Meeting with Business Europe

Scene setter

- You are meeting BusinessEurope, who requested the meeting to discuss “the ongoing challenges for European competitiveness and the Corporate Sustainability Due Diligence Directive file”.

- The meeting will therefore focus on the proposal on Corporate Sustainability Due Diligence Directive, ahead of the trilogue negotiations. It will also be a good opportunity to raise the Upgrading Digital Company Law proposal, given its recent publication and positive overall impact on companies. BusinessEurope was involved in consultations and bilateral discussions in the preparation of the UDCL proposal.

- BusinessEurope officially supports the introduction of a EU due diligence framework, but also calls for it to be proportionate and workable, in order to truly enable and guide businesses in taking necessary steps towards more sustainable supply chains.

- During the meeting, we can expect to focus on the areas of major concern for BusinessEurope, and on the relevant recommendations that they put forward.

These recommendations address the following issues: level of harmonisation (which is considered the major concern); coverage of the whole value chain; directors’ duties; norms/conventions listed in the Annex; legal liability; EU/international guidance; group level approach.

- In an official statement, BusinessEurope urged the European Parliament and the Council to take these recommendations into account in the following steps of the legislative process.

- You could stress the multiple benefits that the proposed rules will bring to EU companies and economy in terms of improved sustainability, competitiveness, and resilience.

- You may also want to remind him that the contribution of companies across all sectors of the economy will be essential to succeed in the EU’s transition to a climate-neutral, green and sustainable economy. The Commission will strive for a proportionate solution without undermining the Commission proposal.

Corporate Sustainability Due Diligence

- The Commission adopted the proposal for a Directive on corporate sustainability due diligence in February 2022 aiming at supporting EU companies in the transition toward a more sustainable business model. It requires companies to identify, prevent and mitigate adverse sustainability impacts at their global value chains.

- The new rules are expected to bring multiple benefits to EU companies. This includes a harmonized legal framework in the EU, a level playing field, competitiveness, better risk management and resilience.

- The general approach was adopted by the Council in December 2022 (NL, DK, IE, FI and EE voted against). In the European Parliament, the JURI committee is the leading committee with 8 other committees associated. It is planned that the EP will adopt its position (plenary mandate for the trilogues) on 1 June. A first handshake trilogue is scheduled for 8 June, under the SE Presidency, while political trilogues will begin in July, under the ES Presidency.
a) Points which will be raised by:

Corporate Sustainability Due Diligence

Level of harmonisation

- The interlocutor considers that full harmonisation is necessary to avoid fragmentation of the EU single market and ensure a level playing field.
- In their view, this can be achieved by using, for instance, an “internal market clause”. If the EU wishes its model to be used as a reference elsewhere in the world, it cannot rely on the limited harmonisation provided by the directive that would potentially lead to 27 different frameworks.
- LTT:
  - EU company law is usually regulated with a minimum harmonisation approach, which respects the specificities of company law and corporate governance at national level.
  - Member States should be allowed to introduce further provisions if they wish to protect stakeholders’ interests better. This is already the case, for example, of certain health and safety impacts, where certain interests are protected more than in the proposal. Furthermore, as this is a framework Directive regulating every economic activity, it has to allow that for example certain specific harmful products are subject to more stringent or detailed provisions with respect to (for example) the identification or mitigation of certain harms.
  - Minimum rules allow alignment in areas already regulated in Member States company laws, for rules on supervision which must fit to the competences and characteristics of national regimes, and for liability rules which must respect the national civil laws.

Value chain

- According to BusinessEurope, focusing on all aspects within the whole value chain is neither manageable nor realistic.
- Supply chains alone can comprise multiple tiers with hundreds or thousands of locations, product lines and entities.
- LTT:
  - The coverage of the entire value chain is key to achieving the objective of the proposal i.e. to address adverse impacts related to production chains.
  - It takes into account that most harm occurs in the value chain (upstream and downstream) further away from own operations.
  - To address important human rights and environmental adverse impacts, the use phase (impact of the product and its foreseeable use - critical from the perspective of the environmentally harmful emissions of the product) and the downstream value chain (dismantling and disposal of the product, recycling, etc), which is where most harm is in some sectors need to be included.

Risk prioritization

- Companies should be able to prioritise the most salient risks and address identified adverse impacts in accordance with a risk-based approach.
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- Without this ability to prioritise, companies cannot realistically implement due diligence requirements in an efficient way. The absence of a risk-based approach could also lead to counter-productive disengagement from value chains.
- LTT:
  - The “risk-based approach” has been taken into account as much as possible in the Commission proposal already: the company has the right to prioritize, but does not have the right to select some risks and ignore the rest. Furthermore, prioritization does not exonerate from liability if the company should have foreseen a significant risk, including in its value chain.
  - The OECD regime is also clear on this: once the company has addressed prioritized risks, it has to address the other risks too.

