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MEETING DOCUMENT

From:	Presidency
To:	Working Party on Company Law (Attachés)
Subject:	Presidency Flash - 19/12/2023 Company Law WP meeting (Attachés)

Delegations will find attached the Presidency Flash in view of the Company Law Working Party meeting (Attachés) on 19 th December 2023.

Working Party on Company Law

Presidency Flash 19 December

Dear colleagues,

We are pleased to provide you with some information on the results of the fifth political Trilogue on the Corporate Sustainability Due Diligence (CSDD) took place in the European Parliament's premises in Strasbourg on 13-14 December 2023 (13:30 – 7.40). This debriefing note focuses on the compromises on points and provisions that were discussed during the Trilogue.

In addition, a version of document 4c, which covers all the operative part, is provided together with the flash. The annex has not yet been included, insofar as the redactions of the agreed texts have to be included. It will be distributed as soon as the relevant lines have been added. With the technical work done so far, all lines and related recitals are covered in green.

We hope that delegations will find this information useful.

Kind regards,

The Spanish Presidency Team.

Points for Discussion

CONTEXT AND APPROACH

This last Trilogue was intended to address the most relevant political issues to the closure of the dossier. These were: treatment of the financial sector; accommodation of climate change obligations (Art. 15); and definition of the article on civil liability (Art. 22). In addition, specific elements of the annex and scope remained as outstanding issues from previous discussions.

It should be outlined that the Presidency's aim was to try to maintain the positions defined in the package solution for the revised mandate approved in COREPER I on 10 November 2023 (see Annex of this note).

To this end, the Council's objectives were to:

- (a) Regarding the financial Sector: to postpone its specific treatment to a later stage - through a review clause and political declaration in the form of an inter-institutional statement-;
- (b) In relation to the Climate Change: to take into account the proper nature of climate change obligations, establishing them as obligations of means, aligning the content of climate change transition plans with the CSRD and establishing financial incentives for the implementation of the transition plan; and
- (c) In relation to Civil Liability: establishing a civil liability system that would maintain the Council's systematic - fault-based system - albeit with strengthened elements of access to justice.

In addition, regarding the scope, the Presidency intended to maintain the level of the thresholds as set in the Council's mandate. Also, in relation to the Annex, it aimed at keeping the systematic and logic of the Councils' text, which meant that it should only list instruments containing obligations that were applicable to companies, that were of binding nature and that were ratified by all Member States.

It should be noted that these objectives placed the Council in positions far from those of the Parliament, which made the agreement difficult. Therefore, an ambitious stance was necessary on the bargaining elements. In this sense, big efforts were made to find compromises that respected the terms of the revised mandate and that, at the same time, maintained the coherence and added value of the proposal.

The outcome, from the perspective of the Presidency, is a text that broadly respects the limits of the revised mandate and at the same time provides real value and respects the concerns of all negotiating parties.

The areas of compromise are listed below.

- A. **Financial sector.** This was one of the main core political differences between the two institutions. The Council proposed to postpone its specific treatment to a later stage - through a review clause and political declaration in the form of an inter-institutional statement-. On the contrary, the Parliament envisaged a comprehensive treatment, covering financial services through a specific Article and the integration of banking and insurance through specificities in the due diligence process.

A.1. Approach

As it was one of the elements underpinning the majorities that allowed for the approval of the revised mandate, there was no room for compromise on this point. To this extent, the aim was to ensure the approach presented and approved in the revised mandate.

The last resort concessions that could be accepted were: (a) the possible integration of the upstream chain of activities – to the extent these are not affected by the special nature of financial sector- and (b) the possible inclusion for the purposes of Article 15, as it would be consistent with the alignment with the CSRD, while maintaining a limited impact, to the extent that Article 15 is isolated from the due diligence procedure.

A.2. Main amendments to the Council's text

- Deletion of references to financial activities in the downstream part of the value chain (in Article 3(g)), and deletion of all references to the specificities of the financial sector in the due diligence procedure. This entails that Financial Sector would only be covered upstream and for the purposes of Article 15¹.
- Inclusion of the financial sector in the review clause (to be accompanied by an inter-institutional political declaration).

A.3. Added value of the outcome

- It made possible to have an agreement on the overall package. This treatment for the Financial Sector was the base for the revised mandate. No other solution was feasible in the Council and this approach helped to ensure added value in other parts of the text.
- The inclusion upstream ensures that those activities (inputs) that are not affected by the special nature of financial sector are covered.
- The inclusion of the financial sector for the purpose of Article 15, while addressing some of the concerns from the EP, allows further consistency with CSRD. It also ensures to foster the use of financial incentives to promote this plans also in this sector, creating added value.

