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From:	General Secretariat of the Council
To:	Permanent Representatives Committee
No. Cion doc.:	6533/22
Subject:	Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 - Preparation for the trilogue

I. INTRODUCTION

1. On 23 February 2022, the Commission submitted to the European Parliament and to the Council a proposal for a Directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937¹.
2. The proposed Directive, based on Article 50 and Article 114 of the TFEU, lays down rules on obligations for companies regarding actual and potential human rights adverse impacts and environmental adverse impacts, with respect to their own operations, the operations of their subsidiaries, and the value chain operations carried out by entities with whom the company has an established business relationship. It also lays down rules on liability for violations of these obligations.

¹ 6533/22 + ADD 1

3. The proposed Directive aims to set out a horizontal framework to foster the contribution of businesses operating in the single market towards the achievement of the Union's transition to a climate-neutral and green economy in line with the European Green Deal and the UN Sustainable Development Goals.
4. At its meeting of 1 December 2022, the Council (Competitiveness) adopted a General Approach on the proposal.²
5. The European Parliament's Committee on Legal Affairs (JURI) appointed Ms Lara WOLTERS (S&D, NL) as rapporteur on the proposal. The European Parliament voted on its report at Plenary session on 1 June 2023.
6. The opinion of the European Economic and Social Committee was adopted on 14 July 2022³.

II. STATE OF PLAY

7. Three political trilogues have taken place on 8 June, 11 July and 7 September 2023. The Permanent Representative Committee was debriefed on 16 June, 14 July and 13 September respectively.
8. Following discussions between the Presidency, the European Parliament and the Commission at 15 technical meetings since June 2023, as well as at the Company Law Working Party at nine meetings since 8 June 2023, progress has been achieved on the file.
9. In view of seeking a mandate from the Permanent Representative Committee for the fourth trilogue foreseen on 22 November 2023, the Presidency is exploring possible compromises that could provide the basis for an agreement with the European Parliament with the aim of finding solutions that are workable in practice, ensure legal certainty and do not entail excessive costs for companies and administrations. The main elements of the compromise suggestions are explained under Section III.

² 15024/1/22.

³ 11489/22.

III. MAIN ISSUES

10. The deliberations with the European Parliament and within the Council have permitted the Presidency to have a clearer picture of the most important elements of the Parliament's position. These elements have been discussed at the Company Law Working Party meetings of 16-17 October, 23 October, 6 and 10 November. With a view to the upcoming trilogue on 22 November 2023, the Presidency would like to ask the Permanent Representative Committee for flexibility with a view to a compromise package based on the following elements which should be part of an overall balanced agreement.

A. Scope (Article 2)

11. In its General Approach, the Council retained the overall approach proposed by the Commission to determine which companies would have to carry out due diligence. The criteria are based on the number of employees and the net worldwide turnover for EU companies, and on the net turnover generated in the Union for non-EU companies. The criteria would have to be fulfilled at the level of individual companies, but the Council also introduced provisions allowing companies to fulfil some of the due diligence obligations at a group level.
12. The European Parliament has lowered the thresholds for the application of the Directive and extended the scope compared to the Council's position. The Parliament has also introduced changes to the calculation of the thresholds, with the aim of avoiding circumvention.
13. The Presidency proposes to keep the thresholds as in the General Approach and accommodate some of the European Parliament's concerns by: 1) incorporating some of the anti-circumvention measures proposed by the Parliament such as the calculation of the thresholds at group level and the inclusion of franchises – this would be done ensuring some fine-tuning on these clauses in order to ensure that they are fit for purpose, 2) the addition of new sectors in Article 2(1)(b) and Article 2(2)(b), and 3) the addition of new provisions on the meaningful engagement with stakeholders by adjusting the terms of the new Article 8d proposed by the European Parliament.

B. Regulated financial undertakings (Article 3, points (a) and (g), Article 6(3), Article 7(6) Article 8(7) and Article 10(2))

14. The Council reached a delicate balance in its General Approach as regards the financial sector. Regarding the definition of regulated financial undertakings that would fall under the scope of the proposed Directive, the Council left out of the scope financial products. The Council's position also leaves the decision of whether or not to include the provisions of financial services by regulated financial undertakings up to each Member State when transposing the Directive. In addition, if the Member State decides to apply the Directive to the provision of such financial services, investment activities - because of their specificities - are left out of the definition of 'chain of activities' in respect to regulated financial undertakings.
15. The European Parliament adopted a broader definition of the 'value chain' for financial undertakings, applying the due diligence obligations to the downstream part and including the financial sector' main markets: investment, banking and assurance.
16. Given the delicate balance on this issue achieved in Council and the difficulties to find a compromise with the position of the European Parliament, the Presidency would propose to exclude the financial sector from the scope of the Directive and delay its extension to this sector to a later stage by adding a review clause, once a detailed impact assessment has been done. To this end, an inter-institutional political declaration would be agreed between the European Parliament, the Council and the European Commission.

