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MEETING DOCUMENT

From:	Presidency
To:	Working Party on Company Law (Attachés)
Subject:	Presidency Flash - 6/11/2023 Company Law WP meeting (Attachés)

Delegations will find attached the Presidency Flash in view of the Company Law Working Party meeting (Attachés) on 6th November 2023.

Working Party on Company Law

Presidency Flash

06 November

Dear colleagues,

We are pleased to send you the sixth flash on the Due Diligence Directive (CSDDD) in preparation for the Company Law Group meeting on 06 November.

The objective for this meeting is twofold:

- From a technical perspective: with a more expository character, to present presidency's drafting proposals for articles 11, 12, 13 and 14, which are intended to respect the original mandate. The aim is to provide a complete overview of the more technical part of the text, complementing the explanations already given for articles 4-10 and 17-21. The draft of these articles are included in the PART I of this document (*Presidency compromise proposals. Art. 11 to 14*). Delegations will be invited to comment on them.

- From a political perspective: to allow Member States to show their preferences on the two main pending political elements: scope and annex. Having already discussed the financial sector, the Climate Change and the Civil Liability, the aim is to have a clear picture of the possible elements that can be used to prepare the change of mandate. In order to organise the discussion, in PART II two option papers with targeted questions are included, one on the Annex and another one on the scope.

We thank you in advance for your discretion and for maintaining the confidentiality of the information circulated, as this is highly needed for the ongoing negotiation.

We hope this information helps to have a fruitful discussion.

Kind regards,

The Spanish Presidency Team

PART I.

Presidency compromise proposals
Articles 11 – 14

All the compromise proposals aim to respect the spirit of the mandate. To this extend, three criteria have been followed when discussing possible compromises: (a) the proposed solutions should be feasible in practice; (b) the amendments must not affect the legal certainty; and (c) no new burdens should be introduced –neither for companies nor for administrations-.

A. Article 11. Communicating. No relevant differences were detected between the mandates of the two institutions. The discussion focused on the technical elements and systematics of the article.

A.1. Approach

The aim is to maintain the logic of the article and the main safeguards to ensure that there is no duplication of the reporting obligation with that already contained in the CSRD.

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

- Possibility to use the official languages of the Union for the annual statement.
- Clarification on the deadlines.
- Obligation for third country companies to include in the statement the information pursuant to Article 16(2) on the company's authorised representative.
- Cross-reference in paragraph 2 to art 40a of the Directive 2013/34/EU, to cover also third country companies.
- Redraft of the reference to the delegated act that can be adopted by the Commission to clarify the objective.

B. Article 12. Model contractual clauses. No relevant differences were detected between the mandates of the two institutions. The discussion focused on the deadline to adopt guidance by the Commission.

B.1. Approach

The logic and systematics of the article are maintained. Besides, (a) a deadline is included and (b) the associated recital -recital 45- is adapted to accommodate Parliament's concerns. That is: that this model contractual clauses should not aim to fully transfer the obligations contained in this Directive; and that the mere use of this models should not be understood *per se* as compliance with the obligations of the directive, to the extent that certain adaptation to the specific case might be needed.

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

- Reference to the deadline referred to in the Article.
- Adaptation of recital 45 as set out above.

C. **Article 13. Guidelines.** the difference between the mandate of the two institutions lies mainly in the degree of detail that the Parliament sets out in the content of these guidelines.

C.1. Approach

The aim is to build up on the EP's additions, trying to improve the systematics, while: a) ensuring that guidance cover the elements that would be necessary to facilitate the implementation of the Directive and under any circumstance is used to a re-interpret its scope or essential elements; b) ensuring flexibility for the Commission in identifying the relevant areas in which the guidance might be needed.

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

- Inclusion of a list of specific elements form the EP Text.

D. **Article 14. Accompanying measures.** The main differences in the mandates of the Parliament and the Council relate to: (a) support and information/transparency obligations that the EP imposes on MS; (b) the development of safeguards by the EP in the use of industrial initiatives; (c) the role that the OECD is intended to play in the EP text.

