Council of the European Union
General Secretariat



**Brussels, 08 September 2022**

**WK 11686/2022 INIT**

**LIMITE**

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**MEETING DOCUMENT**

| | |
|---|---|
| From: | General Secretariat of the Council |
| To: | Working Party on Company Law |
| Subject: | Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 – table of MS comments on doc. 11566/1/22 - Italy comments on Presidency Flash |

Delegations will find attached the above-mentioned Italy comments

Council of the European Union
General Secretariat



**Brussels, 30 August 2022**

**WK 11198/2022 REV 1**

**LIMITE**

**DRS**

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**WORKING DOCUMENT**

| | |
|---|---|
| From: | General Secretariat of the Council |
| To: | Working Party on Company Law |
| Subject: | Working Party on Company Law 5-6 September 2022 - Presidency flash |

Delegations will find attached on behalf of the Czech Presidency a revised version of the flash note in view of the Company Law Working Party meeting on 05-06 September 2022

EU2022.CZ



# Presidency Flash

**5 – 6 September 2022**

Dear Colleagues,

We hope that you all had a relaxing summer vacation and are ready to continue discussions on the proposed Directive.

We would like to thank you for your support so far and invite you to the second meeting of the Working Party on Company Law during the Czech Presidency. At the first meeting, we were able to discuss a number of topics that helped us to prepare the first Presidency compromise text on the Corporate Sustainability Due Diligence proposal that was circulated to you at the end of July. We kindly remind you that we are expecting your written contributions or comments by 2 September at the latest.

The Presidency compromise text does not address all of the issues that were raised by Member States. This was mostly due to the lack of support of the majority of Member States for some changes. This Flash note addresses some of the issues that were not tackled in the Presidency compromise text. The aim is to help us prepare a second Presidency compromise text.

Please note that all the drafting suggestions in this Flash document are of a preliminary nature and do not prejudice the final wording of the next Presidency compromise text. Any interpretation of the international standards or other legal instruments presented in this Flash note is not an official one and serves only as a basis for the discussion during the meeting of the Working Party.

We are looking forward to another fruitful and interesting discussion.

Czech Presidency company law team

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# Agenda

## Monday 5 September

- Presentation of case studies on carrying out due diligence by the Commission
  Presentation by the Commission of 2-3 case studies, followed by questions from the Member States
- Examination of the first Presidency compromise text (doc. 11566/1/22 REV 1)
  Presentation by the Presidency, followed by questions and comments from the Member States (discussed together with question 4 of the Presidency Flash)
- Presentation of the national legal frameworks for due diligence by France, Germany, and the Netherlands
  Presentation by the Member States (right after lunch break)

## Tuesday 6 September

- Examination of the first Presidency compromise text (doc. 11566/1/22 REV 1)
  Possible continuation of presentation by the Presidency, followed by questions and comments from the Member States (discussed together with question 4 of the Presidency Flash)
- Presentation of data concerning the scope of the proposed Directive by the Commission
  Presentation by the Commission of data on number of companies falling under the scope of the proposed Directive, followed by questions from the Member States
- Discussions based on this Presidency Flash
  Presentation by the Presidency, followed by comments from the Member States (except for question 4)
- Information from the Presidency and the next steps
  Next Working Party meeting will take place on 26 and 27 September

# Points for discussion

## 1. Financial undertakings and their specificities

### 1.1. Termination of the business relationship by financial undertakings – Articles 7(6) and 8(7)

According to the exemption provided to financial undertakings under Articles 7(6) and 8(7), they are not required to terminate some of their contracts if such action *"can be reasonably expected to cause substantial prejudice to the entity* [their business partner]".

Many Member States raised the question of what is considered a "*substantial prejudice*" and whether this term should be defined in the proposed Directive or left for the Member States to define during the implementation. The term "*substantial prejudice*" was also used in the Presidency text in Articles 7(7)(b) and 8(8)(b).

