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Latest on EU CSDDD proposal

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Introduction

On 23 February 2022, the European Commission submitted a Corporate Sustainability Due Diligence Directive (CSDDD) proposal⁽¹⁾ for the:

- issuance of a new EU Directive on corporate due diligence in relation to sustainability; and
- modification of EU Directive 2019/1937.

The CSDDD proposal responds to the call of the European Parliament⁽²⁾ with respect to the need to submit a legislative proposal on mandatory value chain due diligence.

Given that after the publication of the CSDDD proposal, the legislative procedure consists of its review by the Council of the EU as well as the European Parliament, on 1 December 2022, the former one adopted its agreed negotiating position thereon, which included amendments regarding (among others):

- the subject scope of application;
- the notion of "value chain";
- directors' duties; and
- civil liability.

In the latest developments, on 25 April 2023, the European Parliament's committee on legal affairs (JURI) drafted a report entailing amendments to the CSDDD proposal. The report addressed the threshold criteria as well as the rest of the issues raised by the Council – although JURI disagreed with the Council's stance on the majority of those issues. Subsequently, on 1 June 2023, the European Parliament agreed on its own position, thus allowing interinstitutional negotiations to commence. However the CSDDD is not expected before 2024.

Importance of CSDDD

As many EU companies are based in global value chains, including a great deal of suppliers both inside and outside the European Union, chains are not easy to control in terms of risk mitigation related to the adverse environmental and human rights impacts. Companies' implementation of due diligence in their value chains to determine the risks is therefore deemed crucial.

Further, more and more large companies appear to be interested in due diligence procedures in order to be more competitive and meet market demands with regards to sustainability. In fact, during the public consultation organised for the CSDDD proposal, interested parties (particularly large companies) were in favour of adopting due diligence horizontally. This would allow:

- the formation of equal competition conditions; and
- the eradication of any competitive disadvantage against third companies not established in the European Union (for instance, as happens in the case of "carbon leakage", when industries choose to migrate from the European Union into third countries where the EU Emissions Trading System does not apply).

The CSDDD proposal aims to set out a framework to promote the:

- companies' contribution towards the environment and human rights through the integration of due diligence in their policies;
- identification of actual or potential adverse human rights and environmental impacts;
- prevention and mitigation of potential impacts, and the ending or minimisation of actual impacts;
- establishment and maintenance of a complaints procedure;
- monitoring of the effectiveness of the applied due diligence; and
- public communication on due diligence.⁽³⁾

By virtue of the proposed CSDDD, therefore, companies are required to undertake all the appropriate actions to enact and implement due diligence as regards their activities, their subsidiaries and their business relations throughout their value chains, from the production, to the transportation, storage, distribution and recycling of the product. In general, the suggested CSDDD is going to complement the existing EU regulatory framework to assist companies in assessing and managing any sustainability risks throughout their whole value chains.

CSDDD in conjunction with existing EU "green" measures and Paris Agreement

It should be stressed that companies falling within the subjective scope of application⁽⁴⁾ of the CSDDD will be required to develop a plan to ensure that their business model and strategies comply with the Paris Agreement regarding the prevention of the global warming from exceeding 1.5°C.⁽⁵⁾

The CSDDD proposal also presents a comprehensive package of measures for the promotion of sustainability within the framework of the EU Green Deal,⁽⁶⁾ especially since the European Commission has included, within this framework, an initiative for sustainable corporate governance. The EU Green Deal, in combination with various EU climate endeavours,⁽⁷⁾ promotes that priority be given in the sustainability targets to company actions and strategies and climate-driven new investment and policy decisions taken by large industries managing value chains.

In this vein, the CSDDD proposal must comply with and reinforce these intentions. In particular, the civil liability framework introduced by the

CSDDD proposal⁽⁸⁾ complements the Environmental Liability Directive⁽⁹⁾ since the latter is based on the "polluter pays" principle, for companies' own operations, while the former covers companies' value chains too.