D.1. Approach

The Council's approach seeks to maintain a sufficiently ambitious approach for this Article, while limiting the burden on MS. To this end: a) information/transparency obligations are developed but always referring to them in a general rather than individualised way –i.e. avoiding references to legal counsel, among other- and building on the information that should be prepared and developed by the Commission according to articles 11, 12 or 13; b) the use of industrial initiatives are set in a broad manner, given that these are useful to alleviate the burden on companies.

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

- In paragraph 1, a detailed reference to the information that should be published on the website of MS is included. Most of the elements listed derives from the obligations already contained in Articles 11, 12 and 13, so they do not entail burden on MS.
- In paragraph 3, in addition to the reference to the support that may be provided to companies, it is stated that MS may also provide support to stakeholders for the purpose of facilitating the exercise of the rights laid down in this Directive.
- In paragraph 4, a horizontal provision is included to guarantee the extensive use of industry and multi-stakeholder initiatives for the fulfilment of due diligence obligations, that without prejudice to articles 18, 19 and 22.
- Paragraph 4a includes the use of independent third-party verification on and from companies in their chain of activities to support the implementation of aspects of their due diligence obligations referred to in Articles 5 to 11 –horizontal approach-. This prevision also ensure the use of the verification carried out by other companies or by and industry initiative, what would reduce the burden on companies.

Presidency compromise proposals[1].

Article 11

Communicating

(*) For this Article, insofar as the structure has been adapted, the changes are not marked exhaustively. In this line, only relevant changes are marked, leaving out those that are merely formal or those that respond to a relocation of the content.

1. Member States shall ensure that companies report on the matters covered by this Directive by publishing on their website an annual statement. This annual statement shall be published:

   (a) **in at least one of the official languages of the Union of the Member State of the supervisory authority designated pursuant to Article 17 and, where different**, in a language customary in the sphere of international business.

   (b) within a reasonable period of time, but **no later than** ~~*which shall not exceed*~~ 12 months after the balance sheet date of the financial year for which the statement is drawn up, **or, for companies reporting in accordance with the Directive 2013/34/EU, by the date of publication of the annual financial statements**.

   In the case of a company formed in accordance with the legislation of a third country, the statement shall also include the information pursuant to Article 16(2) regarding the company's authorised representative.

2. Subparagraph 1 shall not apply to companies that are subject to sustainability reporting requirements in accordance with Articles 19a, 29a or **40a** of Directive 2013/34/EU, or that are exempted from such requirements in accordance with Articles 19~~*a(7) and 29a(7)*~~a(**9) or 29a(8)** of that Directive.

3. The Commission shall adopt delegated acts in accordance with Article 28 concerning the content and criteria for ~~*such*~~ **the** reporting under paragraph 1, specifying, **in particular, sufficiently detailed** information on the description of due diligence, potential and actual adverse impacts **identified and appropriate measures** ~~*and actions*~~ taken with respect to those impacts. **In preparing these delegated acts, the Commission shall take due account of, and align as appropriate, the sustainability reporting standards adopted pursuant to Article 29b and 40b of Directive 2013/34/EU**.

4. **[FS Pending discussion on the final approach]**

[1] Additions are shown in **bold and underlined**; deletions in italics and strikethrough ~~*(example)*~~; undecided issues in brackets and bold **[XXX]**.

Article 12

Model contractual clauses

In order to provide support to companies to facilitate their compliance with Article 7(2), point (b), and Article 8(3), point (c), the Commission, in consultation with Member States and stakeholders, shall adopt guidance about voluntary model contractual clauses**, no later than after two years from the entry into force of this Directive**.

Recital 45 (New wording)

(45) In order to give companies tools to help them comply with their due diligence requirements through their value chain, the Commission, in consultation with Member States and stakeholders, should provide guidance on model contractual clauses, which can be used voluntarily by companies as a tool to help fulfil their obligations in Articles 7 and 8. The guidance should aim to facilitate a clear allocation of tasks between contracting parties in ongoing cooperation, in a way that avoids the transfer of the obligations of this Directive to a business partner in their entirety. The guidance should further clarify that the mere use of contractual assurances cannot, on its own, satisfy the due diligence standards of this Directive.