Some Member States argued that a clearer definition would enhance legal certainty for financial undertakings, improve harmonisation, and prevent negative economic impacts of "just to be safe" terminations. On the other hand, a precise definition could limit the possibility of the assessment on a case-by-case basis, by supervisory authorities or courts.

OPTION A – introduce a definition of the term "substantial prejudice"

As far as the Presidency is aware, the term "*substantial prejudice*" is not defined in EU legislation. "*Substantial prejudice*" might be bound to lead to irreversible negative impacts on the financial situation of the entity, or even to bankruptcy. The drafting suggestion below aims to cover a broader variety of situations. However, this is entirely open to discussion.

A drafting suggestion for Article 3 new point (v) would be:

"***(v) 'substantial prejudice' means a bankruptcy or other negative, significant, and irreversible effect on the entity's legal or financial, situation or its production capacity, including in the long term perspective;***".

OPTION B – introduce a recital on a substantial prejudice

Under this option, a recital containing the definition (as is the case under option A) or characteristics of a substantial prejudice could be introduced. A recital may provide guidance for Member States, courts and companies. It would also enable assessment on a case-by-case basis.

OPTION C – keep the current wording

*IT Comments – We support option B, as the determination of the "substantial prejudice" appears to be among the task of national legislators and judges. In our view, they should be guided in order not to create uneven treatment areas. We also suggest a slighter modification of the proposed definition: "(v) 'substantial prejudice' means a ~~bankruptcy or other~~ negative, significant, and irreversible effect on the entity's legal or financial, situation or its production capacity,* ***undermining its business continuity even*** *~~including in~~* ***on*** *the long term perspective".*

### 1.1. Supervisory authority of financial undertakings – Article 17(5)

Article 17(5) is construed as a "may" clause. Taking into account Article 17(1) and (8), a question of whether such a clause is necessary in the text of the proposed Directive arises in situations when it does not provide for any new possibilities or obligations. At the same time, the same words are included in the last sentence of Recital 53. This can also raise the question of the nature of the role played by the European Central Bank under the proposed Directive.

OPTION A – delete Article 17(5) and leave only Recital 53

Under this option, Recital 53 can either be kept unamended, or it can be amended as the Member States deem necessary.

OPTION B – amend Article 17(5)

Member States are invited to propose clarifications and possible amendments, such as clear acknowledgement of the role of the European Central Bank (and other national central banks), or other possible improvements to the text.

OPTION C – keep the current wording

*IT Comments –Among the proposals, option C seems preferable, since the current setting does not seem problematic. Another issue could be why expressly mention only the financial market authorities: perhaps a more general wording would be preferable.*

## 2. Supporting measures for SMEs

### 2.1. Targeted and proportionate support – Articles 7(2)(d) and 8(3)(e)

Articles 7(2)(d) and 8(3)(e) were contested by some Member States, which consider that the wording "*targeted and proportionate support*" and "*jeopardise the viability*" lack sufficient clarity. As these Articles are included in the list of actions to be taken by companies to address adverse impacts, it is important for the companies to know what is expected from them. Therefore, many Member States demanded clarification of these concepts, either in the operative part of the text or in the recitals. The concept of "*targeted and proportionate support*" is described in the last sentence of Recital 34, which includes a non-exhaustive list of examples.

Some Member States objected, maintaining that the obligation to provide targeted and proportionate support to SMEs might incentivise large companies to stop doing business with SMEs so as to avoid such obligations. Large companies could also force their SME-business partners to assert that their viability will not be jeopardised through compliance with the code of conduct or an action plan, without any regard for the actual situation. This would mean that they transfer the compliance costs to SMEs. The question is whether these risks can be prevented and how.

Another question is whether the wording "*jeopardise the viability*" substantively differs

from the wording "*cause substantial prejudice*", also used in Articles 7 and 8. Member States are invited to share their views on the possible differences in the meaning of each wording.