¹ In terms of drafting technique, the same objective could have been achieved with an explicit exclusion for the downstream part of the value chain, subject to a review clause. Although this alternative systematic approach was chosen, the agreement with Parliament refers to the end: inclusion only upstream and for the purposes of Article 15.

- B. **Climate change** Article 15 is one of the main political elements of the proposal, in which relevant differences in the approach of the two institutions are detected. In part, these differences are due to the different perceptions of the difficulty of applying to companies' obligations that were originally intended for States. The Council's approach has sought to decouple climate change obligations from those relating to environmental impacts. The Parliament, on the contrary, integrates it in the Due Diligence process, setting also implications in terms of civil liability. There were also differences in terms of the remuneration policy to ensure the implementation of the plan.

B.1. Approach

The aim of the Presidency was to ensure a compromise within the limits set in the revised mandate. That is: (a) to set it as an obligations of means, ensuring that the company would only be responsible for what it's under its control; (b) to align the contents of the plan, where possible, with the CSRD; (c) as a concession, to link it with the financial incentives, among others, to promote the implementation of the plan and providing flexibility for companies in order to avoid unnecessary disruption of corporate governance. To this end, the final draft of the Article was built up on the systematic of the proposal presented by some MS.

B.2. Main amendments to the Council's text

- The obligation is set as an obligation of means (by the wording chosen for paragraph 1. Also explicitly referred to as an obligation of means in the recitals).
- Alignment with CSRD is ensured (including also intermedium targets). Those companies complying with the CSRD would be exempted from the obligation to adopt the plan.
- Inclusion of the financial incentives, among others, to promote the implementation of the plan.
- Inclusion of the Financial Sector for the purpose of this Article.

(*) No reference to this Article has been added in Article 22. In Article 18 no references have been added further the adoption or the design of the plan (formal perspective)

B.3. Value of the outcome

- It establishes an obligation of means, which intends to push towards the achievement of climate objectives, but without setting obligations beyond what is under the control of companies.
- Ensures consistency of the obligation with the CSRD, while avoiding duplication by exempting companies that already comply with the CSRD obligation to draw up the plan.
- Creates added value incorporating the Financial Sector, already included in CSRD.
- Introduce, for the case of big companies (more than 1000 employees), the financial incentives in order to promote the implementation of the plan, extending a practice that is already exists in big listed companies.

- C. **Civil Liability.** The Article on civil liability is one of the politically relevant elements of this negotiation for two reasons: from a technical perspective, it can be assumed that the practical impact of this Directive will depend to some extent on the terms in which civil liability and access to justice are framed; also, from a political perspective, it would be fair to say that this is considered to be a central element for the Council and also for the Parliament, in light of the discussions that took place to prepare their respective mandates.

The approach of the two institutions had relevant differences in terms of the systems set in par. 22.1 and 22.2 (fault based system vs objective system). The Parliament approach also included elements in relation to access to justice that were not included in the Council text.

C.1. Approach

As approved in the revised mandate, the aim of the Presidency was to ensure the systematic of the Council in par. 1 and 2. In return, it would include the demands of the EP in terms of access to justice (that is, those elements included by the EP in line 286 et seq. of the 4 column document: limitation periods, legal standing, disclosure of evidence, injunctive measures and cost for claimants). The final aim was to ensure the added value of the additions while ensuring the minimum possible disruption to national liability systems.

While, in order to ensure the compromise on the overall package it was needed to include all the elements requested by the Council. At the same time, to avoid unnecessary disruptions with national liability systems, the Presidency: (a) took inspiration on already existing pieces of legislation – particularly, but not only, the Directive 2014/104/EU or the collective redress directive-, (b) tried to open flexibility for MS when transposing the directive; and (c) ensured that these provisions would be without prejudice to the legal procedural systems.

C.2. Main amendments to the Council's text

- Inclusion of limitation periods (5 years) and expressing the starting for computation in a very basic manner. The wording of this provision is aligned with other pieces of legislation –particularly with Directive 2014/104/EU-.
- Inclusion of the legal standing provision, in an open manner and ensuring that this would be done without prejudice to national rules of civil procedure.
- Addition of the disclosure of evidence, setting that courts are able to order that such evidence be disclosed by the company in accordance with national procedural law. The principles of proportionality and protection of confidential information are also ensured through alignment with some of the basic conditions set in Directive 2014/104/EU.
- Addition of injunctive measures and reference to the cost for claimants in an open manner (following the structure of the EP amendments), ensuring no disruption with national systems.

The Council text is preserved for par. 1 and 2. The demand of the EP for the legal successor is not included. No other changes are added except for those needed in terms of consistency with the rest of the text as discussed in previous

WP meetings (i.e. reference to multi-stakeholder initiatives and contractual clauses).

