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**MEETING DOCUMENT**

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| From: | Presidency |
| To: | Working Party on Company Law (Attachés) |
| Subject: | Presidency Flash - 16-17/10/2023 Company Law WP (Attachés & Experts) meeting |

Delegations will find attached the Presidency Flash in view of the Company Law Working Party (Attachés and Experts) meetings on 16th and 17th October 2023.

# Working Party on Company Law

## Presidency Flash
### 16 and 17 October

Dear colleagues,

We are pleased to send you the fourth flash on the Due Diligence Directive (CSDDD) in preparation for the Company Law Group meeting on 16-17 October.

With this meeting, and after discussing the core of the due diligence process on 6 October without detecting major problems, the objective is twofold: (a) from a more technical basis, to present the compromise proposal that will guide the Council's position for the block of articles 17 to 21, which to a large extent determine the public governance system for monitoring the effective compliance with the obligations; and (b) from a more political perspective, open the discussion on the relevant political elements with a view to facilitating a change of mandate.

The annexes to this document contain:

- Annex I. Presidency's compromise proposals for articles 17 to 21. The draft proposals seek to respect the original mandate while taking into account the discussions with the Parliament in the inter-institutional meetings. Although these cannot be considered as a closed proposal, they provide a close view of the area for compromise with the European Parliament.

- Annex II. Option proposals for the technical elements that cover: (1) Termination of business relationship –art 7 and 8-; (2) Combating Climate Change –art.15-; and (3) Financial Sector.

The information provided in the annexes integrates questions to inform the debate. Delegations' comments will be taken into consideration to guide the preparaton of negotiating packages that will form the core of the change of mandate.

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

# **ANNEX I.** PRESIDENCY COMPROMISE PROPOSALS FOR ARTICLES 17 -21[1].

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 legal certainty; and (c) no new burdens should be introduced –neither for companies nor for administrations-.

**A. Article 17. Supervisory Authorities.** No major differences were detected between the mandates of the two institutions. However, changes had to be articulated to ensure consistency with the compromises in Article 4.a.

## A.1. Approach

The structure is maintained while para. 3a is readapted in line with the amendment proposed for Article 4a (where an inclusion of the cross-reference to Article 18 was introduced to make it explicit that Article 4a is *without prejudice to the subsidiary being subject to the exercise of the supervisory authority's powers in accordance with Article 18 and to their civil liability in accordance with Article 22*). To ensure this, the solution maintains the competence of the relevant authority pursuant par 2 or 3 of article 17 while making reference to coordination and mutual assistance according to article 21.

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

- Adaptation of par. 3.a. in the line explained above.
- Reference to the description of competences assumed by each competent authority (in case there is more than one for the same Member State) in the information to be published by the Commission.
- Obligation to publish an annual report on the activities carried out by the supervisory authorities.

**B. Article 18. Powers of supervisory authorities.** No major differences were detected between the mandates of the two institutions. However, changes are being considered in order to include the possibility of positive injunctive measures by the supervisory authorities in par. 5. Also, some other changes are included for the sake of a compromise, but with little practical impact.

## B.1. Approach

The structure and content of the article is maintained, so that the burden on administrations is not raised and ensuring powers to guarantee correct compliance and action to address adverse impacts. To this extent, the possibility for administrative authorities to establish mandatory enforcement measures for compliance with the Directive is incorporated. Also, an obligation for the supervisory authorities to provide information about their actions by, which is already the case in practice, is included.

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

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

- Inclusion of positive injunctive measures in 5(a) – still open to discussion.
- Obligation to maintain information on their actions by the supervisory authorities.
- Explicit reference to the fact that these actions shall be without prejudice to the company's civil liability under Article 22

**C. Article 19. Substantiated Concerns.** No major differences were detected between the mandates of the two institutions. The EP called for minor changes to ensure the accessibility of the procedure and the protection of those submitting substantiated concerns against possible retaliation.

### C.1. Approach

The aim is to ensure that the burden on administrations is not raised. The substance of the Article is maintained while introducing some precisions on the confidentiality and accessibility of the procedures.

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

- Inclusion of par. 1.a. to include references to accessible procedures and the need to protect the identity of the person submitting the substantiated concerns.

**D. Article 20. Penalties.** The main differences were in relation to the list of elements to be considered when deciding whether to impose penalties and, if so, in determining their nature and appropriate level. EP also included a minimum threshold for maximum sanctions.

### D.1. Approach

The objective is to maintain the logic of the original proposal while introducing targeted amendments. The list of elements that may be taken into account in determining whether and at what level sanctions should be imposed is fleshed out. In addition, the threshold suggested by the EP is incorporated. These changes are intended not to unduly limit the competence of the Member States to set sanctions, while accommodating some of the EP's demands.