Article 13

Guidance

1. In order to provide support to companies or to Member State authorities on how companies should fulfil their due diligence obligations **in a practical manner**, the Commission, in consultation with Member States and stakeholders, the European Union Agency for Fundamental Rights, the European Environment Agency, and where appropriate with international bodies having expertise in due diligence, shall issue guidelines, including **general guidelines and** for specific sectors or specific adverse impacts, no later than after two years from the entry into force of this Directive.

New: all the following elements would be added to the Council text:

1a. In order to provide support to companies or to Member State authorities on how companies should fulfil their due diligence obligations, the guidelines shall include:

(a) guidance and best practices on how to conduct due diligence in line with the obligations in Articles 4 to 11, particularly, the identification process pursuant to Article 6, the prioritisation of impacts pursuant to Articles 6a, appropriate measures to adapt purchasing practices pursuant to Article 7(2) and 8(3), information on responsible disengagement pursuant to Articles 7(5) and 8(6), appropriate measures for remediation pursuant to Article 8c, and on how to identify and engage with stakeholders pursuant to Article 8d, including through the mechanism established in Article 9;
(b) practical guidance on climate plans pursuant to Article 15;
(c) guidance on the assessment of risk factors, as defined in Article 3(qf)
(d) data and information sources available for the compliance with the obligations in this Directive;
(e) sector specific guidance [tbd if some of specific sector in row 22a of EP text is to be included]

(f) information on how to share resources and information among companies and other legal entities for the purpose of compliance with this Directive, in line with the protection of trade secrets pursuant to Article 4(3) and protection from potential retaliation and retribution pursuant to Article 8d.

1b. The guidelines shall be made available in all the official languages of the Union. The Commission shall periodically review the guidelines and adapt them.

Article 14

Accompanying measures

1. **No later than after two years from the entry into force of this Directive**, Member States shall, in order to provide information and support to companies ~~and the~~, **their** business partners ~~*in their chains of activities in their efforts to fulfil the obligations resulting from this Directive*~~ **and stakeholders**, set up and operate individually or jointly dedicated websites, platforms or portals. Specific consideration shall be given, in that respect, to the SMEs that are present in the chains of activities of companies. **These websites, platforms or portals shall, in particular, give access to**:

   (a) the Commission's reporting content and criteria under Article 11;

   (b) the Commission's guidance about voluntary model contractual clauses regulated in Article 12 and guidelines regulated in Article 13;

   (c) information for stakeholders and their representatives on how to engage in due diligence.

2. Without prejudice to applicable State aid rules, Member States may financially support SMEs. **Member States may also provide support to stakeholders for the purpose of facilitating the exercise of the rights laid down in this Directive**.

3. The Commission may complement Member States' support measures building on existing Union action to support due diligence in the Union and in third countries and may devise new measures, including facilitation of joint stakeholder initiatives to help companies fulfil their obligations.

4. **Without prejudice to Articles 18, 19 and 22**, companies may ~~*rely on*~~ **participate in** industry ~~*schemes*~~ and multi-stakeholder initiatives to support the implementation of ~~*their*~~ **aspects of the** obligations referred to in Articles 5 to 11 to the extent that such schemes and initiatives are appropriate to support the fulfilment of those obligations. **In particular, companies may take effective appropriate measures through an industry initiative. When doing so, companies shall monitor the effectiveness of such measures and, continue to take appropriate measures where necessary to ensure the fulfilment of their obligations**.

   The Commission and the Member States may facilitate the dissemination of information on such schemes or initiatives and their outcome. The Commission, in collaboration with Member States, shall issue guidance for assessing the fitness of industry schemes and multi-stakeholder initiatives. (relocated form previous par.)

4a. [New] Without prejudice to Articles 18, 19 and 22, companies may use independent third-party verification on and from companies in their chain of activities to support the implementation of aspects of their due diligence obligations referred to in Articles 5 to 11 to the extent that such verification is appropriate to support the fulfilment of the relevant obligations. Third-party verification may be carried out by other companies or by an industry initiative, provided it remains independent from the company, free from any conflicts of interests and reliable. **[**The Commission shall adopt a delegated act in accordance with Article 28 to specify the minimum standards, including transparency standards, for the independent third-party verification**]**.

PART II. 1

OPTIONS FOR THE ANNEX I

CONTEXT

The Annex I is one of the relevant elements of the proposal, as legal certainty in the implementation and control of the obligations of the Directive depends to a large extent on it.

