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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 –Malta's comments on the Presidency Flash

Delegations will find attached the above-mentioned document.

Presidency Discussion Point	Maltese Position	Additional Feedback from Malta
1. Financial undertakings and their specificities 1.1. Definition of financial undertakings – Article 3 point (a)(iv) The definition of financial undertakings in Article 3 point (a)(iv) fulfils two objectives, namely the inclusion within the scope of the proposed Directive of financial undertakings in legal forms not covered in Article 3 point (a)(i) or (iii) and the definition of financial undertakings for the purpose of exemptions or deviations elsewhere in the text of the proposed Directive, including the definition of the value chain. The second objective is more important, as most of the financial undertakings will be in legal forms covered by Article 3 point (a)(i) or (iii). The proposed definition is exhaustive and was taken, word by word, from Article 6(2) of the proposal for a Council Directive laying down rules to prevent the misuse of shell entities for tax purposes and amending Directive 2011/16/EU. OPTION A – keep the proposed wording OPTION B – leave out AIF and UCITS from the scope of the proposed Directive Alternative investment funds (AIF) (managed by an AIFM (alternative investment fund manager), see Article 4(1)(b) of Directive 2011/61/EU or an AIF supervised under the national law) and undertakings for collective investment in transferable securities (UCITS) (see Article 1(2) of Directive 2009/65/EC) are included in the proposed Directive and in the definition of financial undertakings in Article 6(2) of the proposal for a Council Directive laying down rules to prevent the misuse of shell entities for tax purposes. AIFs and UCITS, however, are not legal entities capable of carrying out due diligence duties, as they do not have any personal substance and are only financial products (in the terminology of SFDR). The managers of such	Option B + Trusts	Malta believes that Option B is the right one because collective investment schemes and UCITS do not really determine the strategies of companies. These are financial instruments that are used on a retail basis. Malta thinks that personal trusts should be also exempted from this Dossier.

financial products (AIFMs and UCITS management companies) are included in the definition of financial undertaking. For these reasons, the Presidency believes that the AIFs and UCITS should be left out of the scope of the proposed Directive. This would require two sets of changes. Firstly, there would be a need to delete AIFs and UCITS from the definition of financial undertakings as provided for in Article 3 point (a)(iv). However, this would not specifically exclude the AIFs, UCITS, or other financial products, from the scope of the proposed Directive should they exceed the scope thresholds. In such a case, the financial products would not be allowed to profit from the exemptions of financial undertakings. This is the reason for the need for a second change, an exemption of financial products from the scope of the proposed Directive. Article 1(3a) of the CSRD provides: „The coordination measures prescribed by Articles 19a, 29d and 29a, shall not apply to financial products referred to in Article 2, point 12, points (b) and (f) of Regulation (EU) 2019/2088 of the European Parliament and of the Council.“. A drafting suggestion for Article 2 new paragraph 5 would be: “**5. This Directive shall not apply to financial products referred to in Article 2, point 12, points (b) and (f) of Regulation (EU) 2019/2088 of the European Parliament and of the Council.**” OPTION C – limit the list of financial undertakings differently to option B Some Member States proposed limiting or completely deleting the list of financial undertakings. Member States supporting this option are invited to present their views on which financial undertakings should be removed from the list and to explain the need for such a change. OPTION D – broaden the list of financial undertakings Some Member States proposed broadening the list of financial undertakings. Member States supporting this option are invited to present their views on which financial undertakings should be added to the list and to explain the need for such a change.		

1.2. Definition of “value chain of financial undertakings” – Article 3 point (g) The definition of the term “value chain of financial undertakings” contains several problematic points that were addressed during the previous Working Party meetings. Most of them relate to the wording ”other financial services” and an inconsistent list of expressly mentioned financial products or services throughout the proposed Directive. In Article 3 point (e) of the Presidency compromise text, the definition of a direct business partner was amended and refers to the following financial services: “(…) to whom the company provides credit, loans, financing, investment, insurance, reinsurance, or other financial services (…)”. The Presidency proposes the following, non-exclusive options. OPTION A – clarify the term “other financial services” The financial services that are currently deemed to be included in the term ”other financial services” might need to be clarified under a definition. Should this option be supported, the question of which financial services should be included in the definition and what should be used as a reference base arises. OPTION B – align the definitions of the terms “value chain of financial undertakings” and “direct business partner” Both parts of the definition of the term “value chain of financial undertakings” might be aligned with the definition of the term “direct business partner”, should this amended definition be supported. A drafting suggestion for the second part of Article 3 point (g) would be: “ (…) ‘value chain’ with respect to the provision of these specific services shall only include the activities of the clients receiving such loan**s**, credit, and **financing, investment, insurance, reinsurance, or** 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**s**, credit, financing, **investment,** insurance**,** or reinsurance**, or other financial services** of such entities;”.	Ideally Option A but Malta could live with Option B	Malta would ideally opt for option A that is to clarify the term “other financial services”. However, that could possibly open a pandora box. Malta thinks that the alignment of the text as proposed by the Presidency in (b) is currently the best optimal solution.