The obligation to exercise due diligence must be proportionate to the size and means of the company in question.
- LTT:
  - This principle was taken into account when selecting the scope of the proposal. Large companies can realistically be required to assume the burden of conducting due diligence, without specifying that they should do it in proportion of their means. Such addition could lead to confusion and legal uncertainty as to when a company has sufficient means and it does not fit with the nature of the instrument which is about fundamental human rights and environmental protection.

Directors’ duties
- Regulating directors’ duties is unnecessary to reach the objectives of the proposal and does not belong in a due diligence framework.
- It will have negative side-effects, e.g. interfering with national company law systems and creating legal uncertainty, without added value to the ability of companies to apply effective due diligence.
- LTT:
  - The proposal does not set a duty of care, but only clarifies the duty to act according to the best interest of the company. The duty is already present in all Member States.
  - The relevant provision in the Directive clarifies what the directors should take into account when fulfilling the duty of care, in line with the French Loi Pacte and jurisprudence or corporate governance Codes in many Member States. The provision builds upon what already exists in the Member States. The clarification of the duty of care is necessary to ensure that directors are not subject to contradictory duties in company law as duty of care today is largely interpreted as requiring action in the short-term financial interests of shareholders.

Annex
- The list of norms/conventions in the Annex is too far reaching and generates legal uncertainty.
- Most of the norms in the annex are only applicable to States and not to legal private entities like companies. To be workable, this list should be reviewed and shortened, clearly indicating what are the requirements directly applicable to companies, and guidance must be provided on how this should be implemented in practice.
- LTT:
  - The list of conventions is aligned with the international voluntary framework. Having those
norms and conventions listed in **an exhaustive Annex to the Directive will provide for legal certainty**. This list of conventions that companies will have to consider as a reference point will help them identify, bring to an end, prevent, mitigate and account for adverse human rights and environmental impacts.

- While the international conventions apply to States, it is internationally recognized that companies have a responsibility to respect human rights and the environment.

**Liability**

- Legal liability provisions need to be balanced and companies cannot be made liable for damages they have not caused or directly contributed to (intentionally or negligently).
- The widely accepted principle that due diligence is first and foremost an obligation of means need to be truly incorporated.
- **LTT:**

  - The Commission proposal respects these principles. **Civil liability should not be excluded** with respect to harm in the value chain, including indirect business relationships as the conditions of liability can be fulfilled also with respect to such harm and the company often has a possibility to exert or increase its leverage over the business partner and thereby prevent or mitigate harm. This is all the more necessary as it is known that human rights, social and environmental harm occurs more often in the value chain. However, liability in indirect relationships is subject to certain conditions in the Commission proposal.

**Guidance**

- Clear guidance needs to be adopted and made available before rules enter into effect to help companies comply with and national authorities to enforce the legislation.
- Sectoral guidance would be helpful for specific industries as well as commodities such as minerals based on applicable relevant international guidelines and standards. More emphasis should be given to multi-stakeholder and industry initiatives to support companies’ due diligence efforts, for example by recognising relevant initiatives where appropriate.
- **LTT:**

  - In order to support companies and Member States with the implementation of the directive, **the Commission may issue further guidance**, where necessary.
  - Planned accompanying measures include supporting tools such as hotlines, databases or training, funding, support as part of partnership cooperation, e.g. to create a stronger regulatory environment in a third country and capacity-building.
  - We will also work with EU trading partners to ensure mutually reinforcing initiatives, including development of voluntary sustainability standards, support of multi-stakeholder alliances and industry coalitions, as well as accompanying support provided through EU development policy and other international cooperation instruments.

**Group level**

- The legislation should acknowledge the possibility of organising due diligence at group level.
- Groups of companies that do not have a classic corporate structure consisting of parent companies and subsidiaries should be included.
- **LTT**
In line with international frameworks (e.g. UNGPs), the proposal requires companies to carry out due diligence and be accountable for it on an individual basis. However the Commission proposal allows cooperation within the group when this leads to efficiency gains.

b) Other issues you may wish to proactively raise:

**Upgrading digital company law**

- Explain that the proposal for a **Directive to further expand and upgrade the use of digital tools in company law**, adopted on 29 March, responds to developments in digitalisation and addresses cross-border obstacles faced by companies, and fits squarely into the **March European Council’s call to remove barriers and complete the Single Market**. The guiding principle when preparing this proposal was to **reduce the overall administrative burden on companies while ensuring legal certainty and increasing transparency**.

