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**MEETING DOCUMENT**

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<td>To:</td>
<td>Working Party on Company Law (Attachés)</td>
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</table>

Delegations will find attached the Presidency Flash in view of the Company Law Working Party meeting (Attachés) on 10th November 2023.
Dear colleagues,

We are pleased to send you the seventh flash on the Due Diligence Directive (CSDDD) in preparation for the Company Law Group meeting on 10 November.

The aim of the meeting is to present a comprehensive package providing a global and exhaustive overview of the landing zone proposed by the Presidency for the political elements of the proposal. This vision would complement the work already developed for the technical part of the text over the last months and which has been presented and discussed in detail with delegations. This whole package, if agreed, would be presented to COREPER on the 15 November in a complete package for the change of negotiating mandate, with a view to reaching an agreement that accommodates the main concerns of the Parliament and the Council, while shaping a proposal that brings added value and responds to the objectives initially pursued.

To this end, this document includes:

- In the first section, a presentation of the overall balance and the relevant political compromises on which the agreement would rest. This is not just a matter of listing individual elements, but of explaining the logic followed, taking into account the dynamics of the entire negotiating process.
- The second section deals in detail with the individual political elements, addressing those sub-elements on which flexibility will be required and whose eventual inclusion or non-inclusion in the agreement would depend on the final balance of the agreement.
- A third and final section deals with the other relevant issues contained in the technical part.

The aim of this approach is (a) to provide sufficient clarity to delegations on the elements that will be subject to the change of mandate and the limits within which the negotiation should take place, and (b) to give the Presidency sufficient flexibility on the elements to be used in the negotiation with the Parliament.

We thank you in advance for your discretion and for maintaining the confidentiality of the information provided, which is particularly necessary for the ongoing negotiation.

We hope this information helps to have a fruitful discussion.

Kind regards,

The Spanish Presidency Team
PART I.
Overall Presidency proposal for the change of mandate

I. CONTEXT: LIST OF POLITICAL ELEMENTS TO BE CONSIDERED

There is a broad set of elements in the text that, by their very significance within the diligence process, have some political and practical importance. However, some of them stand out from the rest, either because of the starting distance between the institutions' mandates or because of the relevance given to them by each institution. These are the elements on which the entire negotiation pivots and whose balance must be clear before the change of mandate.

Along these lines, after intense discussions within the Council and with the Parliament, it can be concluded that the main political issues identified in the text are essentially the following five: (1) the subjective scope -article 2-; (2) the treatment of the financial sector; (3) the treatment of climate change issues -article 15-; (4) civil liability -article 22-; and (5) the content of Annex I, linked to the definitions of adverse environmental impact and adverse human rights impact, which delimit the objective scope of the proposal.

Along these lines, a first step in laying the foundations for a political agreement is to clarify the centre of gravity between these elements. This should be set in a way that offers a reasonable, sufficient and fair solution to the concerns expressed by the two institutions, while allowing for a sufficient degree of ambition to meet the original objectives of the proposal. This implies that the solutions also respect the three-fold objective which the Presidency has used as a guide in the negotiation: solutions have to be workable in practice, ensure legal certainty and not entail excessive costs for administrations or businesses.

While clarity must be given on the overall balance between the five blocks, it is important that sufficient flexibility is given in relation to the sub-elements integrated in each of them to ensure a margin of political manoeuvre for the Presidency during the trilogue.

II. BALANCING: PACKAGE SOLUTION AND RATIONALE BEHIND

The policy elements listed above have been thoroughly analysed in the working group, allowing the Presidency to have a full picture of Member States' sensitivities, and to understand their main concerns and their degree of flexibility for a political compromise.

From these meetings it is concluded that the three elements that should define the gravitational centre of the agreement are: the treatment of the financial sector; the way in which Climate Change is addressed - article 15-; and civil liability - article 22-. In addition, a reasonable balance must also be maintained for the Annex I and Scope.

In this line, the Presidency's approach involves:

A. A maximalist approach for the financial sector, relegating its inclusion to a later stage - through a review clause and political declaration in the form of an inter-institutional statement-.
B. An ambitious but clearly defined and targeted approach for the elements related to access to justice and Climate Change.
C. Concessions on the scope (subject to the condition of maintaining general thresholds) and Annex I (through a readjustment of the elements listed in the Annex and the amendment of the definitions of adverse environmental and human rights impacts, included in article 3).

The approach is based on the following logic:

A. Financial sector:

- **Context.** The Council mandate provided a delicate balance for the financial sector. It implied an exclusion for the downstream part of the chain of activities that would operate for the banking and insurance sectors (the so-called national clause), potentially keeping them outside the scope of the Directive, along with financial services.

