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NOTE

From:	General Secretariat of the Council
To:	Working Party on Company Law (Sustainability information)
N° Cion doc.:	8132/21
Subject:	Proposal for a Directive of the European Parliament and of the COUNCIL amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting - WP meeting of 03/02/2022 - Comments from Spain and Estonia

Delegates will find herewith the comments of Spain and Estonia on the above mentioned proposal

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SPANISH COMMENTS TO COMPROMISE TEXT 28 JANUARY 2022

1. ARTICLE 34 OF THE ACCOUNTING DIRECTIVE (application of articles 7 and 12 of the Audit Regulation to the independent assurance service providers when the CE has adopted reasonable assurance standards)

Paragraph 3.a of this article states as follows:

*“3a. Member States may allow an independent assurance services provider to express the opinion referred to in paragraph 1, second subparagraph, point (aa), provided that **such independent assurance services provider** it is subject to requirements that are equivalent with **to** those set out in Directive 2006/43/EC of the European Parliament and of the Council as regards the assurance of sustainability reporting as defined in Article 2, point 22 of that Directive, in particular with requirements on:*

- i) training and examination, ensuring that independent assurance services providers acquire the necessary expertise on sustainability reporting and the assurance of sustainability reporting;*
- ii) continuing education;*
- iii) quality assurance systems;*
- iv) **professional ethics, independence, and objectivity, confidentiality and professional secrecy;***
- v) **appointment and dismissal;** and*
- vi) **investigations and sanctionssupervision.***
- vi) sanctions*

Articles 7 and 12 of Regulation (EU) No 537/2014 shall apply mutatis mutandis to independent assurance services provider carrying out assurance engagements of sustainability reporting once the Commission has adopted assurance standards for reasonable assurance

Where an independent assurance services provider gives the opinion referred to in paragraph 1, second subparagraph, point (aa), this opinion shall be prepared in accordance with Article 28a of Directive 2006/43/EC.;

- A) On one hand regarding the proposal made by Germany regarding the inclusion of the provisions on **internal organization** in the list of provisions to be applied in a equivalent manner to the independent assurance service provider, we do not oppose. It is our



understanding that the mention “in particular” in the drafting allows to interpret that those are required but other requirements could be included, in this sense and to ensure consistency between Member states it is advisable to include that mention.

In this regard, in relation to the corresponding recital 54 we would support Poland suggestion regarding the drafting proposed by Germany to complete the mention in that recital to other chapters in the Directive which contain provisions applicable to the independent assurance service providers.

NOTE: Poland comment

“Furthermore, recital 54 should be amended as follows: “In particular, Member States should set out equivalent requirements as regards training and examination, continuing education, quality assurance systems, professional ethics independence, objectivity, confidentiality and professional secrecy, appointment and dismissal **and the organization of the work** of the independent assurance services providers, and investigations and sanctions, **as set out in Chapter IV, VI and VII of Directive 2006/43/EC.**”

In our opinion the reference to Chapters IV, VI and VII is incomplete because:

- chapter IV deals with professional ethics, independence, objectivity, confidentiality and professional secrecy, as well as with organisation of the work (art. 24b)
- chapter VI deals with quality assurance, and
- chapter VII deals with investigations and sanctions.

But the above chapters do not regulate the requirements on:

- 1) training and examination and continuing education (these are in chapter II),
- 2) assurance standards and assurance of consolidated sustainability reporting (art. 26a and art. 27a in chapter V) and
- 3) appointment and dismissal (art. 37 and 38 in chapter IX).

So the reference only to chapters IV, VI and VII poses a risk that there will be a contradiction of the wording between the text of recital 54 and the text in Article 34(3a) - one may argue that the reference only to these three chapters means that we may require IASP to meet only the requirements equivalent to the ones set out in these three chapters, without requiring the equivalent requirements on training, examination, continuing education, assurance standards or appointment and dismissal.

Therefore we suggest either to complement the reference to other chapters as indicated above or delete the reference to any chapters.”



B) Regarding the second paragraph included in this paragraph 3.a of article 34 of the Accounting Directive, to extend the application of articles 7 and 12 of the Regulation to the independent assurance service provider.

ICAC position: These provisions should be applicable to the independent assurance service provider if carrying out the assurance engagement of sustainability information becomes aware of any irregularity or any of the circumstances contained in article 12. There is no sense in limiting this only when the reasonable assurance standards have been adopted by the Commission. We acknowledge that the level of work carried out in a limited assurance engagement is different to that carried out in a reasonable assurance service but this does not seem to justify that if the independent assurance service providers carrying out his work becomes aware of these situations will not report them if the engagement is a limited assurance one.