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

- Re-adaptation of the list of elements that may be taken into account in determining whether sanctions should be imposed, and at what level.
- Addition of the minimum threshold for maximum sanctions (5%).

### D.3. Pending elements

- It should be discussed if penalties could be set at group level.

**E. Article 21. European Network of Supervisory Authorities.** No major differences were detected between the mandates of the two institutions. The EP demands to include the obligation to list the non-EU companies under the scope of the Directive.

### E.1. Approach

Maintain the systematics of the Council text.

### E.2. Main amendments to the Council´s text.

- Still being discussed: obligation to publish an indicative list of non-EU companies under the scope of the Directive

DRAFTING

## Article 17

Supervisory Authorities

1. Each Member State shall designate one or more supervisory authorities to supervise compliance with the obligations laid down in national provisions adopted pursuant to Articles ~~6~~**5** to 11 and Article 15 ('supervisory authority').

2. As regards the companies referred to in Article 2(1), the competent supervisory authority shall be that of the Member State in which ~~*such*~~ **the** company has its registered office.

3. As regards companies referred to in Article 2(2), the competent supervisory authority shall be that of the Member State in which ~~*such*~~**the** company has a branch. If the company does not have a branch in any Member State, or has branches located in different Member States, the competent supervisory authority shall be the supervisory authority of the Member State in which the company generated most of its net turnover in the Union in the financial year preceding the last financial year before the date indicated in Article 30 or the date on which the company first fulfils the criteria laid down in Article 2(2), whichever comes last.

   Companies referred to in Article 2(2) may, on the basis of a change in circumstances leading to it generating most of its turnover in the Union in a different Member State, make a duly reasoned request to change the supervisory authority that is competent to regulate matters covered in this Directive in respect of that company.

3a. **Where the parent company fulfils the obligations resulting from this Directive on behalf of its subsidiaries in accordance with Article 4a, the competent supervisory authority of the parent company shall cooperate with the competent supervisory authority of the subsidiary, which will remain competent to ensure that the subsidiary is subject to the exercise of powers in accordance with Article 18. In this regard, the Network of supervisory authorities shall facilitate the needed cooperation, coordination and mutual assistance according to Article 21.** [2]

4. Where a Member State designates more than one supervisory authority, it shall ensure that the respective competences of those authorities are clearly defined and that they cooperate closely and effectively with each other.

5. **Pending FS**

[2] Previous version of Article 3.a. in the Council mandate (lines 241a and 241b of the 4C document) would be deleted.

6. By the date indicated in Article 30(1), point (a), Member States shall inform the Commission of the names and contact details of the supervisory authorities designated pursuant to this Article, as well as of their respective competence where there are several designated supervisory authorities. They shall inform the Commission of any changes thereto.

7. The Commission shall make publicly available, including on its website, a list of the supervisory authorities**, and, when a Member State has several supervisory authorities, the respective competences of those authorities in relation to this Directive**. The Commission shall regularly update the list on the basis of the information received from the Member States.

8. Member States shall guarantee the independence of the supervisory authorities and ~~shall~~ ensure that they, and all persons working for or who have worked for them and auditors, ***experts and any other person*** ~~*or experts*~~ acting on their behalf, exercise their powers impartially, transparently and with due respect for obligations of professional secrecy. In particular, Member States shall ensure that the authority is legally and functionally independent from the companies falling within the scope of this Directive or other market interests, that its staff and the persons responsible for its management are free of conflicts of interest, subject to confidentiality requirements, and that they refrain from any action incompatible with their duties.

   **Recital (53)** In order to ensure the monitoring of the correct implementation of companies' due diligence obligations and ensure the proper enforcement of this Directive, Member States should designate one or more national supervisory authorities. These supervisory authorities should be of a public nature, independent from the companies falling within the scope of this Directive or other market interests, and free *of* **from** conflicts of interest **and external influence, whether direct or indirect. In order to exercise their powers impartially, these supervisory authorities should neither seek nor take instructions from anybody**. In accordance with national law, Member States should ensure *appropriate financing of the competent* **that each supervisory** authority. **is provided with the human and financial resources necessary for the effective performance of its tasks and exercise of its powers**. They should be entitled to carry out investigations, on their own initiative or based on *complaints or* substantiated concerns raised under this Directive. **These investigations can include, where appropriate, on site inspections and the hearing of relevant stakeholders**. Where competent authorities under sectoral legislation exist, Member States could identify those as responsible for the application of this Directive in their areas of competence. They could designate authorities for the supervision of regulated financial undertaking also as supervisory authorities for the purposes of this Directive

9. **Member States shall ensure that supervisory authorities publish and make accessible online an annual report on their activities under this Directive**.