  The problem with the text, which served to secure a difficult agreement in the Council, is that it creates difficult problems to overcome in working out a reasonable landing zone with the Parliament. The Council was (and remains) divided on this political element between those that can be flexible to an ambitious approach and those opposed to the inclusion of the financial sector at this stage. This division is furthermore particularised by the unease expressed by many delegations in relation to the already agreed by the Council-national option, which might affect the level playing field and that would cover the possibility of excluding *sine die* most of the financial sector in some Member States.

- **Group discussions: initial approach and main conclusions.** The Presidency's first approach was to put forward an ambitious proposal, which entailed removing the national option and giving broad coverage to the financial sector in exchange for certain adjustments to the due diligence process (see flash WK 13073/2023). The aim was to see whether this sector could be used as a valuable element of compromise or, alternatively, by adjusting its sub-elements, whether it was possible to explore intermediate options that still offered added value. What emerged from the debate, however, was a complete split in the Council between those who were flexible and those who legitimately raised doubts and concerns because of the lack of a proper impact analysis for the inclusion of the financial sector and also because of the practical difficulties that its inclusion might entail at this stage.

  This disagreement in the Council raises substantive but also practical problems in terms of negotiating logic. From a substantive point of view, it seems that a tailor-made inclusion of the financial sector - largely at the cost of limiting its scope - would require a lot of time and loss of political capital without adding significant value to the proposal, which would put into question its value as a concession to Parliament. Moreover, the cost in terms of support in the Council would mean that flexibility would have to be given up on elements which are equally important to Parliament and which, moreover, can add value and make a difference to the practical impact of the directive. At this point, a middle ground approach would certainly create potential cross vetoes that would put the agreement at risk.

- **Proposed solution.** Given the above drawbacks, the Presidency proposes a maximalist approach, with a possible exclusion of the financial sector which would delay the extension to the financial sector to a later stage. This option would consist of
establishing a review clause for the extension to the financial sector, 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. Obviously, such a
concession, in order to be fair to the Parliament, needs (a) to be accompanied by
concessions on the other elements of the proposal, that must be sufficient, explicit and
operate as a *sine qua non* condition for this overall approach, and (b) to ensure a clear
political commitment. If the Member States do not agree with this conditions, this
solution would not be credible to work as an acceptable solution for both institutions. In
such a case, intermediate solutions for the Financial Sector should be analysed and
included.

- **Bargaining value.** Under these conditions, the Presidency considers that this
  proposal, despite being maximalist, would offer some value for the Parliament, to the
  extent that: (a) it is not realistic to present an intermediate option with sufficient added
  value; (b) any later revision to include the financial sector will certainly be more
  comprehensive than what is feasible to have as an intermediate solution at this stage;
  and (c) the cost in terms of political capital of maintaining part of the financial sector in
  would limit the level of concession that could be given from the Council to the other
  relevant elements.

The choice proposed for the financial sector conditions the concessions on the other relevant
politic elements, which necessarily include civil liability and Climate Change as the core
elements, but also ensuring further concessions in Annex I and Scope. In this line, is important
to outline that concession in these areas must be sufficient and explicit, but also adequately
targeted so as not to affect the red lines that have been made explicit in the Council. The
framing for this other elements would be as follows:

**B. Civil liability:**

- **Context.** A delicate balance is set for civil liability in the Council general approach,
  where one of the sensitive issues was the subjective fault-based system, which
guarantees the right to effective and full compensation, with the limit of avoiding
overcompensation. In its approach, however, the Council does not incorporate
elements that facilitate access to justice. Indeed, these elements, which can
undoubtedly have an important practical impact and generate added value in the
proposal, are normally controversial in the Council. The reason is to avoid creating
singularities in civil liability regimes with each piece of legislation, what would end up
affecting the predictability and consistency of the system as a whole.

However, understanding these caveats, the Presidency considers that these elements
could make a difference in this proposal provided that they are accommodated in a
proportionate way, and if they are incorporated trying to minimise disruptions in national
systems.

- **Group discussions: initial approach and main conclusions.** Possible additions in
  the area of access to justice were discussed in the options paper on civil liability. In this
  paper, the amendments were proposed in a broad manner and on condition that the
civil liability framework provided for in Article 22(1) and (2) of the Council text would be
respected (see flash presented on Civil Liability doc.WK13486/2023). In the debate,
Member States expressed some flexibility but also numerous reservations about the
inclusion of certain elements contained in the Parliament's proposal, expressing reluctance to include them or suggesting alternative ways of accommodating them.