Therefore, we would propose the following drafting:

“Articles 7 and 12 of Regulation (EU) No 537/2014 shall apply mutatis mutandis to independent assurance services providers carrying out assurance engagements of sustainability reporting ~~once the Commission has adopted assurance standards for reasonable assurance~~”

C) Regarding the paragraph included in article 3.a of article 34 of the Accounting Directive to make a reference to art. 28.a) for the report of the independent assurance service provider (Where an independent assurance services provider gives the opinion referred to in paragraph 1, second subparagraph, point (aa), this opinion shall be prepared in accordance with Article 28a of Directive 2006/43/EC) and the proposal made by Germany and supported by Poland to make a reference to the standards applicable to that report when issued by the independent assurance service provider, we do not find it necessary since article 28.a) of the Audit Directive states that “the statutory auditor(s) or the audit firm(s) shall present the results of the assurance of sustainability reporting in an assurance report on sustainability reporting. The report shall be prepared in accordance with the requirements of assurance standards adopted by the Commission or, **by Member States until the Commission adopts the assurance standards where applicable, the guidelines prepared by the CEAOB, as referred to in Article 26a.**”

However, we do not oppose to the inclusion of a cross reference for clarity reasons, since some other Member States have identified a lack of clarity.



2. ARTICLES 16 AND 17 OF THE AUDIT DIRECTIVE (Register of third country auditors/audit firms)

The drafting of these articles in the 28 th January Compromise text is as follows:

“Article 16 is amended as follows:

(c) in paragraph 2, the following subparagraph is added:

The register shall indicate which third-country auditors are registered for carrying out the financial audit, the assurance of sustainability reporting or both.

Article 17 is amended as follows:

b) in paragraph 2, the following subparagraph is added:

‘The register shall indicate which third-country audit entities are registered for carrying out the financial audit, the assurance of sustainability reporting or both.’;

The content in paragraph 2 of these articles in the Current Directive 2006/43/EC is as follows:

“16.2. Third-country auditors registered in accordance with Article 45 shall be clearly indicated in the register as such and not as statutory auditors.”

“17.2. Third-country audit entities registered in accordance with Article 45 shall be clearly indicated in the register as such and not as audit firms.”

Article 45 of the current Directive states as follows:

“1. The competent authorities of a Member State shall, in accordance with Articles 15, 16 and 17, register every third-country auditor and audit entity, where that third-country auditor or audit entity provides an audit report concerning the annual or consolidated financial statements of an undertaking incorporated outside the Union whose transferable securities are admitted to trading on a regulated market of that Member State within the meaning of point 14 of Article 4(1) of Directive 2004/39/EC, except when the undertaking in question is an issuer exclusively of outstanding debt securities for which one of the following applies:

- (a) they have been admitted to trading on a regulated market in a Member State within the meaning of point (c) of Article 2(1) of Directive 2004/109/EC of the European Parliament and of the Council (²⁷) prior to 31 December 2010 and the denomination per unit of which is, at the date of issue, at least EUR 50 000 or, in the case of debt securities denominated in another currency, equivalent, at the date of issue, to at least EUR 50 000;*
- (b) they are admitted to trading on a regulated market in a Member State within the meaning of point (c) of Article 2(1) of Directive 2004/109/EC from 31 December 2010 and the denomination per unit*



of which is, at the date of issue, at least EUR 100 000 or, in case of debt securities denominated in another currency, equivalent, at the date of issue, to at least EUR 100 000.”

(...)

4. *Without prejudice to Article 46, audit reports concerning annual accounts or consolidated accounts referred to in paragraph 1 of this Article issued by third-country auditors or audit entities that are not registered in the Member State shall have no legal effect in that Member State.”*

Therefore, auditors who are now registered in the Official Register of the respective Member State, according to article 45 of the Directive are those auditors/audit firms who provide an audit report concerning the annual or consolidated financial statements of an undertaking incorporated outside the Union whose transferable securities are admitted to trading on a regulated market of that Member State. This registration is needed according to paragraph 4 of article 45 so that the audit reports have legal effect in the Member State. But this registration does not allow third country auditors/audit firms to carry out the audit activity in that Member State (as per articles 16/17 paragraph 1).

ICAC position: The proposed drafting might create confusion since it might convey the idea that auditors or audit firms can be registered to carry out the audit activity, while paragraph 1 of the respective articles 16 and 17 is clearly stating otherwise (they cannot be registered to carry out audits).

The following alternative writing is proposed:

“The register shall indicate which third country auditors (or audit entities) are registered so that their audit, report, their sustainability information assurance report, or both are valid in that Member State.”