C.3. Value of the outcome

- It maintains the systematic of the Council, avoiding disruptive changes.
- The additions related to access to justice facilitates the effective compensation of the victims, creating real added value.
- Most of the elements are maintain in a quite open manner and its frame take inspiration in already existing EU pieces of legislation, giving room for manoeuvre to MS and minimising the disruption in the national liability systems.

D. **Scope.** There were relevant differences among the two institutions. In this line, the Parliament maintained lower thresholds, at the level of the Council's high-risk sectors, and incorporated anti-circumvention clauses (group and franchise consideration).

D.1. Approach

The approach was to respect the terms of the revised mandate, where the maintenance of the thresholds was set as a red line. In return, however, some flexibility was allowed with the addition of additional sectors as high-risk sectors. Furthermore, the addition of anti-circumvention clauses (group and franchise) and stakeholder meaningful engagement obligations.

In relation to anti-circumvention clauses, particular attention was paid to ensure that they were fit for purpose. Also with regard to the undertaking, in order to avoid unnecessary burdens. The extension to new high-risk sectors was used as a concession of last resort and was kept to the minimum possible.

D.2. Main amendments to the Council's text

- Inclusion of Group level, ensuring that thresholds apply to EU consolidated annual statements, while avoiding capturing companies at group level not engaged in management or operational decisions of the subsidiaries.
- Franchises, individually or at group level, would be captured on the basis of a specific threshold on the royalty's volume of 7.5 million² and a minimum net turnover of EUR 40 million in the Union .
- Addition of the construction sector to the list of High Risk Sectors³.
- Inclusion of a new Article 8d for meaningful engagement, which incorporates the time and manner in which consultations are articulated in the diligence procedure. To a large extent, it results from the grouping of obligations that were previously dispersed in the text.

² Result of applying the average royalty (5%) to the general group threshold -150 million

³ This addition is justified by the primarily human rights concerns associated with large construction projects in third countries. The addition means extending the scope to 850 additional companies (according to Commission data). In principle, the addition does not represent a major change, as (1) large construction companies involved in global chains were covered by the general thresholds and (2) the medium-sized companies that would be included operate mainly within the EU, where they already have sufficient environmental and human rights standards.

D.3. Value of the outcome

- It maintains the systematic and logic of the Council, avoiding disruptive changes.
- The additions of the anti-circumvention clauses ensure a more uniform application of the rule, which is not affected by the choice of corporate form. The fine tuning of the clauses, following the concerns expressed in the WP, ensures that these clauses are fit for purpose.
- The additions of high-risk sectors are kept very limited while addressing the concerns expressed by the EP. Moreover, given the nature of the sector included, it should have a low impact on smaller European construction companies.

E. Annex. There were relevant differences among the two institutions in relation to the systematic and to the instruments and particular obligations listed.

E.1. Approach

The approach was to maintain systematic of the Council while trying to address most of the EP demands. That means:

For the Human Rights:

- Vulnerable groups: (1) inclusion of particular provisions that were specific enough for their inclusion in Part 1 of the Annex -and potentially in Part 2- plus, (2) for those that could not be included, introduction of some interpretative element in the sense that particular consideration should be given in the due diligence process to potential impacts on especially vulnerable groups.
- ILO core conventions: addition through delegated act once ratified by all MS. Inclusion of the ILO Declaration on Fundamental Principles and Rights at Work (amended in 2022) in the recitals.
- Armed conflict and corruption: reference in the risk factors to be considered by the company when carrying out the Due Diligence policy (it would be done through the guidance prepared by the COM, that would take into account that aspects).

For Environmental adverse impacts:

- Targeted additions in the list of prohibitions and obligations.
- Targeted extension of point 18 to cover additional impacts not covered by the already existing international instruments. This extension was done trying to align the concepts used with those already set in other pieces of legislation (particularly, ecosystem services –Environmental Crimes Directive-).

D.2. Main amendments to the Council's text

- Inclusion of specific reference to vulnerable groups in the recital. These should be taken into account when carrying out the Due Diligence policy.
- Targeted inclusion in the lists of human rights, specific rights (particularly, among others, those related with the Convention of the Rights of the Child).
- References to the consideration to the vulnerable groups in the recitals.
- References to the consideration of conflict areas and corruption, interpreted in consistency with the international instruments, in the recitals and in the definition of risk factors (open list).
- Targeted additions in the list of environmental prohibitions and obligations.
- Targeted extension of point 18 to cover additional impacts not covered by the already existing international instruments. This extension was done trying to align the concepts used with those already set in other pieces of legislation (particularly, ecosystem services –Environmental Crimes Directive-).

F. Other elements.

Value chain: the definition of the value chain is not altered as a result of the discussion on the sales phase. In this line, the only amendment that was agreed on is to include among the appropriate measures referred to in article 7 and 8, the modifications of, or improvements to, the company's own business plan, overall strategies and operations, including purchasing practices, design and distribution practices. This addition of the design and distribution practices would aim to address adverse impacts arising both in the upstream part and the downstream part of their chain of activities, before and after the product has been made.