- It is now discussed in the Council, where it was **overall positively received by Member States**. Thank BusinessEurope for their involvement in the preparation of the proposal and encourage them to **constructively support the proposal** during the ongoing negotiations.
DEFSNIVES

UPGRADING DIGITAL COMPANY LAW

How will the new proposal reduce administrative burden for companies?

- Thanks to the proposed measures, companies planning to engage in cross-border business activities, or to create cross-border subsidiaries or branches, will benefit from annual savings (administrative burden reduction) of around EUR 437 million per year.

- This would be achieved by the following:
  - Companies will be able to use a multilingual EU Company Certificate containing essential information about their company in all cross-border situations e.g., in public tenders, in the context of tax or authorisation procedures in another Member State. The certificate will be accepted in another Member States without any further formalities.
  - Companies may use a multilingual model for a digital EU power of attorney to authorise a person to represent the company in another Member State.
  - Companies do not need to obtain an apostille on company documents or information from business registers, and on certain notarial documents, when such documents are presented in another Member State.
  - Companies will need certified translations of company documents or information provided by business registers only in limited cases.
  - When companies set up subsidiaries or branches in another Member State, they will benefit from the application of “once-only principle”. This means that they will not need to re-submit the information already available in their business register, and business registers will exchange that information through BRIS.

Will there be costs for companies?

- The guiding principle when preparing this proposal was to reduce the overall administrative burden on companies while ensuring legal certainty. For example, the measures that aim to make more company information available, build, as far as possible, on the company information that is either already in the business registers or that companies have at their disposal.

- The proposal may result in one-off costs for those companies that currently do not file information required under the proposal (e.g. groups of companies, central administration/principal place of business) with a register. However, one-off costs will depend on fees for filing information to the business register and these will depend on Member States as neither the existing EU law nor the proposal regulate this. Overall, the expected benefits for companies in terms of burden reduction will far outweigh the one-off costs.

[For background information: The impact assessment for this proposal estimated potential one-off filing costs at around EUR 20 fee per company. On that basis, the Impact assessment]
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estimated total one-off costs of around EUR 311 million for 14 million companies but this was an overestimation given that the Commission proposal dose not result in new disclosure requirements for 14 million companies but only a fraction of all companies (e.g. information on central administration/principal place of business will only need to be filed when these are in a different Member State than the registered office).]

**Why do we need a new initiative so soon after the 2019 Company Law Digitalisation Directive?**

- The 2019 Digitalisation Directive ensured that company law procedures can be carried out on-line, and in particular that companies can be set up on-line. This proposal is complementary and focuses on the cross-border access to and use of company information through digital tools and processes. As the digitalisation is a continuously developing phenomenon, we need to ensure that EU law is adapted to keeps up with the digitalisation to better respond to the needs of companies, authorities and other stakeholders.
BACKGROUND

CORPORATE SUSTAINABILITY DUE DILIGENCE (CS3D)

The Corporate Sustainability Due Diligence (CSDD) proposal was adopted on 23 February 2022. The Council General Approach was adopted on 1 December 2022 in the COMPET Council with NL, DK, IE, FI and EE voting against. It is planned that the EP will adopt its position (plenary mandate for the trilogues) on 1 June 2023.

A first handshake trilogue is scheduled for 8 June, under the SE Presidency, while political trilogues will start in July, under the ES Presidency.

Council General Approach (GA)

- **Personal scope:** as COM proposal, and a phase-in approach was introduced.
- **Material scope:** notion of “value chain” replaced with “chain of activities”; **financial sector coverage in the proposal was made optional**, concept of “established business relationships” deleted; risk-based approach strengthened; list of human rights/violations reduced; a limited number of environmental conventions added.
- **Civil liability** of companies: excluded if the damage is caused only by the business partners in the chain of activities, but not excluded for value chain impacts.
- **Due diligence obligations:** broadly the same.
- **Directors’ duties** (and elements related to the remuneration): deleted.

EP Report

- **Scope:** extended and aligned with the Corporate Sustainability Reporting Directive.
- **Value chain:** use of products by consumers and companies excluded, but the impact of the product covered.
- **Financial sector:** covered, including financial investors.
- **Climate change due diligence** introduced.
- **Civil liability:** confusing formulation which does not appear to exclude liability for harm in the value chain but limits it to those impacts that should have been remedied.