In addition, the CSDDD will support the EU targets of:

- a 55% reduction of greenhouse gas emissions by 2030;
- the conversion of Europe into the first climate-neutral continent by 2050; and
- updating the EU Emissions Trading System⁽¹⁰⁾ which should be supported throughout the value chains.

However, the 55% target is going to be applied only indirectly in some non-EU value chains of EU companies through the Carbon Border Adjustment Mechanism.⁽¹¹⁾

New EU battery Regulation

The European Commission submitted a proposal⁽¹²⁾ that a Regulation be issued for batteries and waste batteries (battery Regulation), as an integral part of the EU Green Deal. According to this proposal, batteries are valuable tools within the framework for the transition to clean energy and low-carbon economy and, in this context, minimising the various adverse impacts generated throughout batteries' life cycles is deemed essential. As the proposal imposes an obligation on companies to set out a due diligence policy throughout supply chains, it is obvious that the CSDDD proposal will play a key role in supporting it through the establishment of due diligence in value chains.

The most recent development in the aforesaid proposal came in July 2023 when the Council of the EU adopted the proposed battery Regulation, applying to all batteries and regulating their whole life cycle: from their production to reusing and recycling, aiming to promote a circular economy for the batteries sector. Considering the battery Regulation's objective to reduce the consequences arising from the battery life cycle, it sets tight due diligence rules for operators, who must verify the source of raw materials used for batteries placed on the market. However, SMEs are excluded from this framework. Equally important are the objectives for:

- waste batteries collection;

- lithium recovery from waste batteries; and
- the recycling efficiency target for nickel-cadmium batteries.

Last but not least, the battery Regulation introduces requirements for:

- a carbon footprint declaration;
- labelling and information;
- an electronic "battery passport"; and
- a QR code providing access to the electronic battery registry.

Legal basis of CSDDD

The proposed CSDDD is legally based on the Treaty on the Functioning of the European Union and, in particular, articles:

- 50, concerning measures safeguarding the freedom of establishment; and
- 114, regarding measures approaching the legislative, regulatory and administrative framework of the member states, aiming at establishing and operating of the internal market.

The ratio of the said context lies in the fact that the implementation of due diligence across the European Union takes place at different rates, as not all member states have enacted relevant legislation and there are differences among respective national legislation, despite the intention of all member states to use international standards⁽¹³⁾ as a guide. This, in combination with the fact that some companies may fall within the scope of more national legislation and others may not fall within the scope of either, leads to the fragmentation of the internal market as well as to the distortion of the competition. This is why the CSDDD's objective focuses on the harmonisation of due diligence requirements.

Comment

The proposed CSDDD is likely to form a new basis for the thriving of legal certainty and equal competition conditions for businesses, as well as for transparency for investors and consumers while taking into consideration the green transition and protection of human rights in the European Union and beyond.

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Endnotes

(1) COM(2022) 71 final/23.02.2022.

(2) Dated 10 March 2021.

(3) Articles 5 to 11 of the CSDDD proposal.

(4) This article does not set out the criteria for companies to fall within the scope of the CSDDD, such as the number of employees and the amount of the turnover, as there are counterpoints expressed by the Council and the European Parliament. This will therefore be a topic for discussion during the negotiations phase.

(5) Article 15 of the CSDDD proposal.

(6) COM(2019) 640 final/11.12.2019.

(7) Namely:

- EU Regulation 2021/1119;
- the Commission's plan for climate targets by 2030 (SWD(2020) 176 final/17.09.2020); and
- the Commission's announcement regarding the formation of a climate-resilient Europe (COM(2021) 82 final/24.02.2021).

(8) Article 22 of the CSDDD proposal.

(9) Directive 2004/35/EC.

(10) Directive proposal No. COM(2021) 551 final/14.07.2021.

(11) Regulation proposal No. COM(2021) 564 final/14.07.2021.

(12) COM (2020) 798 final/10.12.2020.

(13) Specifically, the United Nations Guiding Principles on Business and Human Rights, the OECD Due Diligence Guidance for Responsible Business Conduct.