The words ”loan, credit or other financial services” are also used in Articles 6(3), 7(6), and 8(7), which should be aligned accordingly. OPTION C – clarify which members of the client’s group are part of the value chain According to the definition of the term “value chain of financial undertakings”, not only clients receiving financial services but also the members of their groups are part of the value chain, provided that the activities of such members are “linked to the contract in question”. In practice, it could be challenging to determine when the activity of the company that is part of the clients’ group is linked to the contract entered into by the client, e.g. insurance. In addition, in other parts of the proposed Directive, the term “subsidiary” is used more frequently than “companies belonging to the same group”. Hence, only in the case of the value chain of financial undertakings, not only subsidiaries of the client (being linked to the contract in question), but also other members of the group (another daughter company of the client’s mother company) would be covered. It should be discussed whether there is a need for clarification. If so, the Member States are invited to propose possible solutions. OPTION D – keep the current wording of Article 3 point (g)		
<u>1.3. Identification of adverse impacts by financial undertakings and monitoring – Article 6(3) and Article 10</u> A number of Member States raised the question of whether Article 6(3) limiting the process of identification of adverse impacts carried out by financial undertakings is sufficiently clear. According to the Commission, the identification of adverse impacts shall be carried out only once before providing the service in question. This may be expressly included in the text. The relation between Article 6(3) and Article 10 requiring companies to carry out periodic assessments is also unclear. Article 10 does not provide for any exception from the periodic assessments. This might be understood as meaning that financial undertakings are obliged to periodically assess the	Option B	Malta believes that Option B as set out by the Presidency is the right way forward. The vetting in terms of guarding certain financial products and services should be done once prior to their authorization.

operations of their clients, even though Article 6(3) should relieve them of such a task. OPTION A – clarify Article 6(3) A simple clarification of Article 6(3) may solve the first part of the abovementioned problem. However, this would not clarify the relationship between Article 6(3) and Article 10. A drafting suggestion would be: “When companies referred to in Article 3, point (a)(iv), provide credit, loan or other financial services [possibly amended in line with the proposal in question 1.2.], identification of actual and potential adverse human rights impacts and adverse environmental impacts shall be carried out only **once** before providing that service.”. OPTION B – clarify Article 6(3) and Article 10 Under this option, not only the clarification mentioned in option A, but also a clarification of Article 10 would be made. This would make it clear that financial undertakings are not required to carry out periodic assessments of their clients’ operations. A drafting suggestion for Article 10 new paragraph 2 would be: ”**2. By way of derogation from paragraph 1, companies referred to in Article 3, point (a)(iv) shall carry out only periodic assessments of their own operations and measures and those of their subsidiaries.**”. OPTION C – keep the current wording		
<u>1.4. Termination of the business relationship by financial undertakings – Articles 7(6) and 8(7)</u> 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	Option A	Malta believes that the definition set out by the Presidency in Option A on substantial justice is a step in the right direction. Further exchange of ideas and refinement in the suggested draft in order to include a clear definition could take

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		place during the relations in the working party.
<u>1.5. Supervisory authority of financial undertakings – Article 17(5)</u> 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	Option C	N/A

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		
2. Supporting measures for SMEs Member State suggestions for any possible additional supporting measures for SMEs are still very much welcome. Meanwhile, some aspects of the current supporting measures for SMEs may require further clarification or discussion. <u>2.1. Definition of SME – Article 3 point (i)</u> The definition of SME excludes companies that form part of a large group, as defined in the Accounting Directive (2013/34/EU). The Presidency would like to bring to the attention of Member States Article 3(7) thereof, which defines thresholds for groups considered to be large: “7. Large groups shall be groups consisting of parent and subsidiary undertakings to be included in a consolidation and which, on a consolidated basis, exceed the limits of at least two of the three following criteria on the balance sheet date of the parent undertaking: (a) balance sheet total: EUR 20 000 000; (b) net turnover: EUR 40 000 000; (c) average number of employees during the financial year: 250.”. According to the definition, a number of companies might be excluded from being considered an SME (and enjoy the protection of various provisions of the proposed Directive), solely on the basis of their membership in a large	Option A	Malta believes that Option A concerning the definition of SMEs is optimal. Further discussions may be required to curb abuse.