The following options are non-exclusive and the Presidency is open to any other suggestions clarifying the provisions.

OPTION A – clarify targeted and proportionate support in Articles 7(2)(d) and 8(3)(e)

A non-exhaustive list of examples inspired by the last sentence of Recital 34 may be included in Articles 7(2)(d) and 8(3)(e). This would provide a partial "safe harbour" for companies without limiting the interpretation of the provisions.

A drafting suggestion would be:

"*provide targeted and proportionate support for an SME with which the company has an established business relationship, where compliance with the code of conduct or the corrective action plan would jeopardise the viability of the SME;* ***the targeted and proportionate support may take the form of financing, such as direct financing, low-interest loans, guarantees of continued sourcing, or assistance in securing financing, or guidance, such as in the form of training or the upgrading of management systems;***".

OPTION B – clarify the wording "jeopardise the viability of an SME"

Since it can be assumed that there is a difference between the wording "*jeopardise the viability*" and "*cause substantial prejudice*" (used in Articles 7(6) and 8(7)), a clarification of the wording may prove necessary. Should this option be supported, Member States are invited to provide drafting suggestions or explanation of the difference between the wording. For example, the wording "*jeopardise the viability*" could only apply to very serious financial problems, such as bankruptcy.

OPTION C – keep the current wording

*IT Comments – we support both option A and option B, as they help in clarifying the text (while not being exhaustive and therefore limiting, specifically for option A). Regarding option B, we believe that there is not a substantial difference between "jeopardise the viability" and "cause substantial prejudice". We would therefore suggest to replace the first expression with the second one in the text (with the modifications proposed earlier on in this document).*

## 3. Some aspects of addressing adverse impacts – Articles 7 and 8

### 3.1. Differences between the wording of Articles 7 and 8

Although the wording of Articles 7 and 8 should be more or less the same, some minor differences raise questions. Differences clearly caused by a different character of the clauses are not intended, such as the difference between the "prevention" and "corrective" action plan. There is a need for a discussion on whether the differences mentioned below should stay in the text in the light of the different nature of Articles 7 and 8, or whether the texts should be further aligned.

The Presidency has identified the most important differences and put them into the following separate points:

(i) the wording "where relevant" in Articles 7(2)(a) and 8(3)(b)

This difference between the wording of Articles 7(2)(a) and 8(3)(b) implies that, in the case of preventing potential adverse impacts, affected stakeholders should always be consulted on the prevention action plan. This contrasts with the corrective action plan in the case of actual adverse impacts regarding which affected stakeholders should be consulted, where relevant.

OPTION A – add "where relevant" to Article 7(2)(a)

OPTION B – delete "where relevant" from Article 8(3)(b)

OPTION C – keep the current wording

*IT Comments – we support option A, which enables to remove unbalances on consultations with stakeholders foreseen for the corrective action plan and the preventive one.*

(ii) success of efforts "in the short-term" in Article 7(5)(a) compared to Article 8(6)(a)

Articles 7(5)(a) and 8(6)(a) differ substantively as regards the wording "*if there is reasonable expectation that these efforts will succeed in the short-term*" in Article 7(5)(a) which is absent in Article 8(6)(a). A possible interpretation of this is that a temporary suspension of the business relationship in the case of an actual adverse impact under Article 8 would be sufficient, even if there is no reasonable expectation of success in the short-term. At the same time, in the case of a potential adverse impact under Article 7, termination of the business relationship would be required.

OPTION A – add the condition of a "reasonable expectation of success in the short-term" to Article 8(6)(a)

OPTION B – delete the condition of a "reasonable expectation of success in the short-term" from Article 7(5)(a)

OPTION C – keep the current wording

*IT Comments – We support option B, as the "reasonable expectation" of success results seem redundant. Companies would already take this into account, assessing and implementing preventing/mitigating measures, while taking a strong decision such as suspending a business relationship.*

### 3.2. Option to terminate the business relationship in national contract laws – Article 7(5) second subparagraph and Article 8(6) second subparagraph

The obligation to temporarily suspend or terminate the business relationship under Articles 7(5) and 8(6) should only apply "*where the law governing their relations so entitles them to*". This exception covers mainly the case of mandatory insurance, but there may be other examples in the laws of Member States.