## Article 18

Powers of Supervisory Authorities

1. Member States shall ensure that the supervisory authorities have adequate powers and resources to carry out the tasks assigned to them under this Directive, including the power to ~~*request*~~ **require companies to provide** information and carry out investigations related to compliance with the obligations set out in Articles **[5],** 6 to 11 and Article 15. **[As regards Article 15, Member States shall only require supervisory authorities to supervise that companies have adopted the plan[3].]**

2. A supervisory authority may initiate an investigation on its own motion or as a result of substantiated concerns communicated to it pursuant to Article 19, where it considers that it has sufficient information indicating a possible breach by a company of the obligations provided for in the national provisions adopted pursuant to this Directive.

3. Inspections shall be conducted in compliance with the national law of the Member State in which the inspection is carried out and with prior warning to the company, except where prior notification hinders the effectiveness of the inspection. Where, as part of its investigation, a supervisory authority wishes to carry out an inspection on the territory of a Member State other than its own, it shall seek assistance from the supervisory authority in that Member State pursuant to Article 21(2).

4. If, as a result of the actions taken pursuant to paragraphs 1 and 2, a supervisory authority identifies a failure to comply with national provisions adopted pursuant to this Directive, it shall grant the company concerned an appropriate period of time to take remedial action, if such action is possible.

   Taking remedial action does not preclude the imposition of penalties or the triggering of civil liability in case of damages, in accordance with Articles 20 and 22, respectively.

5. When carrying out their tasks, supervisory authorities shall have at least the following powers:

   (a) to order:
      i. the cessation of infringements of the national provisions adopted pursuant to this Directive;
      ii. the abstention from any repetition of the relevant conduct; and
      iii. where appropriate, to provide remediation proportionate to the infringement and necessary to bring it to an end;
      iv. [**The implementation of specific actions carried out in a specified manner and within a specific period of time to ensure effective compliance with the obligations under this Directive**].

   (b) to impose penalties in accordance with Article 20; and
   (c) to adopt interim measures in case of ~~*urgency due to*~~ **imminent** risk of severe and irreparable harm.

[3] Reference contingent on the discussion on Article 15.

6. **While ensuring the effectiveness [and equivalence] of legal remedies**, supervisory authorities shall exercise the powers referred to in this Article in accordance with the national law:

   (a) directly;
   (b) in cooperation with other authorities; or
   (c) by application to the competent judicial authorities.

7. Member States shall ensure that each natural or legal person has the right to an effective judicial remedy against a legally binding decision by a supervisory authority concerning them**, in accordance with national law**.

8. **Member States shall ensure that the supervisory authorities keep records of the investigations referred to in paragraph 1, indicating, in particular, their nature and result, as well as records of any enforcement action issued under paragraph 5.**

**9. [Decisions of supervisory authorities regarding a company's compliance with this Directive shall be without prejudice to the company's civil liability under Article 22.]**

## Article 19

Substantiated Concerns

1. Member States shall ensure that natural and legal persons **who have, in accordance with national law, a legitimate interest in the matter** are entitled to submit substantiated concerns, through easily accessible channels, to any supervisory authority when they have reasons to believe, on the basis of objective circumstances, that a company is failing to comply with the national provisions adopted pursuant to this Directive ('substantiated concerns').

**1a. Member States shall ensure that, where persons submitting substantiated concerns so request, the supervisory authority takes the necessary measures for the appropriate protection of the identity of that person and their personal information, which, if disclosed, would be harmful to that person**

2. Where the substantiated concern falls under the competence of another supervisory authority, the authority receiving the concern shall transmit it to that authority **and inform the person that has submitted a substantiated concern as provided for in paragraph 1**.

3. Member States shall ensure that supervisory authorities assess the substantiated concerns in an appropriate period of time and, where appropriate, exercise their powers as referred to in Article 18.

4. The supervisory authority shall, as soon as possible and in accordance with the relevant provisions of national law and in compliance with Union law, inform the person referred to in paragraph 1 of the result of the assessment of their substantiated concern and **of its**

**decision to accede to or refuse the request for action,** providing the reasoning for it, and, where relevant, a description of the further steps and measures it will take.

5. Member States shall ensure that the persons submitting the substantiated concern according to this Article ~~*and having, in accordance with national law, a legitimate interest in the matter*~~ have access to a court or other independent and impartial public body competent to review the procedural and substantive legality of the decisions, acts or failure to act of the supervisory authority.

## Article 20

Penalties

1. Member States shall lay down the rules on penalties, including pecuniary penalties, applicable to infringements of national provisions adopted pursuant to this Directive, and shall take all measures necessary to ensure that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive.

