelines and accompanying measures developed and in place well ahead of the implementation date of the Directive. In particular, we call for the model clauses to be developed no later than one year after the entry into force of the proposed Directive.

*"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 **no later than one year after the entry into force of this Directive.**"*

- **Article 15: directors' variable remuneration**

From a general standpoint, we believe that it is important to strike the right balance between the aim to better regulate remuneration mechanisms and the need to allow companies define by themselves the most appropriate remuneration structures.

We do not see the need for the provision set out in Article 15(3) linking the variable remuneration of directors to the contribution to climate change objectives. We believe that long-term value creation should not be seen as a balancing of all different kinds of interests, but rather taking into account all relevant factors, including externalities such as climate change.

The venture capital and private equity model involves the alignment of interest and long-term focus: our members are long term investors and therefore take long term interest into account. Venture capital and private equity backed companies design corporate governance structures that hold directors to account and incentivise long-term value creation. This will naturally also be reflected in the remuneration policies. Various externalities are already taken into account by the directors when considering the company's business strategy, long-term interests and sustainability.

In addition, existing EU legislation, in particular the AIFMD, already contains provisions regarding remuneration structures. Further, soft law and self-regulation also prove efficient to contribute to establish balanced remuneration systems. In this context, we believe that adding another provision on remuneration, and in particular in the case of the provision at hand which appears to be very vague and unclear, would be unnecessary and lead to more open questions than actual solutions to address important issues such as climate change.

- **Article 18: powers of supervisory authorities**

We would like to underline that, cumulatively, remedy actions (investments, suspension or termination of the business relationship…) and sanctions (pecuniary compensations, absence of public support…) may place a heavy weight on companies.

We therefore suggest adding the below provision to article 18:

> ***When exercising their powers, supervisory authorities shall take due account of the cumulative effects of the different measures or sanctions imposed on companies. Any decision shall be reasonable, non-discriminatory and proportionate.".***

- **Article 20: sanctions**

We understand that the Commission aims at introducing a harmonised framework at EU level. However, sanctions are laid down by the different Member States. We are concerned that market players are not placed on a level playing field depending on the tools available to the supervisory authorities in their jurisdiction. In other words, this situation may lead to regulatory arbitrage.

We suggest rewording paragraph 1 as follows:

> *"~~Member States~~* ***The Commission*** *shall lay down ~~the rules~~* ***a list of*** *~~on~~ sanctions applicable to infringements of ~~national provisions adopted pursuant to~~ this Directive* ***no later than one year after its entry into force. Member States****~~, and~~ shall take* ***adequate sanctions from the list and*** *all measures necessary to ensure that they are implemented. The sanctions provided for shall be effective, proportionate and dissuasive".*

- **Article 22: civil liability**

We support the approach of the Commission to recognize only the direct civil liability of companies and its effort to integrate in the assessment of civil liability the measures that have been put in place by companies to meet the required obligations. This will allow for a pragmatic and effective study of the measures taken within the company.

We would however like to warn the Commission against any potential unintended consequences of such liability regime on SMEs. Indeed, we are concerned that larger market players may transfer some of their responsibility or possible sanctions onto smaller players in their value chain.

We are concerned that companies may be liable to a disproportionate accumulation of possible sanctions, as the regime established by the proposed Directive is without prejudice to EU and national rules on civil liability concerning situations which are not covered by the Directive and/or stricter liability than that provided for in the Directive.

- **Article 25: duty of care**

A key concern of our members in relation to the Commission's proposal is the risks of increased liabilities imposed on directors. One of the cornerstones of our industry is the active investment, where venture capital and private equity managers provide not only capital to businesses, but also take up an active role as directors of the boards of these companies, in order to provide active and long-term hands-on support such as business expertise, knowledge and network, helping the investee businesses thrive, grow and expand. As long-term investors, the long-term value creation for the business is evidently the key priority for our members when they act as directors of boards of their portfolio companies.

In this value creation, various stakeholders and other externalities are already today being taken into account, as they have an important impact on the performance of the company. Having to take into account a wide range of all different kinds of externalities, stakeholders and civil society organisations with no clear prioritization, and with the risk of being held personally accountable, will undoubtedly dilute and hamper the directors' responsibilities for creating real, long-term value for the company. We find it sensible that companies can be held liable for their own adverse impacts in relation to the environment and human rights. However, we would like to underline the importance of the liability laying with the company itself and not the directors personally. It should be clarified to whom a director can be liable, under which conditions, under which jurisdiction.