C. Combating climate change (Article 15)

17. The Council's approach dissociated climate change obligations from those related to the environmental impacts. The obligation is linked only to the largest companies within the scope of the Directive and to the adoption of a plan, and avoids interfering with different corporate governance systems within the Union by deleting the link between the variable remuneration of directors to their contribution to the company's business strategy and long-term interest and sustainability.
18. On the other hand, the European Parliament's position includes the implementation of the plan, provides for a set of requirements of the contents of the plan aligning it to the provisions of the Corporate Sustainability Reporting Directive (CSRD), extends the scope to all

companies within the scope and keeps the link between companies' transition plans and the variable remuneration of directors.

19. The Presidency is of the view that an ambitious approach on this issue is needed in order to achieve a balanced compromise with the European Parliament, including strengthening the provisions related to the obligations to adopt a plan by the inclusion of an obligation of means, providing further details on the content of the plan, and linking it to the directors' remuneration as an incentive for the plan's implementation.

D. Civil liability (Article 22)

20. The Council amended this article significantly in order to achieve legal clarity, certainty for companies and to avoid unreasonable interference with the Member States' tort law systems. Four conditions have to be met in order for a company to be held liable: a damage caused to a natural or legal person, a breach of the duty, the causal link between the damage and the breach of the duty and a fault (intention or negligence). The Council's General Approach also foresees full compensation for the damage occurred while avoiding overcompensation.
21. The European Parliament extended the civil liability provisions with a series of elements to guarantee access to justice including limitation periods, cost of legal proceedings and injunctive measures. Moreover, the European Parliament's position also includes guarantees to ensure a company would still be held liable when using multi-stakeholder initiatives or contractual clauses, and the possibility for a parent company to be held liable when there is no legal successor.
22. The Presidency believes that a possible compromise on this important issue could be envisaged by incorporating elements related to access to justice contained in the European Parliament's position such as limitation periods to bring claims by those affected by adverse impacts, broadening the legal standing allowing the participation of trade unions and civil society organisations, disclosure of evidence, injunctive measures and cost of proceedings for claimants.

E. Annex I and definitions of adverse impacts (Article 3, points (b) and (c))

23. The significant changes made to Annex I in the Council's General Approach have the objective of making the obligations as clear and easily understandable for companies as possible, while ensuring a legally sound base. The logic of the Annex I is to list specific rights and prohibitions, the abuse or violation of which constitutes an adverse human rights impact (Article 3(c)), or adverse environmental impacts (Article 3(b)). To better understand how these rights and prohibitions should be interpreted, the Annex I contains references to international instruments that serve as points of reference. Furthermore, it only lists those international instruments that have been ratified by all Member States. Overall, the Annex I only refers to such obligations and prohibitions that can be observed by companies, not just by States.
24. On the other hand, the European Parliament extends the list of international instruments encompassing rights that cannot be clearly abused by companies, that are not binding in nature or have not been ratified by all Member States, and includes a general clause that tries to address the absence of international environmental treaties to cover all possible impacts in this area.
25. The Presidency proposes to add new elements to the obligations and instruments listed in the Annex as regards human rights, particularly as regards vulnerable groups and core International Labour Organisation (ILO) Conventions, the latter through delegated acts when these are fully ratified by all the Member States, while maintaining the Council's overall approach and systematic on the Annex. As regards the environmental impacts, a compromise could be sought by building on the definition of environmental impacts provided by the European Parliament, that includes points 18 and 19 of the Part I.1. of Annex I and by broadening the referred point 18 to cover specific environmental impacts.

E. Other issues

26. As regards the politically sensitive provisions on **termination and responsible disengagement in Articles 7 and 8**, the Presidency proposes to find a compromise whereby termination will be provided in the company's prevention plan, where the company itself would set an appropriate timeframe and where termination would be linked to serious adverse impacts.
27. On the inclusion of the **definition of risk factors**, the Presidency suggest to add a definition of risk factors in **Article 3**, which would include the geographical and operation context, as well as a rewording of **Recital (28b)** proposed by the European Parliament along the same lines.
28. The Presidency's proposal for a revised mandate also includes proposals for compromises on all the other elements of the proposed Directive, following the broad mandate given to the technical level at the previous trilogues. These elements comprise:
 - a. the provisions related to the core of the due diligence process (Articles 4 to 10), including new articles on **due diligence at a group level (Article 4a)** and **remediation (Article 8c)**;
 - b. the provisions related to the implementation of the due diligence framework established in the Directive (Articles 11 to 14). In this line, particular attention is given to those elements included in relation to the industry schemes and multi-stakeholder initiatives, and to third-party verification, that are redrafted – particularly but not only in Article 14 - in order to alleviate the burden on companies;
 - c. the provisions related to establishing the public governance system for monitoring compliance with the due diligence obligations (Articles 17 to 21).

The compromise proposals discussed at technical level are included in the four-column table accompanying this Note (doc. 15012/23 ADD1).

IV. CONCLUSION

29. The Presidency is of the opinion that compromises as outlined above could cater for the most important concerns of the European Parliament, while preserving the essential aspects of the Council's General Approach, and that an approach along the lines suggested would thus pave the way for an overall balanced compromise package on this important proposal. The Presidency is therefore hopeful that such a compromise could be supported by a majority of delegations.
30. The Permanent Representatives Committee is invited to:
- examine the elements as set out in Section III above; and
 - mandate the Presidency to continue the negotiations with the European Parliament at the fourth trilogue on 22 November 2023 on the basis of the approach outlined above.
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