Business Europe position

On 19 January, BusinessEurope issued the following Joint Business Statement on its position on the CS3D:

“The European business community supports an EU due diligence framework. However, it calls for realism, proportionality, and workability for this framework to truly enable and guide businesses in taking necessary steps towards more sustainable supply chains. This includes companies under the scope but also SMEs that will be impacted. In this crucial phase of the legislative process, the business community would like to put forward a number of recommendations and concerns to enhance the benefits of the corporate sustainability due diligence proposal (CS3D):”
• The most important element of the proposal should be full harmonisation. This is necessary to avoid fragmentation of the EU single market and ensure a level playing field. This can be achieved by using, for instance, an “internal market clause”. If the EU wishes its model to be used as a reference elsewhere in the world, it cannot rely on the limited harmonisation provided by the directive that would potentially lead to 27 different frameworks.

• Focusing on all aspects within the whole value chain is neither manageable nor realistic. Supply chains alone can comprise multiple tiers with hundreds or thousands of locations, product lines and entities. Companies should be able to prioritise the most salient risks and have the freedom to take appropriate actions to cease, prevent or mitigate identified adverse impacts in accordance with a risk-based approach. Without this ability to prioritise, companies cannot realistically implement due diligence requirements in an efficient way. The absence of a risk-based approach could also lead to counter-productive disengagement from value chains. The obligation to exercise due diligence must be proportionate to the size and means of the company in question.

• Regulating directors’ duties is unnecessary to reach the objectives of the proposal and does not belong in a due diligence framework. It will have negative side-effects, e.g. interfering with national company law systems and creating legal uncertainty, without added value to the ability of companies to apply effective due diligence. • The list of norms/conventions in the Annex is too far reaching and generates legal uncertainty. Most of the norms in the annex are only applicable to states and not legal private entities like companies. To be workable, this list should be reviewed and shortened, clearly indicating what are the requirements directly applicable to companies, and guidance must be provided on how this should be implemented in practice.

• Legal liability provisions need to be balanced and truly incorporate the widely accepted principle that due diligence is first and foremost an obligation of means and that companies cannot be made liable for damages they have not caused or directly contributed to (intentionally or negligently).

• Clear guidance needs to be adopted and made available before rules enter into effect to help companies comply with and national authorities to enforce the legislation. Sectoral guidance would be helpful for specific industries as well as commodities such as minerals based on applicable relevant international guidelines and standards. More emphasis should be given to multi-stakeholder and industry initiatives to support companies’ due diligence efforts, for example by recognising relevant initiatives where appropriate.

• The legislation should acknowledge the possibility of organising due diligence at group level, including groups of companies that do not have a classic corporate structure consisting of parent companies and subsidiaries.

We urge the European Parliament and the Council to take these recommendations and concerns into account in the following steps of the legislative process. As it has been the case so far, the European business community stands ready to engage constructively to make the upcoming framework fit for purpose.”

UPGRADING DIGITAL COMPANY LAW

BusinessEurope’s views about the initiative
BusinessEurope is in general in favour of this initiative and DG JUST services have kept in touch with BusinessEurope bilaterally throughout its preparation. In their reply to the public consultation on this initiative, BusinessEurope:

- was in favour of continuing the process of digitalisation of EU company law and mentioned that having access to digital tools to perform key company operations is essential for companies.
- supported better cross-border access to publicly available company information, by making a more efficient use of the existing infrastructure of national company registers and platforms, and ensuring better connectivity between them. They stressed that new measures should not lead to an increase of the administrative burden for companies regarding data provided and to avoid creating overlapping burdens, given a substantial increase of information requirements for companies in the past years.
- saw a clear value added in possibility to create a company digitally, register branches digitally following the “once only” principle, which European businesses should be able to benefit from without delay.
- asked to ensure balance between transparency and protection of other values such as protection of economic and physical integrity and privacy of entrepreneurs (whose personal data can often be found in business registers) as well as cybersecurity.
Whistleblower Directive

Scene setter

Business Europe is concerned about what they consider as a too restrictive interpretation by COM of the Directive (EU) 2019/1937 on whistleblower protection, obliging large companies (with 250+ workers) belonging to a group to have each their own reporting channels, thus providing to whistleblowers the choice to report at the subsidiary or group level (whilst their preferred solution would be to only have group-level channels). In August 2021, they had brought to the CAB’s attention a joint-statement they had issued. A reply was given by the Director of Directorate C.

This issue has been extensively discussed with Member States at the expert group on the Directive and the published minutes make clear that national transposition laws allowing corporate groups to only set up group-level channels would be incorrectly transposing the Directive. (As confirmed with LS, the Directive’s rules on this are straightforward and leave no room for interpretation). Business Europe is likely to ask for this issue to be revisited in the expert group.