Most directors' duties are already enshrined in existing European Regulations – e.g. act in good faith in the best interests of the company, exercise skill and care and avoid conflicting interests. Directors already take externalities into account. The obligation to act in the best interests of the company is standing law, and is already what directors currently do, and the proposed interference in corporate governance models would not achieve the goal of encouraging directors to take into account sustainability matters.

**The proposed Directive should not lead to personal liability for directors and managers with respect to the impacts of the company on its stakeholders. Directors owe fiduciary duties to the company itself and not to third parties.** Placing an obligation on directors to pursue both the company's interest and diverse external stakeholders' interests, which may be contradictory, would generate conflicting situations. It would not be neither practicable nor acceptable for directors to face personal liability. Likewise, it would not be economically realistic for directors to bear liability for corporate-scale damages. Any liabilities for failings in relation to a company's activities should therefore be borne by the company itself (i.e. its Board of Directors) and not its individual directors.

We therefore suggest placing the duty of care on the board of Directors rather than on the individual directors and clarify article 25 as follows:

> *Article 25: **Boards of** Directors' duty of care*
>
> 1. *Member States shall ensure that, when fulfilling their duty to act in the best interest of the company, **boards of** directors of companies referred to in Article 2(1) 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.*
>
> 2. *Member States shall ensure that their laws, regulations and administrative provisions providing for a breach of board of directors' duties apply also to the provisions of this Article.*

- **Article 26: Setting up and overseeing due diligence**

We believe that setting up and overseeing due diligence is rather a duty of the company as a whole, and even though directors can play a role in this, the ultimate responsibility should lay with the company rather than the individual director. It is key to clarify that this should not lead to external parties having the right to sue directors personally as opposed to companies.

We therefore suggest clarifying article 26 as follows:

> 1. *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.*

2. *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.*
3. ***Member States shall ensure that civil liability under Article 22 shall apply to the companies and not the directors individually.***

In addition, the proposed Directive provides that any breach of directors' duties should be addressed by national laws, regulations or administrative provisions. We are concerned that this will not ensure the appropriate level of harmonisation across Member States.

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## Contact

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## About France Invest

Established nearly 40 years ago, France Invest brings together venture capital, private equity, infrastructure and private debt teams based in France, as well as the associated professions which support them. Its membership currently counts roughly 400 management firms and 180 associate members.

Private equity supports unlisted companies for a fixed period of time and provides them with the equity capital, through the acquisition of minority or majority stakes in their capital, needed to finance growth and transformation projects. It supports the creation of start-ups (venture capital), participates in the growth and transformation of many regional SMEs and mid-caps (growth capital) and contributes to the transfer of companies (replacement capital).

France Invest's members represent one of the main growth drivers for the French and European economy and support a significant portion of employment in France and Europe. In 2021, French private equity and infrastructure players invested €36 billion in 2,500 companies and infrastructure projects. They raised €42 billion from investors, half of which abroad (one third at EU level excluding France), which will be invested over the next 5 years[5]. In addition to that, in 2021, private debt players (structures financing companies and infrastructure projects) invested €14.7 billion in 233 transactions and raised €9.3 billion that will finance new transactions in the coming years[6]. European companies, in particular start-ups and SMEs, are the main recipients of these

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5 https://www.franceinvest.eu/wp-content/uploads/2022/04/France-Invest-Etudes-2022_Activite-2021_VDEF.pdf

6 https://www.franceinvest.eu/activite-des-fonds-francais-de-dette-privee-2/

investments. Over the 2015-2020 period, over 244 237 jobs were created in companies backed by French venture capital and private equity[7].

In particular, during the pandemic, the venture capital and private equity industry has demonstrated its adaptability, supporting existing portfolio companies as and when needed, while continuing to invest in new businesses that require capital and operational expertise to grow.

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7 https://www.franceinvest.eu/wp-content/uploads/2022/04/France-Invest-E%CC%81tudes-2021_Croissance-et-creation-demplois-2020.pdf