3. POLAND PROPOSAL FOR PARAGRAPH 5 AND 5A IN ARTICLE 45 OF THE AUDIT DIRECTIVE (Register of third country auditors/audit firms so that their audit report or sustainability report is valid)

The proposal made by Poland for the drafting of article 45, paragraphs 5 and 5a) is as follows:

*“5. A Member State may register a third-country audit entity **for the purpose of the audit of financial statements** only if:*

*(b) the majority of the members of the administrative or management body of the third-country audit entity meet requirements which are equivalent to those laid down in Articles 4 to 10, **with the exception of Articles 7(2), 8(3), 10(1) second subparagraph and 14(2), fourth subparagraph**;*

*(c) the third-country auditor carrying out the audit on behalf of the third-country audit entity meets requirements which are equivalent to those laid down in Articles 4 to 10, **with the exception of Articles 7(2), 8(3), 10(1) second subparagraph and 14(2), fourth subparagraph**;*

(d) the audits of the annual or consolidated financial statements referred to in paragraph 1 are carried out in accordance with international auditing standards as referred to in Article 26, as well as the requirements laid down in Articles 22, 22b and 25, or with equivalent standards and requirements;

(e) it publishes on its website an annual transparency report which includes the information referred to in Article 13 of Regulation (EU) No 537/2014 or it complies with equivalent disclosure requirements;



A Member State may register a third-country audit entity for the purpose of the assurance of sustainability reporting only if:

(b) the majority of the members of the administrative or management body of the third-country audit entity meet requirements which are equivalent to those laid down in Articles 4 to 10;

(c) the third-country auditor carrying out the audit on behalf of the third-country audit entity meets requirements which are equivalent to those laid down in Articles 4 to 10;

(d) the assurance of the annual or consolidated sustainability reporting referred to in paragraph 1 are carried out in accordance with assurance standards as referred to in Article 26a, as well as the requirements laid down in Articles 22, 22b, 25 and 25b, or with equivalent standards and requirements;'

(e) it publishes on its website an annual transparency report which includes the information referred to in Article 13 of Regulation (EU) No 537/2014 or it complies with equivalent disclosure requirements.

5a. A Member State may register a third-country auditor for the purpose of the audit of financial statements only if he or she meets the requirements set out in points (c), (d) and (e) of paragraph 5, first subparagraph of this Article.

A Member State may register a third-country auditor for the purpose of the assurance for sustainability reporting only if he or she meets the requirements set out in points (c), (d) and (e) of paragraph 5, second subparagraph of this Article."

ICAC position: For the reasons explained in point 2 of this writing and for consistency reasons we propose the following drafting for those paragraphs.

5. A Member State may register a third-country audit entity for the purpose of so that the audit report of the financial statements is valid only if:

(b) the majority of the members of the administrative or management body of the third-country audit entity meet requirements which are equivalent to those laid down in Articles 4 to 10, with the exception of Articles 7(2), 8(3), 10(1) second subparagraph and 14(2), fourth subparagraph;

(c) the third-country auditor carrying out the audit on behalf of the third-country audit entity meets requirements which are equivalent to those laid down in Articles 4 to 10, with the exception of Articles 7(2), 8(3), 10(1) second subparagraph and 14(2), fourth subparagraph;

(d) the audits of the annual or consolidated financial statements referred to in paragraph 1 are carried out in accordance with international auditing standards as referred to in Article 26, as well as the requirements laid down in Articles 22, 22b and 25, or with equivalent standards and requirements;

(e) it publishes on its website an annual transparency report which includes the information referred to in Article 13 of Regulation (EU) No 537/2014 or it complies with equivalent disclosure requirements;

A Member State may register a third-country audit entity so that the sustainability information assurance report is valid of the assurance of sustainability reporting only if:

(b) the majority of the members of the administrative or management body of the third-country audit entity meet requirements which are equivalent to those laid down in Articles 4 to 10;

(c) the third-country auditor carrying out the audit on behalf of the third-country audit entity meets requirements which are equivalent to those laid down in Articles 4 to 10;

(d) the assurance of the annual or consolidated sustainability reporting referred to in paragraph 1 are carried out in accordance with assurance standards as referred to in Article 26a, as well as the requirements laid down in Articles 22, 22b, 25 and 25b, or with equivalent standards and requirements;'

(e) it publishes on its website an annual transparency report which includes the information referred to in Article 13 of Regulation (EU) No 537/2014 or it complies with equivalent disclosure requirements.

5a. A Member State may register a third-country auditor for the purpose of so that the audit report of the financial statements is valid only if he or she meets the requirements set out in points (c), (d) and (e) of paragraph 5, first subparagraph of this Article.

A Member State may register a third-country auditor for the purpose of the assurance for sustainability reporting so that the sustainability information assurance report is valid of the assurance of sustainability



reporting only if he or she meets the requirements set out in points (c), (d) and (e) of paragraph 5, second subparagraph of this Article.

4. ARTICLES TO BE MODIFIED IN THE AUDIT REGULATION (prohibition of provision of certain services)

In the compromise text there are some inconsistencies that should be analysed.