European corporate groups have been lobbying national governments to exempt groups from this obligation in the transposition laws.

To be noted that this issue was never raised in the negotiations on the Directive: there were lengthy discussions on flexibilities for the medium-sized companies, but there was no request either from EP or individual Member States or from Business Europe and other private sector stakeholders to provide exemptions for corporate groups.

LTT

- A main objective of the EU Directive is to effectively facilitate whistleblowing, including by requiring the set up of easily accessible reporting channels. To this end, it obliges all private companies with 50 or more workers to set up channels for internal reporting by their employees. This is an essential rule and it does not make any exemption for companies belonging to a group.
- Where also group-level channels exist, whistleblowers are best placed to decide whether to use those or to report at the level of the subsidiary where they work, depending on the specific circumstances.
- The obligation of all subsidiaries with 50 or more workers to be equipped with effective, confidential channels can only strengthen corporate compliance mechanisms.
- The possibility for whistleblowers to report at their subsidiary, in particular if they have reasons not to trust the group-level channels, actually gives companies an additional opportunity to find out and effectively address wrongdoing; otherwise the whistleblowers would report directly to the authorities with the ensuing risk of reputational and financial damage.
Defensives

1. The obligation to establish reporting channels at each entity of the group is based on a restrictive interpretation of the Directive by the Commission. A number of Member States have transposed the Directive’s rules allowing for group-level channels. The Commission should revisit its interpretation.

- The rule is clear and contributes to an essential objective pursued by the Directive.
- The Commission has been supporting Member States’ transposition efforts, including by providing indications about the correct interpretation of the Directive, subject to the authoritative interpretation of the Court of Justice of the European Union.
- The Commission is currently assessing the compliance with the Directive of all transposition laws adopted and notified so far, and will take all necessary measures in case issues of non-conformity are identified; this issue is part of this assessment.

2. Lack of group oversight might expose the parent companies to sanctions and liability for wrongdoing of their subsidiaries, for instance under EU competition rules or under third countries’ rules such as the US Foreign Corrupt Practices Act.

- The management of risks exposure should rather be addressed upstream, with the development of a robust and comprehensive compliance program applicable throughout the group.
- The Directive does not prohibit sharing the outcomes of cases handled at subsidiary level, for instance for ex-post auditing, compliance or corporate governance - provided confidentiality requirements are respected. This can allow for the identification of structural issues that may impact more broadly the group and for monitoring the corporate compliance systems.
- Also, where reports received by a subsidiary reveal a structural problem or that affects two or more entities of the group, the whistleblowers can be asked if they agree to report the facts to the parent company. If they do not, they may report externally to the competent authorities.

3. There are risks of non-impartial, inconsistent and less specialised handling of whistleblowers’ reports by subsidiaries

- All subsidiaries with 50 or more workers are required under the Directive to be equipped with channels and procedures ensuring, amongst others, confidentiality and impartiality.
- A consistent, high-quality handling of reports across the group aimed at ensuring the full respect of applicable legal standards can (and should) be achieved through well-functioning reporting channels at subsidiary level.
- This includes the appointment of well-trained persons who follow the corporate approach set at headquarters level, combined with appropriate “upstream” knowledge-sharing between group companies, relevant trainings and exchanges of good practices.

BACKGROUND

Obligation for private companies to establish internal reporting channels

Article 8 of Directive (EU) 2019/1937 reads as follows:
“1. Member States shall ensure that legal entities in the private and public sector establish channels and procedures for internal reporting and for follow-up, following consultation and in agreement with the social partners where provided for by national law.

[...]

3. Paragraph 1 shall apply to legal entities in the private sector with 50 or more workers.”

The Directive allows a series of flexibilities (notably the possibility to share resources) for medium-sized companies (50-249 workers) to reduce the costs and administrative burdens for setting up and operating internal reporting channels, and these flexibilities apply also to medium-sized companies that belong to corporate groups. To the contrary, it does not provide for any exemptions as regards large companies.

State of play of transposition of the Directive

Member States had to transpose the Directive by 17 December 2021.

In January 2022, the Commission sent letters of formal notice to 24 Member States for not fully transposing and informing the Commission of the transposition measures before the deadline.

Reasoned opinions were sent to 15 Member States in July 2022, and to 4 more Member States in September 2022.

On 15 February 2023, the Commission decided to refer 8 Member States to the Court of Justice (CZ, DE, EE, ES, IT, LU, HU, PL). As ES and IT adopted the transposition laws before the execution of these referrals, these cases were not submitted to Court
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