Given the initial differences between the mandates of the Parliament and the Council, it is necessary to make an effort to find areas of compromise, but always taking into account the criteria established by the Council in its approximation. That is, introducing binding international conventions, ratified by all Member States, and that contain standards specific enough to serve as points of reference for companies' subject to the Directive.

Based on these premises, this part of the flash analyses the starting positions of both institutions and proposes possible solutions which, if they prove reasonable for the Member States, would serve to explore possible compromises.

APPROACH OF THE TWO INSTITUTIONS AND MAIN DIFFERENCES:

The **Council's** approach is articulated through the definitions of 'adverse environmental impact' and 'adverse human rights impacts' in Article 3b and 3c and the content of the Annex. Based on these definitions, the Part I of the Annex is linked to human rights, which includes: (a) a first section listing specific rights and prohibitions, and (b) a second section listing the international instruments in which these rights and prohibitions are framed –what would provide a point of reference- and on which a catch-all clause established in article 3 applies. On the other hand, Part II of the Annex sets out a list of environmental prohibitions and obligations, this time structured in a single list, in which the obligation or prohibition is linked to the framework from which it derives without the catch-all clause operating residually.

In contrast, the **Parliament** includes some modifications that break with the logic followed by the Council. In the context of the discussions, the following are worth mentioning:

- With regard to environmental impacts:

  a) incorporates, in addition to Part II of the Annex, the rights contained in points 18 and 19 of the section on Human Rights, considering that they are also connected to environmental aspects.

  b) articulates a general clause that tries to cover the absence of international treaties that comprehensively cover all possible impacts in this area.

- With regard to human rights impacts:

  a) Maintains the catch all in the Annex, without detailing conditions applicable.
  b) Extends the list of instruments in the second paragraph, breaking the Council's criteria. That is listing instruments that encompasses rights that cannot be clearly abused by companies, that are not of a binding nature, or that have not been ratified by all the Member States.

OPTIONS TO EXPLORE: RELEVANT ELEMENTS FOR TRANSACTION AND POSSIBLE LANDING ZONES

In order to examine the possible compromises, this document lists possible options in relation to the relevant elements identified. These elements are used to set a comprehensive proposal which could lead us to the best possible outcome during the negotiation.

For the configuration of possible transactions, two sections are established: a first section referring to human rights and a second section for environmental issues.

- *HUMAN RIGHTS ADVERSE IMPACTS*

The structure and logic is maintained by keeping the catch all clause. In exchange, some flexibility would be sought in the instruments included in the list.

Question 1: Could you support this approach? Question 2: Should any other option/element be considered?

A. Catch-all clause

The Council's approach is to maintain the catch-all clause in the terms and placement set by the Council.

The wording of the clause would be maintained, albeit with a reformulation of the reference included in line 128c. In this line, from the Presidency's point of view, the wording of this condition merely refers to the need for the treaty provision in question to be potentially applicable to companies, as opposed to standards that can only be applied by States or public authorities, without prejudging issues of attribution of responsibility where the company contributes to a human rights impact.

The clause would thus incorporate only the first part of the paragraph "the human right can be abused by a company or legal entity ~~other than a Member State or a third country or their authorities~~".

B. List of international instruments: Human Rights

b.1. Especially vulnerable groups

Context: When adopting its mandate, the Council did not consider it appropriate to include reference to Conventions targeted at protection of especially vulnerable groups (children, racial discrimination, people with disabilities, women, indigenous peoples). However, the Presidency observes that the Conventions under this category are broadly ratified and it could be considered that some groups, depending on the circumstances, deserve a special protection from human rights abuses.

Compromise: Possible approaches to this end, from the Presidency's point of view, could be combining the following possibilities:

- *B.1.a. Reassessment to identify particular provisions specific enough for their inclusion in Part 1 of the Annex (and potentially in Part 2).*

  I.e. the Convention on the Rights of the Child contains some precise rights, as it is the case of the protection against all forms of sexual exploitation and sexual abuse (art. 34) or the protection from being abducted, sold or traffic (Articles 35), that could

complete the list already set by some listed instruments, as it is the case of International Labour Organization Worst Forms of Child Labour Convention, 1999.

- *B.1.b. 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*.