Disengagement (Art 7 and 8): the final agreement includes a dynamic approach, which would be set as a last resort solution, and which would provide sufficient flexibility to make it workable in practice for companies –being them the one in charge of defining the deadlines for termination for the severe impacts through an enhanced action plan. The final draft is inspired on the already existing German legislation.

ELEMENTS INCLUDED IN THE CHANGE OF MANDATE AND CONDITIONS ON THE APPROACH

Conditions and approach detailed for the change of mandate were as follows (see COREPER note and related flashes, particularly WK 14594/2023, WK14193/2023, WK13486/2023 and WK14193/2023):

SCOPE (ARTICLE 2)		
Maintain the thresholds of the Council text while changing the mandate to have flexibility for the addition of one or more of the elements listed below		
Sub-element 1	Anti-circumvention: Group level	Condition: fine tuning in order to make it fit for purpose (that is, to capture the ultimate layer in the EU and to avoid capturing business at group level not engaged in in management or operational decisions).
Sub-element 2	Anti-circumvention: Franchise	Condition: fine tuning in order to avoid legal uncertainty or unintended consequences.
Sub-element 3	Addition of sectors in 2.1.b and 2.2.b	Condition: if needed, the sector to be included would be taken from the list detailed in the annex of the flash WK14193/2023
Sub-element 4	Meaningful engagement	Condition: to avoid a disproportionate burden on companies

FINANCIAL SECTOR
A change of mandate would be needed to exclude the Financial Sector, by introducing it in a review clause. This commitment would be accompanied by an inter-institutional political declaration between the Parliament, the Commission and the Council, to address this issue at a later stage, on the basis of a sufficient impact analysis and with a comprehensive and ambitious approach.
Condition: In order to make it feasible to have a final agreement with the Parliament, it would be needed to accompany this demand with (a) concessions from the Council on the other relevant political elements of the proposal -mainly art 15, 22 and Annex-, that must be sufficient, explicit and operate as a <i>sine qua non</i> condition for this overall approach, (b) a strong and clear enough political inter-institutional statement between the three institutions. Otherwise, intermediate solutions for the Financial Sector might have to be included.

CLIMATE CHANGE (ARTICLE 15)		
A change of mandate would be necessary to open up the possibility for the inclusion of one or more of the following elements: (a) incorporate an obligation of means; (b) the development of the content of the plan; and (c) a link with the remuneration policy (art 15.3).		
Sub-element 1	Obligation of means	Condition: keep it as an obligation of means, ensuring that the company would only be responsible for what it's under its control. Drafting conditioned to the needs of the negotiation
Sub-element 2	Development of the content of the plan	Condition: alignment, where possible, with the CSRD.
Sub-element 3	Link with the remuneration policy	Condition: keep it as an incentive linked to the plan. Avoid unnecessary disruption of corporate governance. Flexibility should be provided for companies.

CIVIL LIABILITY (ARTICLE 22)		
A change of mandate would be needed to include the demands of the EP in terms of access to justice (that is, to include some of the elements included by the EP in line 286 a of the 4 column document). In return, par 1 and 2 of the Council text would be maintain as they are.		
Sub-element 1	Limitation periods	Condition: to ensure the added value of the additions while ensuring the minimum possible disruption to national liability systems.
Sub-element 2	Legal standing	
Sub-element 3	Disclosure of evidence	
Sub-element 4	Injunctive measures	
Sub-element 5	Cost for claimants	

ANNEX I AND DEFINITIONS IN ART 3B		
A change of mandate would be needed to reset the list of elements included in the annex and to redefine the obligation in article 3b (adverse environmental impact).		
Sub-element 1	Human Rights – Vulnerable groups	<p>Approach: (1) Reassessment to identify particular provisions specific enough for their inclusion in Part 1 of the Annex -and potentially in Part 2- plus, (2) for those that cannot be included, Introduction of some interpretative element in the sense that particular consideration should be given in the due diligence process to potential impacts on especially vulnerable groups.</p> <p>Condition: flexibility would be needed on the elements to be added while ensuring that additions would respect the criteria of the Council –binding instruments, ratified by all the MS and with a clear standard that would be applicable to companies-.</p>
Sub-element 2	Human Rights - ILO core conventions	Approach: addition. Preferably through delegated act once ratified by all MS.

Sub-element 3	Human Rights - Armed Conflict Situations & Corruption	Approach: demand to be addressed through reference in the risk factors to be considered by the company when carrying out the Due Diligence policy (open list of elements). See next section of these doc.
Sub-element 4	Environmental adverse impacts: inclusion of a reference to points 18 and 19 in the definition of article 3b.	Condition: text to be decided depending on the dynamic of the negotiation.