group of companies, in which none of the companies separately falls under the scope of the Directive. This can happen in two cases. Firstly, a large group can consist of only small and medium-sized enterprises, without any large company, given that the thresholds are calculated on a consolidated level. Secondly, even if the parent company is a large company, it does not have to fall within the scope of the proposed Directive if it does not perform business in one of the high-risk sectors (provided it does not meet the thresholds for group 1 companies). As a consequence, relatively small companies with only medium-sized parent companies, or with large parent companies not falling under the scope of the proposed Directive (such as, for example, start-ups in the financial or IT sector) might not be considered SMEs according to the definition under Article 3 point (i). There is a need for discussion on whether this is an intended consequence, or whether a change is needed. OPTION A – delete the exclusion for large group members This option would allow all SMEs, regardless of their membership in any group, to enjoy the SME status under the proposed Directive. On the other hand, it is a question of whether SMEs, that are part of a large group, might not be used so as to obtain an unfair advantage under the proposed Directive or to circumvent the provisions in some other way. OPTION B – amend the definition of the SME Another possible solution might be to amend the definition so that a company is not considered an SME if it is a part of a large group in which the parent company falls under the scope of the proposed Directive. That might limit the risk of abuse or circumvention, and allow more companies to enjoy SME status. A drafting suggestion would be: 'SME' means a micro, small or a medium-sized enterprise, irrespective of its legal form, that is not part of a large group **in which the parent company falls under the scope of this Directive**, as those terms are defined in Article 3(1), (2), (3) and (7) of Directive 2013/34/EU;". OPTION C – keep the current wording		

<u>2.2. Non-disclosure of sensitive information – Article 4(3)</u> In the Presidency Flash for the meeting of the Working Party held on 12 and 13 July, the Presidency included a drafting suggestion inspired by Article 48c(6) of the CBCR mentioning non-disclosure of certain information (see point 7). Although this option was cautiously supported by some Member States, it was only partially included in the Presidency compromise text. The reason is that companies falling under the scope of the proposed Directive need the information from their business partners in order to fulfil their obligations stemming from the proposed Directive. Accordingly, a balance has to be found. The Presidency invites the Member States to share their views on this issue and propose alternative solutions. OPTION A – disclosure of sensitive information in aggregated or anonymised form Companies (or only SMEs) could be required to disclose sensitive information on an aggregated basis or in anonymised form, thus allowing the company falling under the scope to fulfil its due diligence duties. Inspiration can be drawn from Article 15(1) second subparagraph of the Directive (EU) 2019/2034 on the prudential supervision of investment firms. A drafting suggestion for Article 4(3), second subparagraph, would be: "**Member States shall also ensure that a company or other legal entity may disclose information to its business partner which is complying with the obligations resulting from this Directive in summary or in an aggregate or anonymised form when the disclosure of this information would be seriously prejudicial to its commercial position.**". OPTION B – keep the current wording of Article 4(3)	Option A but would like to change the initial wording of "shall ensure" to "may require". Therefore, the text will read as follows: "**Member States ~~shall also ensure~~ <u>*may require*</u> that a company or other legal entity may disclose information to its business partner which is complying with the obligations resulting from this Directive in summary or in an aggregate or anonymised form when the disclosure of this information would be seriously prejudicial to its commercial position.**"	Malta believes that Option A concerning the non-disclosure of sensitive information is a good way forward. Malta has suggested that the wording "shall ensure" is deleted and is replaced with "may require".

<u>2.3. Targeted and proportionate support – Articles 7(2)(d) and 8(3)(e)</u> 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:	Option A is a good way forward but further clarification in regard to Option B may also be required.	Malta believes that the Presidency drafting on targeted and proportionate support is an important starting point.

“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		
3. Some aspects of addressing adverse impacts –Articles 7 and 8 <u>3.1. List of actions to be taken by the company to address adverse impacts – Articles 7(2) and 8(3)</u> The lists of actions under Articles 7(2) and 8(3) are exhaustive. This means that if the company seeks to avoid its liability under Article 22, its actions need to follow Article 7(2) or Article 8(3). The companies would therefore not be incentivised to look for other possible ways in which to address adverse impacts. For this reason, some Member States asked for the lists to be non-exhaustive and only to contain examples of specific actions to be taken by the company. On the other hand, the lists can be perceived as already including every possible action that the companies can take to address adverse impacts on account of the broad and general wording. For example, a large number of	Option B	N/A

actions might fall under the development and implementation of a prevention or action plan as referred to in Articles 7(2)(b) or 8(3)(b). Because of the linkage to civil liability, it might be difficult and counterproductive to make the lists non-exhaustive, as this may undermine legal certainty of companies. OPTION A – make the lists non-exhaustive Under this option, the lists would consist only of examples of specific actions. However, this might have an influence on the civil liability of companies under Article 22. OPTION B – keep exhaustive lists as proposed		
<u>3.2. Differences between the wording of Articles 7 and 8</u> 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	Option C for (i) Option A for (ii) but we would like to see the full final drafting being proposed.	N/A