  This could be done in a recital, or even in the definition of human rights impact (adding that for determining that a HR abuse could be reasonably identified, this special assessment in relation to vulnerable collectives must be made) or both.

  In this line, it can be noted that the UN Guiding Principles on Business and Human Rights indicate that depending on the circumstances, business enterprises may need to consider additional standards, like to respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts, and it refers to specific instruments on the rights of indigenous peoples; women; national or ethnic, religious and linguistic minorities; children; persons with disabilities; and migrant workers and their families.

  In this line, the compromise would be composed by explicit inclusion of some of the instruments listed by the EP (b.1.a) –particularly the Convention on the Rights of the Child- and an overall reference that might cover the rest (b.1.b). For b.1 it should be taken into consideration the relevant rights are already covered by the ILO conventions and that the catch-all prevents any inappropriate extension of the scope.

Question 3: Could you support this approach? Question 4: Which precise instruments –apart from the above mentioned Convention on the Right of the Child- would you include from the list covered in lines 375 to 380[2] of the EP text? There is any that cannot be included under any circumstance?

b.2. ILO Core Texts

Context. ILO Core instruments were not included fully in the Council's mandate due to some missing ratifications by MS on the two Conventions included in 2022 (ILO Occupational Safety and Health Convention, 1981 -No 155- and ILO Promotional Framework for Occupational Safety and Health, 2006 –No 187-). However, the Presidency understands that all MS are working towards the ratification of this Core ILO Conventions.

[2] Row 375. International Convention on the Elimination of All Forms of Racial Discrimination
Row 376. The Convention on the Elimination of All Forms of Discrimination Against Women
Row 378. The Convention on the Rights of Persons with Disabilities
Row 379. United Nations Declaration on the Rights of Indigenous Peoples
Row 380. The United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities

Compromise. The Presidency would invite a reassessment of this point of the mandate and to include both conventions, for several reasons:

a) only a limited number of MS have not ratified those Conventions, and up to a great extent, among them the vast majority has ratified one of the two, and there is at least some EU legislation on the areas covered by those Conventions, that all MS are already applying internally.
b) during the time elapsed since the adoption of the mandate MS might have made progress in the ratification processes, and in the transposition period MS could continue progressing on that ratification processes or at least on adapting its internal frameworks to those Conventions. If necessary, clarification could be made that the Directive does not entail the imposition on MS of an obligation to ratify them.

Should the inclusion of ILO Conventions 155 and 187 still not be acceptable to all Member States, a **fall back possibility** would be to foresee the amendment of the Directive through delegated acts once all the Member States have ratified them.

Question 5: Would you support directly to introduce this 2 ILO conventions? Question 6: Would you prefer to have delegated acts to include them in a later moment? If so, would you be opened to use this form of delegated powers to update other parts of the Annex?

b.3. Additions proposed by PE: Armed Conflict Situations & Corruption

Context. EP has proposed several amendments in line of including additional international instruments and declarations. The Presidency has considered how those proposals fit into the general approach of the Council as described above (targeted at generally ratified binding international instruments that contain sufficiently specific standards), and would invite delegations to give particular consideration of two specific areas.

Those areas would fit into the general approach described, but would deserve careful deliberation to the extent that are particularly sensitive:

- First area would be **International Humanitarian Law**, contained in the **Geneva Convention** and additional protocols. These instruments would provide a framework for businesses operating in armed conflict situations/geographical areas to conduct their due diligence processes with regard to human rights adverse impacts, but refer to situations which are considered *force majeure* exceptions in other instruments of EU Law.

- Second area refers to the **UN Convention against corruption**. The Presidency observes that fight against corruption is a standard unanimously shared at the EU level and that businesses are already engaging in prevention of these conducts in their internal due diligence processes and standards. However, it might be questioned how this standard relates to human rights and environment protection.

Compromise. The possible compromise could be done by adding a particular reference in the risk factors to be considered by the company when carrying out the Due Diligence policy (open list of elements)[3].

Question 7: Could you support this approach? Question 8: If needed, could you accept to include one of these instruments? Which one?