2. In deciding whether to impose penalties and, if so, in determining their nature and appropriate level, due account shall be taken ~~*in particular of the company's efforts to comply with any remedial action required of them by a supervisory authority, any investments made and any targeted support provided pursuant to Articles 7 and 8, as well as collaboration with other entities to address adverse impacts in its chain of activities, as the case may be*~~**of**:

   **(a) the nature, gravity and duration of the infringement and the severity of the impacts that the company's infringement caused;**
   **(b) any investments or targeted support provided pursuant to Articles 7 and 8;**
   **(c) any collaboration with other entities to address the impacts concerned;**
   **(d) where relevant, the extent to which prioritisation decisions were made in accordance with article 6a;**
   **(e) any relevant previous infringements by the company of national provisions adopted pursuant to this Directive found by a final decision;**
   **(f) the extent to which the company carried out any remedial action with regard to the concerned subject matter;**
   **(g) the financial benefits gained from or losses avoided by the company due to the infringement;**
   **(h) any other aggravating or mitigating factors applicable to the circumstances of the case.**

   **2a. At least the following penalties shall be provided for:**

   **(a) pecuniary penalties;**
   **(b) a public statement indicating the company responsible and the nature of the infringement;**

3. When pecuniary penalties are imposed, they shall be commensurate ~~*with*~~**to** the company's **net** worldwide **turnover. The maximum limit of pecuniary sanctions shall**

**be not less than 5% of the net worldwide** ~~*net*~~ turnover **of the company in the business year preceding the fining decision**.

4. Member States shall ensure that any decision of the supervisory authorities containing penalties related to the infringements of the national provisions adopted pursuant to this Directive is published, publicly available for at least 3 years and sent to the European Network of Supervisory Authorities. The published decision shall not contain any personal data within the meaning of Article 4(1) of Regulation (EU) 2016/679.

## Article 21

European Network of Supervisory Authorities

1. The Commission shall set up a European Network of Supervisory Authorities, composed of representatives of the supervisory authorities. The Network shall facilitate the cooperation of the supervisory authorities and the coordination and alignment of regulatory, investigative, sanctioning and supervisory practices of the supervisory authorities and, as appropriate, sharing of information among them.

   The Commission may invite Union agencies with relevant expertise in the areas covered by this Directive to join the European Network of Supervisory Authorities.

   1.a. **Member States shall cooperate with the Network in order to identify the companies within their jurisdiction, in particular by providing all necessary information in order to assess whether a non-European company fulfils the criteria set in Article 2**. The Commission shall set up a secured system of exchange of information regarding the net turnover generated in the Union by a company referred to in Article 2(2), that does not have a branch in any Member State or has branches located in different Member States~~.~~ **where** Member States shall regularly communicate information they have regarding the net turnover generated by those companies. The Commission shall analyse this information within a reasonable period of time and notify the Member State where the company generated most of its net turnover in the Union in the financial year preceding the last financial year, that the company is a company within the meaning of Article 2(2) and the supervisory authority of the Member State is competent in accordance with Article 17(3).

2. Supervisory authorities shall provide each other with relevant information and mutual assistance in carrying out their duties and shall put in place measures for effective cooperation with each other. Mutual assistance shall include collaboration with a view to the exercise of the powers referred to in Article 18, including in relation to inspections and information requests.

3. Supervisory authorities shall take all appropriate steps needed to reply to a request for assistance by another supervisory authority without undue delay and no later than 1 month after receiving the request. When it is necessary due to the circumstances of the case, the period may be extended by a maximum of two months based on a proper justification. Such steps may include, in particular, the transmission of relevant information on the conduct of an investigation.

4. Requests for assistance shall contain all the necessary information, including the purpose of and reasons for the request. Supervisory authorities shall only use the information received through a request for assistance for the purpose for which it was requested.

5. The requested supervisory authority shall inform the requesting supervisory authority of the results or, as the case may be, of the progress regarding the measures to be taken in order to respond to the request for assistance.

6. Supervisory authorities shall not charge each other fees for actions and measures taken pursuant to a request for assistance.

   However, supervisory authorities may agree on rules to indemnify each other for specific expenditure arising from the provision of assistance in exceptional cases.

7. The supervisory authority that is competent pursuant to Article 17(3) shall inform the European Network of Supervisory Authorities of that fact and of any request to change the competent supervisory authority.

8. When doubts exist as to the attribution of competence, the information on which that attribution is based will be shared with the European Network of Supervisory Authorities, which may coordinate efforts to find a solution.

9. The European Network of Supervisory Authorities shall publish **[an indicative list of non-EU companies under the scope of the Directive and]** the decisions of the supervisory authorities containing penalties as referred to in Article 20(4).

# **ANNEX II.** OPTION PROPOSALS FOR THE POLITICAL ELEMENTS

# OPTIONS ARTICLE 7/8

# TERMINATION OF BUSINESS RELATIONSHIP

## CONTEXT

The conditions for the termination of business relationships represent one of the politically sensitive elements of the due diligence process. In this respect, in view of the preparation of trilogues, it is necessary to define some criteria to facilitate the compromise between the two institutions.