On one hand, the inclusion of article 5.a to prohibit the provision of assurance services related to the preparation of the sustainability information is included only for the cases when an auditor, different to the one carrying out the audit of the financial statements, is in charge of the assurance engagement of the sustainability information.

This is difficult to understand. How can it be that if we have three different professionals who can provide that assurance engagement service, that is the auditor auditing the financial statements, another auditor or the independent assurance service provider, this prohibition to participate in the preparation of the sustainability information is only foreseen for the auditor who is not auditing the financial statements. The provision of these services is a self review threat that cannot be mitigated and therefore the prohibition of the provision of these services should be included in the proposal but in a consistent manner.

On the other hand, the inclusion of paragraph 4 in article 5, to state that the prohibition of the valuation services applies to the assurance engagement of sustainability reporting, seems to be only applicable to auditors auditing the financial statements (no mention is included in article 5.a)). This again poses the same question as before, is it justified to establish a different system of prohibition of provision of services to the three different professionals that might provide the assurance service for the sustainability information?

Finally, article 5 of the current Regulation, includes some other prohibited services (different to those related to valuation services) that could also be prohibited when carrying out the assurance engagement on the sustainability information. This includes the services included in letters b), c), f) g) h) and j).

We have to take into account that the Independence of the auditor and of the independent assurance service provider is the core requirement for third parties to rely on the reports they issue.

Considering that the Regulation is applicable to auditors auditing PIEs (see article 2 on the scope of application) and that the regulation of the provisions applicable to the independent assurance service providers is included in article 34 of the Accounting Directive maybe the following drafting of these articles could be an option:

The following paragraph is added in Article 5 of the Regulation (to be applied when the auditor is carrying out the audit of the financial statements and the assurance of the sustainability information):



5.1.a) When the statutory auditor or the audit firm carrying out the audit of the financial statements is also carrying out the assurance service of the sustainability information of the public interest entity, neither the statutory auditor or audit firm nor any member of the network to which the statutory auditor or the audit firm belongs, shall directly or indirectly provide to the audited entity, to its parent undertaking or to its controlled undertakings within the Union consulting services for the preparation of sustainability reporting in the period between the beginning of the period audited and the issuing of the assurance report.

5.a) is added with the following drafting (to be applied when the assurance of the sustainability information is carried out by an audit who is not auditing the financial statements)

Article 5 paragraph 1, letters b), c), e), f), g), h) and j), paragraphs 2, 3 and 5 of Regulation (EU) No 537/2014 and article 5.1.a) shall apply mutatis mutandi to an auditor, other than the one carrying out the audit of the financial statements, carrying out the assurance engagement of sustainability reporting.

Articles 7, 8 and 12 shall apply mutatis mutandis to the provision of assurance engagements of sustainability reporting, by an auditor, other than the one carrying out the audit of the financial statements.

The following paragraph is added in Article 34 3.a (to be applied when the independent assurance service provider is carrying out the assurance of the sustainability information):

Article 5 paragraph 1, letters b), c), e), f), g), h) and j), paragraphs 2, 3 and 5 of Regulation (EU) No 537/2014 and article 5.1.a) shall apply mutatis mutandis to independent assurance services providers carrying out assurance engagements of sustainability reporting.

1. Terminology

We are concerned with certain terminology such as using audit and assurance next to each other. I understand that one means statutory audit and the other assurance of sustainability reporting, but in the short version it is confusing, especially when it is used 'audit or assurance' considering that audit is assurance engagement as well. Another example 'carry out assurance'. Most likely the intention has been to say 'carry out assurance engagement'.

We encourage to review the new terminology use in the directive, especially for the 'assurance (engagement) of sustainability reporting'.

2. Information in the registry.

We welcome the addition to Art 16 (a) (bb). We make a suggestion not to use 'or not' at the end of the requirement. We predict that additional list for "sustainability auditors" will be created, which will compose of statutory auditors and IASP. The auditors list should provide information whether auditor has been approved for carrying out the assurance of sustainability reporting. We find the requirement to pin out also the ones, who have not been approved, somewhat odd. Currently we already provide information on additional qualifications that statutory auditor might have, such as public sector qualification or internal audit qualification. We do not mention the qualifications they don't have. The same comment applies to the audit firms.

3. We ask for a clarification on Art 34 (Accounting Directive) addition 3 aa. It says „When the Commission adopts standards for reasonable assurance according to Article 26a(2), second subparagraph of Directive 2006/43/EU, **following an impact assessment to determine that it is possible for an auditor to provide reasonable assurance and for an undertaking to access one,**” It is not clear to us what is the meaning of 'for an undertaking to access one'. We agree that on certain information provided in the sustainability report, reasonable assurance cannot be provided. We do not understand which undertaking is referred here nor which access is mentioned.