- **Proposed solution.** The Presidency would need flexibility in terms of all the elements related to access to justice contained in the Parliament's proposal in line 286a of the four-column document. That is: limitation periods, legal standing, disclosure of evidence, injunctive measures and cost for claimants. That would be offered as a partial counterpart to the exclusion of financial sector and also the maintenance of paragraphs 1 and 2 on civil liability. The number of elements to be compromised and the detail for their inclusion would have to be calibrated according to the evolution of the political discussion in the trilogues. The criteria to be respected would be: to ensure the added value of the additions while ensuring the minimum possible disruption to national liability systems.

- **Bargaining value.** The access to justice elements are included only in Parliament's text, constitute a political demand form the Parliament side and have an undeniable practical impact. Inclusion in the package, if properly tailored, has value as a compromise concession.

C. **Combating Climate Change:**

- **Context.** The Council takes a restrictive approach for the Climate Change provision, what is mainly explained by the difficulty of applying these obligations to companies and the implication it would have in terms of practical feasibility and legal certainty. As a result, its mandate dissociates Climate Change obligations from those related to environmental impacts. This implies limiting Climate Change almost exclusively to Article 15, making the obligation rather narrow and avoiding any addition related to corporate governance (deleting Article 15.3). By contrast, the Parliament's approach is intended to be ambitious in all these elements, creating relevant divergences with the Council text. However, these big differences offer the opportunity to make relevant concessions to be made by the Council in return for the exclusion of the Financial Sector.

- **Group discussions: initial approach and main conclusions.** The Presidency proposed to the Member States an exploratory and cautious approach to this article, listing the relevant variables that make the difference of the approach of the two institutions so that they could express the extent to which they could be flexible. However, the approach avoided exploring the extension of the obligation beyond the approval of the plan and also to establish a clear link with variable remuneration (see flash presented on article 15 doc. 13073/2023). During the discussion, little flexibility was given by the delegations because of the legal uncertainty that the application of such obligations could create for companies and also because opposition to include elements that could affect to corporate governance (reference to variable remuneration of directors in Article 15.3).

- **Proposed solution.** Despite the reluctance shown by delegations, the Presidency considers that an ambitious approach on this element is necessary in order to strike a reasonable balance with the Parliament. Along these lines, three elements would mark the ambition for article 15: (a) the establishment of an obligation, which by way of a compromise should take the form of an obligation of means, the details of which should
be defined in the light of the evolution of the political discussion in the trilogue; (b) greater detail on the content of the plan, aligning it with the provisions of the CSR framework; and (c) a link with the remuneration policy, always as an incentive linked to the plan and seeking to avoid unnecessary disruption of corporate governance and providing flexibility to companies. The Presidency would therefore need flexibility on these elements, defining their content in accordance with the development of the political negotiation.

- **Bargaining value.** This is a relevant political demand from Parliament. Moreover, such a framing might generate added value, ensuring the appropriate substance in the plan, and facilitating monitoring and control in its implementation, while limiting the company's obligation to what is under its control, always in the form of an obligation of means.

**D. Scope:**

**Context.** In relation to the scope of application of the Directive, the quantitative differences mark significant distance between the two institutions. This affects directly to a guiding criteria used throughout the negotiation. That is: every single obligation should be drafted taking into consideration its impact in terms of burdens on business -something which obviously depends on the size of the companies covered.

Notwithstanding these considerations, the Presidency considers that there are sufficient elements for a proper landing zone. The anti-circumvention measures proposed by the Parliament or the addition of additional sectors in paragraphs 2.1.b or 2.2.b (which would in practice serve to lower the threshold in a special risk area) could be useful for this purpose. Also some additional concessions of political value to Parliament could be included, such as the inclusion of a specific Article on meaningful engagement, which could generate also added value in the practical implementation of the proposal but which, because of their potential implication in terms of burden on business, was contingent on the scope.

**Group discussions: initial approach and main conclusions.** The Presidency proposed a conservative approach for the thresholds, which should be maintained to the extent that is a clear red line in the Council, but asked delegations for flexibility for the remaining elements (possible addition of sectors in 2.1.b and 2.2.b; inclusion of anti-circumvention measures through consideration of group and franchises; and possible concessions on meaningful engagement). However, during the discussion numerous legitimate concerns were raised on the rationality and impact of the inclusion of new specific sectors or on how to adequately limit anti-circumvention clauses in order to make them fit for purpose.