C. List of international instruments: Environmental adverse impacts

Context. The EP has proposed, in the environmental section of the Annex, a general clause referring to different environmental impacts, a clause that does not link the potential impact to any international instrument. The Presidency finds this approach to be very difficult to reconcile with the overall framework of the proposal and the Council's mandate.

However, the Presidency proposes to assess this proposal with a constructive approach, to the extent that the general objective behind this inclusion, namely to reach a high level of environmental protection with regard to potential impact of business activities, is shared by the Council.

Compromise. To this end, the Presidency observes that the EP position considers points 18 and 19 of the Annex to be environmental in nature, in accordance with its proposal for the definition of environmental impacts. These points already cover in a very broad manner potential impacts based on the Covenants.

The Council might consider enlarging this provision without altering that legal basis in order to cover more broadly potential environmental impact that EP attempts to capture in the proposed general clause for environmental impacts in the Annex. In particular, it might be considered that this point of the Annex could refer, as in the original Commission proposal, to any measurable environmental impact, and as one of the possible sub-requisites, to affection to environmental integrity.

I.e. Indicative text

> *The prohibition of causing* ***any measurable environmental degradation****, such as harmful soil change, water or air pollution, harmful emissions or excessive water consumption or other impact on natural resources:*
>
> *(a) substantially impairs the natural bases for the preservation and production of food**;***
> *(b) denies a person access to safe and clean drinking water;*
> *(c) makes it difficult for a person to access sanitary facilities or destroys them;*
> *(d) harms the health,* ***or use of property of a person, or a person's right to gain a living by work***[4]*.*

[3] This would be in line with the compromise in art. 5 for the deletion of conflict or fragile areas, proposed by the EP. The compromise implies a definition of risk factors in Article 3, which could include geographical and operational context and/or 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".

[4] Instead of the reference to "normal conduct of economic activity" proposed originally by the COM, reference would be made to the internationally protected right to gain a person's living by work, as referred to in Article 6 of the ICESCR in line with point 19.

(e) affects environmental integrity, such as deforestation.

Alternatively, delegations might also consider providing additional guidance in the Directive, whether in the recitals or the operative part, that obligations on companies should be applied consistently with Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, which contains a precise and encompassing definition of environmental damage that applies to business in the EU.

Question 9: Could you support to redraft of the point 18? If not, which specific elements of the proposed wording remain especially problematic? Would you suggest any alternative approach/element? Question 10: Could you consider to set that the obligations on companies should be applied consistently with Directive 2004/35/CE?

PART II.2.

OPTIONS FOR THE SCOPE

CONTEXT

Provided the differences in the approach of the two institutions, the scope is one of the most core political elements to be taken into consideration for the final agreement. In addition, it defines the size of the companies covered and thus the burden they can bear and the resources they will have to develop the due diligence policy. Consequently, its final definition may affect to other relevant issues, such as the meaningful stakeholder (article 8d of the EP).

The discussion on this part of the text should cover two important aspects: (a) the level of the thresholds, and (b) the technical elements for the calculation, which is crucial to avoid loopholes and possible circumvention of compliance.

flash differentiates the analysis of the two aspects. In any case, it is important to point out that they contain elements whose transaction must be part of an overall package and will therefore be certainly linked.

II.2.I THERSHOLDS ANALYSIS

APPROACH OF THE TWO INSTITUTIONS AND MAIN DIFFERENCES

The differences in the approach of the institutions are as follows:

	Council approach		**EP**
	General Thresholds	**Sectorial Thresholds**	
EU Companies	1) Employees: >500 and 2) Net worldwide turnover: >150 million	1) Employees: > 250 and 2) Net Worldwide turnover: > 40 million, provided that at least 20 million were generated in specific sectors.	No sectorial approach. 1) Employees: > 250 2) Net worldwide turnover: 40 million. ***Group approach:*** Groups will fall under the scope of the directive if: 1) Employees: >500 and 2) Net worldwide turnover: > 150 million
Non-EU Companies	1) Employees: Not applicable 2) Net turnover in the Union: > 150	1) Employees: Not applicable. 2) Net turnover in the Union: >40 million but <150 million, provided that at least 20 million were generated in specific sectors.	1) Employees: Not applicable. 2) Net worldwide turnover: > 150 million, provided that at least 40 million were generated in the Union. ***Group approach***: Same thresholds applied to European companies.