## APPROACH OF THE TWO INSTITUTIONS AND MAIN DIFFERENCES

The **Council's mandate** includes an exception to the termination obligation based on two conditions: (a) that the impacts of the termination are more severe than those that the termination is intended to resolve, and (b) that there is no available alternative to that business relationship that provides a raw material, product or service essential to the company. In addition, it establishes particularities for the financial sector, which is exempted from the termination obligation.

**The Parliament**, on the contrary, does not include an exception for termination where there is no available alternative to the business relationship, under the rationale that company's activity cannot be prioritised in the face of environmental or human rights impacts such as those contemplated by the Directive. At the same time, it also gives special treatment to financial services, which are only exempted in the event of bankruptcy.

Leaving aside the particularities of the financial sector, there are some coincidences in the approach of the two institutions: the need for termination to be dynamic in nature, being necessarily a last resort solution and having to take into account the impacts of termination versus non-termination. That could provide some ground to maintain the exception in paragraphs 7.7a and 8.8.a of the Council's mandate, but not necessarily for the exception in point b (absence of alternative suppliers).

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

As a compromise, it could be suggested to introduce an obligation to terminate the business relationship, but subject to a maximum deadline. This would give the company time to resolve the absence of alternatives for the supply of products or services essential to its production process and would also avoid termination at sensitive moments in the economic cycle or specific economic scenarios (i.e. emergencies or relevant economic disruptions). In this line, a deadline of 5 years could be reasonable.

Basis for text proposal (indicative version –further amendments could be explored):

> *no available alternative to that business relationship, that provides a raw material, product or service essential to the company's production of goods or provision of services, exists and the* ***[temporary suspension or]*** *termination would cause*

*substantial prejudice to the company.* ***This derogation shall apply for a maximum period of [5] years from the date the company reports to the competent supervisory authority its decision not to [temporarily suspend or] terminate the business relationship pursuant the second subparagraph.***

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| Question 1: Could you support the approach?<br>Question 2: Should this deadline be extended or shortened?<br>Question 2. Would it be needed to include further conditions? |

# OPTIONS ARTICLE 15
# COMBATING CLIMATE CHANGE

## CONTEXT

In view of the discussions on the two institutions, it can be assumed that Article 15 is one of the main political elements of the proposal. This is also an article in which relevant differences in the approach of the two institutions are detected. In part, these differences are due to the different perceptions of the difficulty of applying to companies obligations that were originally intended for States. This raises doubts and concerns on the practical feasibility and legal certainty, in addition to those related to the disruption of corporate governance national provisions.

## APPROACH OF THE TWO INSTITUTIONS AND MAIN DIFFERENCES:

The **Council's approach** has sought to decouple climate change obligations from those relating to environmental impacts. This separation means that climate change obligations, as well as their content and scope, are practically constrained to this article. With this approach, the obligation is linked only to the largest companies within the scope of the regulation, is limited to the approval of the plan - without an exhaustive description of its content and not including specific obligations for its implementation or setting intermediate targets for the reduction of greenhouse gases- and is dissociated from any element of corporate governance (by deletion of Article 15.3).

In contrast, the **Parliament** opts for a more ambitious approach, incorporating the implementation of the plan, extending the scope to all companies within the scope of the Directive, developing its content and aligning it with the CSRD, setting intermediate greenhouse gas targets, linking the article to that of civil liability and incorporating the element of linkage to director's remuneration.

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

In order to examine the possible compromises, this document lists the possible options in relation to the relevant variables detected in order to assess the flexibility of the Council for different negotiation packages. The analysis is structured following the three par. of the Article.

- *Article 15.1. Scope and substance of the obligation*.

  In this section, the following variables are identified as being susceptible to compromise:

  1. Whether or not to apply the obligation to smaller companies under the scope of the Directive. That is: not only including companies covered by Article 2(1), point (a), but also including companies covered by Article 2(2), point (a).
  2. Possible re-draft of the *implementation actions* reference.
  3. Further specification of the contents of the plan, by clarifying some of the elements that should be included –alignment with CSRD-.
  4. Inclusion of greenhouse gas emission reduction targets (to be analysed in point 15.2)

| Question 1. On which variables would you have more flexibility? |
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Along these lines, as starting solutions, two possible areas for compromise could be envisaged with these variables:

**Option A.** Extending the scope while maintaining the substance of the obligation.

The obligation to adopt a plan to combat Climate Change could be extended to all companies falling under the scope of the directive, in line with the EP's proposal. In return to this concession, the content of the plan would be maintained as set out in the Council's approach to: i) implementation actions, ii) related investment and financial plans, iii) identification of the extent to which CC is a risk to the company or a product of the company's operations, and iv) where appropriate, the company's exposure to fossil fuels.

Basis for text proposal: would be assembled on the basis of the Council's proposal with deletion of reference to 2(1), point (a) and Article 2(2) point (a).

