Amendments to the Corporate Sustainability Due Diligence Directive (CSDDD) proposal

28 November 2022

Introduction

The undersigned associations represent companies headquartered or with significant operations in non-EU jurisdictions who are deeply committed to, and invested in, the EU. We firmly support the goals of the Paris Agreement and the EU objective to reach climate neutrality by 2050. Overall, we are supportive of the goals of the Corporate Sustainability Due Diligence Directive (CSDDD) proposal as shown by the commitment of our Members to implement the UN Guiding Principles on Business and Human Rights (UNGPs) and the OECD Guidelines for Multinational Enterprises.

In this context, we have taken note of an increasing interest from a number of jurisdictions to implement some type of mandatory due diligence requirements to prevent and address human rights violation and/or negative environmental impacts in companies' supply chains. The EU has the unprecedented opportunity to provide guidance and global leadership, but to do that it is of utmost importance that, while it develops its framework, it does not prevent other jurisdictions from doing the same. Global coordination and the establishment of global standards will be key to promoting respect for human rights and the environment in global value chains.

For these reasons, **we call on the EU co-legislators to ensure a workable and proportionate approach with a view to establishing a well-functioning framework.** We are focusing our proposed amendments on **mitigating the unintended consequences of the application of the CSDDD to non-EU companies.** Nevertheless, we share and fully support the overall concerns of the EU financial services sector. Our proposed amendments to the CSDDD proposal on the proportionate scope of application to non-EU companies, the definition of "operations", and transition plans can be found below.

In addition, we would like to highlight some general concerns also raised more broadly by financial sector's trade associations across the EU, such as the **definition of value chain for financial services**, **the call for a risk-based and proportionate approach** and the **exclusion of the investor-investee company relationship and investment management services**. A more detailed explanation of these points can be found at the end of this document.

Proportionate scope of application for non-EU companies

Amendment 1
Proposal for a Directive
Article 2, paragraph 2 and 2a (new)

Text proposed by the Commission	*Amendment*
This Directive shall also apply to companies which are formed in accordance with the legislation of a third country and fulfil one of the following conditions:	This Directive shall also apply to companies which are formed in accordance with the legislation of a third country and ***which have a subsidiary or a branch in the EU***, and ***which*** fulfil one of the following conditions:

(a) generated a net turnover of more than EUR 150 million in the Union in the financial year preceding the last financial year; (b) generated a net turnover of more than EUR 40 million but not more than EUR 150 million in the Union in the financial year preceding the last financial year, provided that at least 50% of its net worldwide turnover was generated in one or more of the sectors listed in paragraph 1, point (b).	(a) generated a net turnover of more than EUR 150 million in the Union in the financial year preceding the last financial year; (b) generated a net turnover of more than EUR 40 million but not more than EUR 150 million in the Union in the financial year preceding the last financial year, provided that at least 50% of its net worldwide turnover was generated in one or more of the sectors listed in paragraph 1, point (b). ***2a. For the purposes of paragraph 2, the due diligence measures referred to in this Directive shall apply only to the third country company's own operations; the operations of its subsidiaries and branches; and the third country company's value chain operations related to products sold in the EU and services provided in the EU.***

Justification

Limiting the scope of the due diligence obligations for non-EU companies that have an EU presence (subsidiary or branch) with respect to value chains related to goods sold and services provided in the EU would create the basis for a workable and proportionate sustainability due diligence framework for the following reasons:

1. **The amendment would establish a territorial connection between the business activities in scope and the EU, facilitating enforcement.**
   The CSDDD as proposed by the Commission will impact the global business operations of non-EU companies active in the EU, covering their governance and organisation. The CSDDD has also the potential to cover business activities that do not have any connection with the EU, for example a loan from a non-EU bank to a non-EU business with activities exclusively outside the EU. These activities, which have no nexus to the EU, are not capable of affecting the EU internal market. Nevertheless, these activities often represent the majority of the business activities of non-EU companies. Such extraterritorial scope of application would be excessive, raise serious jurisdictional conflicts and enforcement challenges, and represent a disproportionate burden for non-EU companies (undermining the principle of proportionality which is a general principle of EU law[1]).