An estimation of the number of companies covered by the Directive under the different proposal calculated by the European Commission can be found in **ANNEX I.**

OPTIONS TO EXPLORE: RELEVANT ELEMENTS FOR TRANSACTION AND POSSIBLE LANDING ZONES

In order to examine the possible compromises, this document lists possible options in relation to the relevant elements identified. To this extent, given the initial approximations, and in purely quantitative terms, there are two basic options:

Option I. To maintain the thresholds at the level proposed in the Council text.

This option would imply compromises with the Parliament, which could go along the following lines:

(a) To incorporate additional specific sectors in par. 2.1.b and 2.2.b, which would allow smaller companies to be covered in specific areas. This respects the Council's logic and systematics, while partially address EP demand to extend the scope.

(b) Incorporating anti-circumvention elements, which also entail a certain extension of the scope (i.e. calculation at group level and inclusion of franchises and licenses) - these elements are dealt with in section 2, on calculation and risk of circunvention.

(c) Additional related concessions, such as the incorporation of a specific stakeholder engagement policy (proposed in Article 8 d of the EP).

Option II. To lower the thresholds to bring them closer to the levels of the Parliament.

This option would involve:

(a) Elimination of specific sectors.

(b) Non-incorporation of additional elements that could lead to a further broadening of the scope, such as consideration at group level.

(c) Reassessment of some of the relevant elements under Articles 4 to 10 that could entail excessive burdens on smaller companies.

In addition to these two options, the additional question arises as to whether the ***calculation of turnover of non-European companies*** should be made in terms of the Union (Council approximation) or on a worldwide basis (EP). This question is affected by different considerations:

- On the level playing field, the question arises as to which companies we want to cover by the Directive and whether size and capacity will vary greatly between EU and non-EU companies depending on the criteria used.
- On the application of the Directive to third country companies, the need is to justify the application of EU legislation to third country companies, for which an effect of the company on the internal market must be demonstrated, which would justify to use the EU turnover (explanation of recital 24 of the Council text).
- On the feasibility of the calculation, the question would be in terms of which data the Commission and the Member States would have access to. This was the reason why the threshold does not refer to employees for third companies in the Council's approach.

From the Presidency's point of view, and in the light of previous discussions in the Council, it is considered that the best option would be to maintain the thresholds and approach of the Council's text, with the related compromises identified above. This option would be consistent with the approach that has been maintained throughout the negotiation. However, in order to

validate this option, a comprehensive set of questions is posed in order to assess the opinion of the MS for all the relevant elements.

Q1. Which of the two options is considered more appropriate?

In case of option 1 (no change to the thresholds):

Q2. Are the sectors mentioned in the Annex of this document adequate to amplify the sectoral approach?
Q3. Which specific sector(s) would you consider possible to add if necessary to reach a compromise (see list in Annex to this document)?
Q4- Do you think these sectors could be incorporated in a possible review clause?

In case of option 2 (bringing the thresholds closer to the EP):

Q5- Could you accept the level proposed by the EP or would you consider the possibility of exploring some intermediate level between that of the Council and that of the Parliament?
Q6. What specific elements of the Directive would you require to be reassess in exchange for this concession?

On the computation of thresholds for companies from third Countries (Net turnover in the Union vs Worldwide turnover):

Q7. On the basis of the above mentioned elements, do you consider that the thresholds applicable to third country companies should be reformulated in any way – the methodology or the level of the quantitative threshold?

II.2.II CALCULATION AND RISK OF CIRCUNVENTION

Although the elements addressed in this section could have an impact on the scope - and should therefore be taken into account in the overall transaction package - their importance goes beyond quantitative consideration. Indeed, some of the elements incorporated in the Parliament's proposal could serve to avoid circumvention of the application of the Directive, thus ensuring its practical application.

Due to that, the following elements (franchises and licenses and group level calculation) could represent concessions to the EP, while create added value and respecting the Council's spirit.

A. Franchises and licenses

Under the Council's GA, companies with corporate structures involving numerous subsidiaries and/or operation systems based on outsourcing of workforce may avoid falling under the scope of the Directive. This business practices allow companies to pass risks and obligations on "independent operators", while, generating benefits and keeping strict control. Taking the example of franchises, the franchisor maintains a significant control over the franchisees including work organization, marketing practices or business performance. Franchisees are required to implement, apply, and comply with the "system" that is licensed to them.