(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		
<u>3.3. Option to terminate the business relationship in national contract laws – Article 7(5) second subparagraph and Article 8(6) second subparagraph</u> 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.	Option A	N/A

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		
4.* Civil liability –Article 22*(to be addressed jointly with the presentation of the first Presidency compromise) <u>4.1. Constitutive elements and exemption from civil liability – Article 22(1) and (2)</u> Firstly, a summary of the constitutive elements of civil liability according to Article 22(1) of the Presidency compromise text. A company can be held liable if there is damage (stemming from the adverse impact that was or should have been identified), fault (failure of a company to comply with the obligations laid down in Articles 7 and 8), and a causal link between the damage and the fault (a company caused or contributed to the damage). Secondly, an exemption from civil liability according to Article 22(2) of the Presidency compromise text. A company would not be held liable for the damages occurred if the damage stems from a correctly performed prioritisation of adverse impacts as laid down in the new Article 6a. To ensure that the provision on prioritisation would not be circumvented to evade civil liability, safeguards were introduced in the text. The exemption does not apply in the case of a company that prioritises in such a way as to lead the company to evade its liability, or when it was unreasonable to expect the prioritisation to be adequate. The proposed changes to the constitutive elements of civil liability and the exemption from civil liability are merely the first steps to clarify Article 22. Member States are invited to present their views on the proposed changes and to propose any other changes needed. The Presidency outlines below		Malta does not have any preference as it would like to delete Article 22 for the below mentioned reasons: Malta has noted the effort made by the Presidency in order to partially narrow down the current broad impact concerning civil liability. However, Malta is still not satisfied with the current text and would like to delete Article 22 for the following reasons: Civil liability in general should revolve around whether a party has directly caused or contributed to the damage or is otherwise directly associated with it, following the basic principle that all civil liability must end where the involvement of a legal distinct third party

a set of possible options to be taken to move forward with the text. Options A to C are not mutually exclusive. OPTION A – amend Article 22(1) as regards the constitutive elements of civil liability Member States are invited to present their views on possible amendments to the text to further clarify the provision on constitutive elements of civil liability. OPTION B – amend Article 22(2) as regards the exemption due to prioritisation Member States are invited to present their views on the introduction of the exemption from civil liability due to correctly performed prioritisation according to new Article 6a and to submit possible amendments to the text to further clarify the exemption. OPTION C – amend Article 22(2) to introduce a new exemption from civil liability Member States are invited to present an exemption to be introduced into the text. A possible proposal would be to reintroduce the exemption for indirect business partners when contractual assurances were sought by a company, as was proposed by the Commission in Article 22(2). The reason for deleting this exemption from the Presidency compromise text is that the civil liability of companies is already limited in a similar manner owing to changes in the constitutive elements of civil liability in Article 22(1). The causal link required to give rise to civil liability is that the company has to “cause” or “contribute” to the damage, thus only two of three possible means of involvement of the company according to Article 3(r) are covered. If the company is merely linked to the damage without causing or contributing to the adverse impacts (as referred to in Article 3(r)(iii)), which would be the most frequent involvement of the company in adverse impact caused by an indirect business partner, the company cannot be held liable. OPTION D – keep Articles 22(1) and (2) as proposed in the Presidency compromise text OPTION E – keep Articles 22(1) and (2) as proposed by the Commission.		begins. Article 22 raises 3 fundamental concerns: a) It mixes up liability of companies for own acts and responsibility for the acts of others. b) It regulates liability without providing neither legal certainty nor real harmonization. c) It unjustifiably interferes with international private law. Malta is concerned that Article 22 would effectively make companies liable for damages not caused by their own actions (that is indirect business relationships). A company does not control its indirect business relationships but neither it’s contractual, business partners and the companies’ degree of leverage along the chain of suppliers may vary widely. In fact, the current drafting suggestion will lead to significant difficulties in practice and create

		uncertainty for the business community. It would also have the effect of shifting liability away from the actual perpetrators of the damages, diminishing the deterrent effect of the damage not caused by their own actions. Furthermore, it does not indicate whether intentionality or gross negligence need to be part of the legal assessment. The current drafting does not clearly stipulate that civil liability should only apply if the usual rules of civil liability are satisfied. In fact, Article 22 introduces civil liability for companies even if a company would have identified the potential or adverse impact but could not have prevented the adverse impact or the damages resulting from it. This would go against the current EU knowledge in the area of civil law traditions.