Nevertheless, the second subparagraph of Articles 7(5) and 8(6) obliges the Member

States "*to provide for the availability of an option to terminate the business relationship in contracts governed by their laws*". The question is whether or not that means that the Member States are obliged to provide for this option even in the cases of mandatorily concluded contracts.

OPTION A – clarify the second subparagraph of Articles 7(5) and 8(6)

Mandatorily concluded contracts may be expressly excluded from the obligation of the Member States to provide for the option to terminate business relationships in their laws.

A drafting suggestion for the second subparagraph of Articles 7(5) and 8(6) would be:

"*Member States shall provide for the availability of an option to terminate the business relationship in contracts governed by their laws**, except for contracts where the parties are obliged by law to enter into them***.".

OPTION B – keep the current wording

*IT Comments – we do not have a strong position on this point, but among the proposed options we currently prefer option B.*

## 5. Sanctions – Article 20

The Presidency would like to continue with the discussions on the possibility of further harmonising the sanctions. Since the enforcement regime and sanctions are sensitive topics for the Member States and a strong majority of Member States did not support any of previously presented options, the Presidency decided not to include this in the first Presidency compromise text and continue with the discussion based on the Flash note.

As far as the Presidency is aware, it is not a common practice in Union legislation (not even in regulations, the less so in directives) to set a minimum level of pecuniary sanctions to be imposed. For that reason, the Presidency does not propose an option to harmonise a minimum limit of pecuniary sanctions.

Option C is not mutually exclusive with option A or B. The Member States are invited to propose alternative options.

OPTION A – introduce a maximum limit of pecuniary sanctions

This option is identical to the drafting suggestion from the Flash note prepared for the meeting of the Working Party on 12 and 13 July. As regards the proposed threshold of 4 % of the company's turnover, it is based on some of the existing or proposed Union rules. For example, Article 83 of the Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (GDPR), Article 13 of Directive (EU) 2019/2161 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU as regards the better enforcement and modernisation of Union consumer protection rules, or Article 23 of the proposal for a Regulation on the making available on the Union market as well as export from the Union of certain commodities and products associated with deforestation and forest degradation (proposal for Deforestation Regulation).

A drafting suggestion for Article 20(3) would be:

"*When pecuniary sanctions are imposed, they shall be based on the company's turnover**, however they shall not exceed 4 % of the company's net turnover***.".

OPTION B – harmonise the maximum limit of pecuniary sanctions by providing a minimum threshold

The difference between options A and B is in the flexibility of Member States to set the maximum limit higher. The provision would ensure, that in every Member State the maximum amount of pecuniary sanctions is at least the same. However, if the Member State so wishes, it can set the maximum limit higher. This approach is used in two of the three examples provided under option A (Article 13 of Directive (EU) 2016/2161 and Article 23 of the proposal for Deforestation Regulation).

A drafting suggestion for Article 20(3) would be:

"*When pecuniary sanctions are imposed, they shall be based on the company's turnover**; the maximum amount of pecuniary sanctions shall be at least 4 % of the company's net turnover***.".

OPTION C – introduce the criteria for imposing pecuniary sanctions in recital

Option C to harmonise the criteria for imposing pecuniary sanctions included in the Flash note for the meeting of the Working Party on 12 and 13 July was not supported by a majority of Member States. Given that the criteria could be useful for the interpretation and implementation, they could be introduced in a recital (possibly in Recital 54 or in a new one).

OPTION D – keep the proposed wording

*IT Comments: we support option B, introducing an explicit upward ceiling for sanctions, consistent with provisions of already existing legislation in the EU.*