One way to tackle this issue would consist of accepting the EP proposal by considering in the calculation of the turnover-threshold generated by third party companies with whom the company and/or its subsidiaries have entered into a **vertical agreement**[5]. In order to make sure that this clause is not discriminatory and goes against the WTO, it should be applied to EU and non-EU companies. This would imply a modification of the Council proposal to include a reference to the **turnover generated by third party companies with whom the company and/or its subsidiaries has entered into a vertical agreement in the Union in return for royalties** in lines 91 and 92 (EU companies) and in lines 97 and 98 (non-EU companies)

Taking into account that these corporate structures affect also the workforce, it is considered appropriate to include some technical adjustments based on the Parliament's proposal to take into account vertical agreements for the calculation of the number of employees. This would entail making and addition in Art. 2(3) to **employees in third party companies with whom the company and/ or its subsidiaries has entered into vertical agreements in the Union in return for royalties.**

Question 8: Could you support these additions?

B. Corporate restructuring

Corporate restructuring may be a potential threat as companies could restructure their operations into smaller entities that do not fulfil the thresholds.

The ant circumvention clause to tackle this issue would be to include the group approach from the EP proposal. This would imply that **if the company did not reach the individual thresholds but is the ultimate parent company of a group that had ~~500 employees or more and~~[6] a net worldwide turnover of more than 150 million**, then the company would fall under the scope of the Directive.

Question 9: Could you support the group approach inclusion? Question 10: Do you think it would be optimal to maintain the EP thresholds for the group approach?

5 The notion of “vertical agreement” is well known in EU law. It is defined in the Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the TFEU to categories of vertical agreements and concerted practices.
6 The number of employees for non-EU groups should not be included to be aligned with the Council and EP’s proposal regarding the non-applicability of the number of employees for the individual thresholds for non-EU companies.

ANNEX I: ESTIMATED NUMBER OF COMPANIES COVERED BY CSDD UNDER THE DIFFERENT PROPOSALS CALCULATED BY THE EUROPEAN COMMISSION.

	Council approach		EP
	General Thresholds	**Sectorial Thresholds**	
EU Companies	9400	3400	28500 ***Group approach:*** 1500
Total	**12800**		**30000**
Non-EU Companies	2600	1400	9600 ***Group approach***: 480
Total	**4000**		**10080**

ANNEX II: EXAMPLES OF OTHER SECTORES THAT COULD BE CONSIDER TO BE INCLUDED IN THE SECTORIAL APPROACH

Row 222.a of the 4C doc. (Parliament's text) includes a list of relevant sectors that could give an indication of those that the EP might wish to include in art.2.1. b and 2.2.b if needed for a compromise. If analysed in comparison with the sectors already included in the Council text for those paragraphs, it appears that some of the differences are only nominative, being already covered by the joint reading of Article 2b and the Council's Annex (i.e. the case of categories 13 or 14 –wearing apparel and fur-). In other cases, the EP reference does not have an exact correspondence with the NACE code and/or is not covered in the Council`s text.

In any case, the listing is exhaustive, in order to give delegations a complete picture[7]:

i) Regarding point (b)(i):
   a. The manufacture of wearing apparel (NACE Division 13)
   b. The manufacture of articles of fur (NACE 14.20)
   c. The wholesale trade and retail of textiles (NACE 46.41)
   (*) Nominative difference - All these categories would be already covered in the Council`s Text.

ii) Regarding point (b)(ii)
   a. Water supply, the management of land and resources, including nature conservation (NACE SECTION E)
   b. The rubber industry (NACE 20.17 and 22.1)

[7] NACE codes are added for guidance purposes. However, some of the sectors displayed do not correspond exactly to this nomenclature.

c. The marketing and advertising of food and beverages.
d. Retail of agricultural raw materials and animal products.
e. Waste management (NACE Division 39)

iii) Regarding point (b)(iii)
a. Mining and quarrying (NACE Section B)
b. Refining, transport and handling of mineral resources
c. The construction sector (NACE SECTION F)
d. The energy sector (NACE Division 35)