(…) in **Article 2**(~~*1), point (a), and Article 2(2), point (a)*~~), shall adopt a plan (…)

**Option B**. Maintain the scope and flesh out the substance of the obligation

This means: only larger companies falling under the scope of the Directive shall adopt a plan to combat climate change, while the content of the plan is specified to a greater extent, considering the EP's proposal and CSRD rules.

Basis for text proposal (indicative version only –further amendments could be explored):

*Member States shall ensure that companies referred to in Article 2(1), point (a), and Article 2(2), point (a), shall adopt a plan, ~~including implementing actions and related financial and investments plans~~, to ensure that the business model and strategy of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C in line with the Paris Agreement and the objective of achieving climate neutrality by 2050 as established in Regulation (EU) 2021/1119, ~~and where relevant, the exposure of the undertaking to coal-, oil- and gas-related activities, as referred to in Articles 19a(2), point (a)(iii), and 29a(2), point (a)(iii), of Directive 2013/34/EU.~~* ***This plan shall include, [where relevant]:***

*(a)* ***a description of the resilience of the company's business model and strategy to risks related to climate matters;***

*(b)* ***a description of the opportunities for the company related to climate matters;***

*(c)* ***the plans of the company, including implementing actions and related financial and investment plans, to ensure that its business model and strategy are compatible with the transition to a sustainable economy and with the limiting of global warming to 1,5 °C in line with the Paris Agreement and the objective of achieving climate neutrality by 2050 as established in Regulation (EU) 2021/1119 of the European Parliament and of the Council;***

*(d)* ***where relevant, the exposure of the company to coal-, oil- and gas-related activities*** *as referred to in Articles 19a (2), point (a)(iii), and 29a(2), point (a)(iii), of Directive 2013/34/EU****;***

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| Question 2: Could you support the approach?<br>Question 3: which option would you prefer?<br>Question 4. Should any additional element be included? |

- *Article 15.2. References to intermediate greenhouse gas emission reduction targets.*

The inclusion of greenhouse gas reduction targets is included in the mandates of both institutions. However, only the European Parliament includes the intermediate target, which makes this element susceptible to be included in a compromise package, along with elements referred to in par. 1.

Basis for text proposal (indicative version –further amendments could be explored):

**Option A.** Incorporate reference to greenhouse gases and intermediate targets.

The operative part of the text could include that, when climate change is or should have been identified as a risk or an impact for the company, the plan must include the progress made by the company in reducing greenhouse gas emissions. Moreover, an addition in recitals 50 could be made in order to explain that time bounds targets may be included as part of this plan, based on scientific evidence.

Basis for text proposal for b2 (indicative version –further amendments could be explored):

> *2. Member States shall ensure that, in case climate change is or should have been identified as a principal risk for, or a principal impact of, the company's operations, the company includes greenhouse gas emission reduction objectives in its plan* ***as well as the progress made in this regard.***
>
> ***Addition to recital 50****: In order to ensure that this Directive effectively contributes to combating climate change, companies should adopt a plan to ensure that the business model and strategy of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C in line with the Paris Agreement. In case climate is or should have been identified as a principal risk for or a principal impact of the company's operations, the company should include greenhouse gas emissions reduction objectives in its plan, such as* ***time-bound targets related to the absolute greenhouse gas emission reduction targets for 2030 and 2050, based on conclusive scientific evidence, as well as a description of the progress the company has made towards achieving those reduction objectives.***

**Option B**. Include greenhouse gas targets in the operative part.

The operative part of the text could include that, when climate change is or should have been identified as a risk or an impact for the company, the plan must include, when appropriate, time bounds targets of greenhouse gas emission reduction, as well as a description of the progress made in this regard.

Basis for text proposal (indicative version only –further amendments could be explored):

> 2. Member States shall ensure that, in case climate change is or should have been identified as a principal risk for, or a principal impact of, the company's operations, the company includes **greenhouse gas** emission reduction objectives in its plan. [**Where appropriate,] the plan shall include a description of the time-bound targets related to the absolute greenhouse gas emission reduction targets at least for 2030 and 2050, based on**

**conclusive scientific evidence, and a description of the progress the company has made towards achieving those targets.**

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| Question 5: Could you support the approach?<br>Question 6: Which option would you prefer? |

- *Article 15.3. Link with the remuneration policy*

The link between the obligation contained in this article with the variable remuneration of directors has been one of the elements that has been strongly contested by Member States. However, with a view to assessing possible compromise scenarios, changes in this element should also be discussed.

Taking into account that the obligation to implement the plan and the responsibility of the directors in this task are two elements of the EP's proposal that cannot be accepted under any circumstance, the directors' variable remuneration policy can be a way to incentivize the implementation of the plan, without being too intrusive in terms of corporate governance.

**Option A:** Companies with more than 1,000 employees must take into account the implementation of the transition plan as a variable in their compensation policy.