<u>4.2. Criteria for the assessment of compensation to be paid by the company</u> In the Presidency Flash for the meeting of the Working Party held on 12 and 13 July, the Presidency included question 11.4 on the assessment under Article 22(2) subparagraph 2 together with a drafting suggestion. Nonetheless, owing to changes made in Article 22(1) and (2) of the Presidency compromise text, it was decided that the drafting suggestion is no longer suitable. Instead, the Presidency would like to draw the attention of Member States to a similar, yet differently worded question and proposal. Since the idea behind the Commission's proposal was to ensure that the company is not obliged to "pay the same money twice", as the Commission explained at the meeting of the Working Party on 12 and 13 July, a provision providing for criteria for the assessment of the compensation to be paid by the company could be introduced. OPTION A – introduce the criteria in new Article 22(2a) The proposed list of criteria to be taken into account when assessing the compensation to be provided stems from the wording of Article 22(2) second subparagraph as proposed by the Commission. In addition, the Presidency proposes that it add the criterion of the company's involvement in the adverse impact (defined in Article 3 point (r)) since, pursuant to Article 22(3), the subsidiaries or business partners of the company could be also held liable for the same damage. The list of criteria is entirely open to discussion. A drafting suggestion for the new Article 22(2a) would be: "**2a. In the assessment of compensation to be provided by the company, due account shall be taken of the company's behaviour, in particular:** **a) the company's level of involvement in the adverse impact,** **b) the company's efforts, insofar as they relate directly to the damage in question, to comply with any remedial action required of them by a supervisory authority,** **c) any investments made in relation to the damage in question,**	Option A but Malta believes that this Article 22 is to be deleted for the above-mentioned reasons.	

d) any targeted support provided pursuant to Articles 7 and 8 and **e) any collaboration with other entities to address adverse impacts in its value chains.**”. OPTION B – introduce such criteria only in Recital 57 or in a new recital OPTION C – not to introduce such criteria		
<u>4.3. Relationship between the proposed provisions and Union and national rules on civil liability – Article 22(4)</u> According to Article 22(4), the civil liability rules are without prejudice to Union or national rules on civil liability (related to adverse human rights impacts or adverse environmental impacts) that either provide for liability in situations not covered by the proposed Directive or provide for stricter liability than the proposed Directive. Some might argue that, as a result of the new exemption from civil liability in Article 22(2) concerning prioritisation of adverse impacts according to Article 6a, a new question regarding the relationship between the proposed rules and the existing Union and national rules on civil liability arises. If the company correctly prioritises the adverse impacts and addresses only the most significant ones at first, then the company cannot be held liable for the damage that would occur from a less significant adverse impact. Hypothetically, this less significant adverse impact could have an adverse human rights impact (e.g. violation of the right to strike) occurring in the EU. Under the proposed Directive, the company could not be held liable for the damage stemming from this less significant adverse impact, owing to the exemption in Article 22(2). Some might argue that, on account of the wording of Article 22(4), the company cannot be held liable for this less significant adverse impact not only under the proposed Directive but also under any Union or national rules on civil liability. The reason is that the adverse impact is covered by the proposed Directive. In addition, neither and Union nor national law provides for a stricter liability (at least hypothetically). That would mean that the rules on the civil liability of the proposed Directive would replace not only the	Same as above. Malta would like Article 22 to be deleted.	N/A

provisions under national general tort law but also specific sectoral legislation. Should this conclusion be correct, then in view of the exemption in Article 22(2), the level of protection of human rights could be reduced, and the right of persons suffering damages to claim compensation could be undermined. On the other hand, it is hard to imagine that the rules on civil liability for the damage caused by breaching due diligence duties under the proposed Directive could override national provisions on civil liability stemming from breaching other legally binding duties, or potentially constitutionally protected duties, as is common in the case of human rights. The Presidency would like to hear the views of the Member States, especially if they share the reservations raised above and if they consider that the text needs to be clarified or amended in order to address these concerns. OPTION A – clarify and amend the text of Article 22(4) Should this option be supported, the Presidency would like to invite the Member States to propose drafting suggestions. OPTION B – keep the current wording		
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 A	A certain degree of harmonization is needed within the EU.

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.		