**Proposed solution.** Despite the doubts expressed by delegations, the Presidency's perception is that maintaining the thresholds would require an effort to accommodate the sub-elements identified. This would be done with some conditions: (a) the wording of the anti-circumvention measures should be readapted in order to ensure that they are fit for purpose and they do not create legal uncertainty or have unintended impacts; (b) the addition of new sectors should be accompanied by a proper rationale and to be consistent with the spirit of the logic of article 2.1.b; and (c) the terms of the meaningful engagement should be adjusted to avoid a disproportionate burden on companies.
**Bargaining value.** The proposed compromise, by maintaining the thresholds and guaranteeing a minimum size of companies covered by the Directive, would allow unlocking relevant political demands from Parliament that have added value in practice, such as the meaningful engagement (art.8.d of the Parliament text). Similarly, the anti-circumvention clauses serve as a concession element, while providing real added value, as they will favour the implementation of the proposal and to cover potential loopholes. Finally, the possible inclusion of sectors offers a key element of flexibility, to the extent that it allows to close the gap on the thresholds for specific cases, while maintaining proportionality in the application of the due diligence policy.

E. Annex I (and definitions in Article 3b and 3c):

**Context.** The Annex is one relevant element of the compromise insofar as it determines the scope of the obligations. In this line, the Council's priority is given by the need to ensure legal certainty by listing only those obligations and prohibitions that set a clear standard that would be applicable to companies. At the same time, it intends also ensure that the international agreements listed are binding and have been ratified by all Member States. For its part, the Parliament seeks a more expansive approach, even at the risk of breaking with the criteria used by the Council.

**Group discussions: initial approach and main conclusions.** In order to frame and articulate the group discussion, the Presidency proposed an approach consisting of:

(a) In the case of human rights, proposing the possible addition of new elements in the obligations and instruments listed while maintaining the Council's systematic. Along these lines, the divergences for the listed elements were grouped as follows: (a) particularly vulnerable groups; (b) core ILO conventions; and (c) conflict zones and corruption. For each of this categories targeted solutions were proposed in order to accommodate the demands of the European Parliament (see flash prepare for the discussion on the Annex WK14193/2023).

(b) In the case of environmental impacts, proposing an alternative to fill the gap created by the lack of an international agreement comprehensively covering all environmental impacts. To this end it was proposed to prepare a compromise that would be built up on the definition of environmental impacts of the European Parliament (which includes items 18 and 19 of the Annex) or, alternatively, by considering providing additional guidance in the Directive, whether in the recitals or the operative part, ensuring that obligations on companies would be applied consistently with some other piece of EU legislation that could cover the possible impacts.

Doubts and concerns were raised at the meeting about the approach of the European Parliament an on the additions proposed by it. However, some flexibility was shown by the some of the delegations.

**Proposed solution.** The Presidency considers that there should be room for a compromise on this part of the text, in order to allow for a closure of the package of relevant political elements that can be reasonable for Member States. At this point, the Presidency would need flexibility to establish the specific terms of the wording, under the condition that the additions should be established respecting the terms and logic of the Council. At this point it is important to note that the environmental elements are key to the final compromise and therefore require particular flexibility on the part of delegations.
**Bargaining value.** Many of the additions raised by Parliament have a political value. In many cases, the elements proposed to be added are already covered de facto, as far as company activity is concerned, by the ILO core conventions. In others, an alternative solution is foreseen without the need to amend the annex. However, the compromise on environmental issues is particularly valuable, as it has been insistently demanded by the Parliament.

**PART II.**

**Elements included in the change of mandate and conditions on the approach**

Given the reasoning explained in Part I of this document for the framing of the package proposal, the areas where a change of mandate is requested and the conditions that would be followed in the approach for the negotiation are as follows:

<table>
<thead>
<tr>
<th>SCOPE (ARTICLE 2)</th>
<th></th>
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<tbody>
<tr>
<td>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</td>
<td></td>
</tr>
<tr>
<td>Sub-element 1 Anti-circumvention: Group level</td>
<td>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).</td>
</tr>
<tr>
<td>Sub-element 2 Anti-circumvention: Franchise</td>
<td>Condition: fine tuning in order to avoid legal uncertainty or unintended consequences.</td>
</tr>
<tr>
<td>Sub-element 3 Addition of sectors in 2.1.b and 2.2.b</td>
<td>Condition: if needed, the sector to be included would be taken from the list detailed in the annex of the flash WK14193/2023</td>
</tr>
<tr>
<td>Sub-element 4 Meaningful engagement</td>
<td>Condition: to avoid a disproportionate burden on companies</td>
</tr>
</tbody>
</table>

**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 *sine qua non* 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 and obligation of means; (b) the development of the content of the plan; and (c) a link with the remuneration policy (art 15.3).