Basis for text proposal (indicative version –further amendments could be explored):

**3. Member States shall ensure that companies with more than 1000 employees on average have a variable remuneration policy for directors that [integrates/takes into account/contemplates/reflects on] the implementation of the plan referred to in this Article. [Such a policy shall be approved by the Annual General Meeting.]**

**Option B:** Companies with more than 1,000 employees must have a relevant and effective policy to promote the implementation of the plan. The variable remuneration of directors linked to the implementation of the plan is proposed as an option within this policy and not as an obligation.

Basis for text proposal (indicative version – further amendments could be explored):

**3. Member States shall ensure that companies with more than 1000 employees on average have a relevant and effective policy to promote the implementation of the plan referred to in this Article, such as variable remuneration for directors.**

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| Question 7: Could you support the approach?<br>Question 8: Which option would you prefer? |

It is important to note that the elements incorporated in paragraphs 1 and 2 could be considered as an alternative transaction to the amendment proposed in paragraph 3 and vice versa.

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| Question 8: Could you support the approach?<br>Question 9: If a package is set in terms of 15.1 and 15.2 Vs 15.3, which element should be maintained as it is in the Council Mandate? |

# OPTIONS ON FINANCIAL SECTOR

## CONTEXT

The treatment of the financial sector is one of the most controversial elements of the proposal, and one of the aspects that will occupy a relevant part of the political discussion to close a provisional agreement in trilogues.

The ES PCY has made its best efforts to strike a balance between the COM proposal, the EP proposal and the General Approach of the Council. The text should be seen as a package and the starting point for further fine tuning, aligned with the trilogue discussions.

To put in place a viable mandate of the Council to discuss this issue on the trilogues, the ES PCY has a comprehensive proposal for financial undertakings, which could lead to the best possible outcome during the negotiations. Competitiveness of the European markets and well-functioning of EU financial companies, along with a strong compromise with the human and the environmental rights, should be a cornerstone of this proposal regarding the financial aspects.

## APPROACH OF THE TWO INSTITUTIONS AND MAIN DIFFERENCES:

The financial aspects of the proposal have created a heated debate both in the EP and in the Council. **On the general approach of the Council**, from 2022, financial undertakings are included on the scope of the proposal in the upstream part of the chain of activities. However, it leaves to each Member State to decide whether to include financial services within the definition of "chain of activities" when transposing the CSSD into national law. This approach has come under criticism for undermining a core function of EU Directives in creating a harmonised approach among EU Member States. Besides, article 3 (g) on the definition of “chain of activities” for financial services, only includes the bank and assurance and reassurance services (an exclusion of investment services). There are also specific references in articles 6, 7 and 8 to create the necessary adjustment for the due diligence of the financial undertakings

On the other hand, **the European Parliament position** stablished a broader definition of “value chain” for financial undertakings, including the three main sectors of the financial markets (investment, banking and assurance). Also, in its proposal, there is no room for a national option to apply or not the CSDD to the downstream part of the financial companies. Specifically, the European Parliament aims to introduce an obligation for them to “induce their investee companies to bring actual adverse impacts caused by them to an end”. This means that institutional investors and fund or asset managers (and possibly the funds which they control) should be required to engage with investee companies, namely by exercising voting rights to induce companies’ managers to minimize or end any negative impacts to human rights and the environment.

- Financial services´ discussion is deeply intertwined with the final agreement of article 3 (g) and the definition of value chain (EP) or chain of activities (GA). Both discussions should be going hand in hand, to assure a common and coherent framework for financial undertakings. Moreover, the scope and the thresholds of article 2 will be extremely relevant to analyze the final impact on the European financial markets of this directive.

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

The main changes and substantive elements of the draft presented by the ES PCY would be as follows:

- **Article 2 ("scope"):** regarding articles 2.6, 2.7 and 2.8, the substance of the proposal that would be made by the Council is kept on articles 2.6 and 2.7. The ES PCY considers that both paragraphs are necessary to avoid a burdensome regulation of specific financial products. However, the national option to include or not the downstream part of the chain of activities could be erased if needed for the compromise. To this extend, it could be a red line for the EP, and it might hamper the level playing field among member states.

  **Question 1**: Could you support to maintain the national option for pensions institutions which are considered to be social security schemes (article 2.6)?
  **Question 2:** Could you support the exclusion of certain financial products of Directive 2019/2088 (article 2.7)?
  **Question 3**: Could you support the deletion of the national option foreseen on article 2.8? If do so, how would you write up the definition of chain of activities regarding financial services?

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- On article 3 (g) and the definition of chain of activities/value chain for financial undertakings, the main elements proposed by the Council would be kept, but adjustments could be introduced to allow the upcoming negotiation with the European Parliament. On this regard:

  a. **On investment services**, the ES PCY would try to strike a balance between the exclusion of these services on the council proposal, and the broad definition of the EP plus the added article 8.a (referred to institutional investors and asset managers). Some Member States have expressed their concerns about that article.