<table>
<thead>
<tr>
<th>Sub-element 1</th>
<th>Obligation of means</th>
<th>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</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sub-element 2</td>
<td>Development of the content of the plan</td>
<td>Condition: alignment, where possible, with the CSRD.</td>
</tr>
<tr>
<td>Sub-element 3</td>
<td>Link with the remuneration policy</td>
<td>Condition: keep it as an incentive linked to the plan. Avoid unnecessary disruption of corporate governance. Flexibility should be provided for companies.</td>
</tr>
</tbody>
</table>

### 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.

<table>
<thead>
<tr>
<th>Sub-element 1</th>
<th>Limitation periods</th>
<th>Condition: to ensure the added value of the additions while ensuring the minimum possible disruption to national liability systems.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sub-element 2</td>
<td>Legal standing</td>
<td></td>
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<tr>
<td>Sub-element 3</td>
<td>Disclosure of evidence</td>
<td></td>
</tr>
<tr>
<td>Sub-element 4</td>
<td>Injunctive measures</td>
<td></td>
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<tr>
<td>Sub-element 5</td>
<td>Cost for claimants</td>
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</tr>
</tbody>
</table>

### 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).

<table>
<thead>
<tr>
<th>Sub-element 1</th>
<th>Human Rights – Vulnerable groups</th>
<th>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. 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.-</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sub-element 2</td>
<td>Human Rights - ILO core conventions</td>
<td>Approach: addition. Preferably through delegated act once ratified by all MS.</td>
</tr>
<tr>
<td>Sub-element 3</td>
<td>Human Rights - Armed Conflict</td>
<td>Approach: demand to be addressed through reference in the risk factors to be considered by the company when carrying out the Due</td>
</tr>
<tr>
<td>Sub-element</td>
<td>Situations &amp; Corruption</td>
<td>Diligence policy (open list of elements). See next section of these doc.</td>
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<td>------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Sub-element 4</td>
<td>Environmental adverse impacts: inclusion of a reference to points 18 and 19 in the definition of article 3b.</td>
<td>Condition: text to be decided depending on the dynamic of the negotiation.</td>
</tr>
</tbody>
</table>

**PART III.**

**Other political elements included in the technical part of the text.**

I. Termination and responsible disengagement

Termination of business relationships represents one of the politically sensitive elements of the due diligence process presented in Article 7 and 8. This issue was addressed in trilogues and also subject of an options paper that was presented to the group for discussion.

In its initial approach, the Presidency considered introducing an obligation to terminate the business relationship, but subject to a maximum time limit. This would give the company time to resolve the absence of alternatives for the supply of products or provision services that could be essential to its production process and would also avoid termination at sensitive moments in the economic cycle or in specific economic scenarios (i.e. emergencies or relevant economic shocks). To this end, a tentative limit of 5 years was proposed. However, the proposal did not receive sufficient support.

In order to explore alternative solutions, an approach inspired on the German Law is proposed as a compromise option. This would allow to maintain a dynamic approach, set as a last resort solution in which it should be taken into account the impacts of termination versus non-termination in the context of responsible disengagement. The particularities for the new approach would be that termination would be determined in the prevention plan to be set by the company itself, which in turn would have to decide on the appropriate timeframe for it. In addition, this termination would be linked to serious adverse effects.

II. Inclusion of the definition of risk factors

During the negotiations, an alternative approach was suggested to MS in return to avoiding the references in the operative part to conflict areas. To this extent, as pointed out for article art. 5 the solution would entail to:

a) Add a definition of risk factors in Article 3, which could include geographical and operational context and
b) An addition in recital 28b, to specify that “in conflict-affected and high-risk areas, human rights’ abuses are more likely to occur and to be severe. Companies should take this into account when integrating due diligence into their policies and risk management systems”.

This solution would serve also to address some of the concerns expressed in the Annex.

III. Other elements

While some other elements could be outlined in the technical part, the intention of the Presidency is to accommodate them through non-disruptive approach within the logic of the Council approach (i.e. for pending elements in relevant definitions) or on the base of the future agreed solutions provided for the core political elements (i.e. transposition periods would be contingent on the decision on the scope). Additionally, some valuable elements would be subject of minor adjustments in the terms discussed in the Working Group to fully address the efficiency package elements so to ensure the alleviation of the burden on companies. For any further substantive change, MS would be duly informed in advance.