     Regarding the institutional investors, asset managers and activities of investment, it should be highlighted that there is no link (nor direct nor indirect) between the investor´s activity and the operations of the investee company. In this case, the leverage to use against the investee company is lower in comparison with the banking sector or the assurance sector. But the European Union and Member States are deeply committed with the ESG aspects, so there should be some sort of application of this Directive to investment activities.

     For that reason, the ES PCY considers that article 8.a of the EP proposal is a good starting point. It is necessary to avoid unnecessary burden upon investment companies, so article 3g of the *Directive on the exercise of certain rights of shareholders in listed companies* ("engagement policy") could be a model to be followed. While some Member States have expressed their concerns on voting behaviour wording of the EP proposal, the ES PCY considers that it should be possible to reach a landing zone if the legislative proposal goes further on the engagement policies.

     The Council mandate can go on that direction, allowing negotiation during trilogues based on this premise. An equal treatment between investment services and the banking or assurance sectors can be avoided, but we can go further on engagement policies and requirements on human and environmental impacts and consequences.

| **Question 4**: Could you support the proposed approach on investment services? |
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If Member States consider the negotiation strategy reasonable, there could be two alternative options. Firstly, the CSDD could modify article 3g of *Directive 2007/36/EC on the exercise of certain rights of shareholders in listed companies*, going further on the requirements of the engagement policies. The drawback on that option is that we would be limiting the obligation only to listed companies. The second option could be a specific article on the CSDD which describes a comprehensive and thorough engagement policy for those companies included in the scope of the proposal. The wording of this article should be defined in a later stage of the negotiation process, with further fine tuning.

| **Question 5**: which option would you prefer?<br>1. Modification of article 3g of Directive 2007/36/EC<br>2. A new article stablishing new requirements on engagement policies for companies included in the scope of CSDD. |
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b. The situation for the **banking sector and the assurance sector** is different. In this case, the ES PCY would like to distinguish between direct and indirect relationship with the potential or actual impacts. In the upstream part of their chain of activities or value chain, companies should be covered by CSDD with the same treatment that any other business. But that is not the case when we are dealing with the downstream part (once we erase the national option of article 2.8).

Under any circumstance, it could be understood that those financial companies have a direct link with the adverse impacts that companies receiving loans or credits are creating (downstream part). However, it seems reasonable to stablish an indirect link between the financial service provided (credit, loans, assurance and so on) and the adverse impact generated by the company receiving those services. This categorizing would be key to explain a reasonable proposal on CSDD for those financial undertakings on banking and assurance.

Given that financial undertakings have no access to information about the whole chain of activities or value chain of their clients, and the aim of this directive is not to create an obligation for financial companies to make a look through of their clients and their value chain, the CSDD should be adapted to the special nature of financial services. This is why there are **several options**:

- Instead of creating an equal approach for the financial and non-financial sector (when there are significant differences), the first one should check whether their clients have adopted proper due diligence procedures against actual or potential adverse impacts, according to this Directive. Instead of requiring a comprehensive due diligence, even a look through, the ES PCY proposal would imply to create a proportional, yet reasonable, obligation for financial undertakings to avoid any potential or actual impact. This option is based on the indirect link is included that has been previously explained.

  With this option, financial undertakings would have an obligation to check if that company is fulfilling their obligations on human and environmental rights. However, the proposal is not imposing to financial companies a burdensome obligation to supervise the whole value chain of their clients. The proposal is fully aligned with the goals and objectives of CSDD.

- Besides the previous approach, there should also be a revision of sanctions imposed by infringements of this directive. If any company has been sanctioned under the penalty regime stablished in CSDD, financial undertakings should be refrained, or at least take appropriate precautions, of enter relationships with that company.

**Question 6**: Could you support the proposed approach on bank and assurance services services?

If the Council's finds these proposals as a reasonable approach, two options could be foreseen to go further on the trilogue negotiations. On one hand, the financial services due diligence could be included in the general process stablish in articles 6 to 8, as it is so far in the COM proposal. On the other hand, there is an option to develop an entire separate procedure for financial companies, adapted to its specificities. In this case, the ES PCY would integrate in a comprehensive article (or articles) for the whole process the different references to financial services made in this directive (articles 6.3, 7.6 and 8.7 of the COM proposal).

**Question 7**: which option would you prefer?

a) Maintain the financial services due diligence on the general process, with their specificities on articles 6, 7 and 8.
b) Creating a new comprehensive article or articles to develop a suitable due diligence process for financial undertakings.

Depending on what Member States decides on the previous issues, the ES PCY would deal with articles 6.3, 7.6, 8.7 and 10.2 on financial services specifications. From the PCY perspective, those are relevant, but rather technical aspects of the proposal, and there should be room to discuss them in the trilogues.