   As noted by the European Commission in the CSDDD proposal, establishing a territorial connection with the EU is necessary for justifying the application of EU law to non-EU companies beyond the simple regulation of conduct within the EU. To fall under the remit of the proposed Directive, non-EU companies should have a subsidiary or branch in the EU and the due diligence obligations under the proposed Directive should only apply with respect to their value chains related to goods sold or services offered within the EU. Clarifying the due diligence obligations in this way would ensure that the non-EU company's business activities which could have an effect on the European single market are covered by the scope of the CSDDD. Conversely, business activities that do not affect the EU internal market should be excluded from the scope of the CSDDD.

[1] Glossary - Regional Policy - European Commission (europa.eu)

2. **The amendment seeks to avoid conflicts of jurisdiction and conflicts of law, including enforcement issues.**
   Non-EU companies are subject to the jurisdiction of their home country and to the laws and regulations applied to them by those jurisdictions as well as other jurisdictions where they have a presence and operate. As a result, non-EU companies are already subject to environmental and human rights due diligence obligations in their home and other jurisdictions of establishment or will be according to relevant legislative and regulatory initiatives. For example, the UK, Australia, and Canada require companies to examine, understand and disclose any impacts on modern slavery within their supply chains[2], and Switzerland imposes due diligence requirements on companies in relation to conflict materials and child labour[3]. In the US, the Dodd Frank Act mandates due diligence obligations for conflict materials[4]. Japan has updated its Corporate Governance Code adding provisions on human rights due diligence[5]. The extraterritorial application of the CSDDD is therefore likely to create overlapping and conflicting requirements of due diligence obligations and significant problems for global companies. For example, companies might be held liable for the same environmental damage or human rights infringement under different legal systems, creating legal uncertainty and a disproportionate burden for businesses.

   We are currently seeing similar challenges in the sustainability disclosure space, where interoperability of disclosure standards is becoming increasingly challenging to navigate (for preparers as well as users of disclosure standards). However, where there may be challenges in implementing differing disclosure standards, there is far more potential for conflict where detailed behavioural rules contradict each other in different jurisdictions. For example, while it might be challenging but possible to disclose different types of information to satisfy different jurisdictional disclosure standards, it may not be possible to comply with different legal frameworks which ask you to take different steps and implement contradictory measures and procedures with regard to due diligence requirements.

3. **The amendment will guarantee a level playing field in the EU.**
   The Impact Assessment accompanying the CSDDD proposal showed that ensuring a level playing field was one of the main reasons for applying the CSDDD to non-EU companies. Qualifying the scope of application as defined in our amendment would guarantee a level playing field for both EU and non-EU companies operating within the EU, as products and services provided by non-EU companies with a sufficient presence in the EU would be subject to the same due diligence obligations as EU companies for their EU business.

Definition of "operations"

Amendment 2

Article 3 – Definitions

Text proposed by the Commission	*Amendment*
	(e a) "Operations" means operational activities of the company and shall not include any business relationship.

[2] UK Modern Slavery Act (link), Australia Modern Slavery Act (link), Canada Modern Slavery Act (link).

[3] Les dispositions visant à mieux protéger l'être humain et l'environnement entreront en vigueur le 1er janvier 2022 (admin.ch)

[4] Final Rules, Guidance, Exemptive Orders & Other Actions | CFTC

[5] Publication of Revised Japan's Corporate Governance Code | Japan Exchange Group (jpx.co.jp)

Justification

The CSDDD applies at the level of the individual entity in scope. Thus, the due diligence obligations apply to the operations of the entity in scope, to the operations of its subsidiaries, and to the business relationships of the entity in scope (Article 1 of the CSDDD). We understand that it is the intention of the legislator to distinguish between the operations of the company (entity in scope) and its subsidiaries, and the business relationships of the company (entity in scope). The business relationships of the subsidiaries of the entity in scope are not subject to the CSDDD obligations (unless the subsidiaries meet the thresholds themselves). We therefore suggest that the CSDDD provides a distinct definition of "operations". Without a clear definition, there is a risk that during the transposition into national law, Member States could define "operations" in a way that also captures "business relationships". Different transpositions into national law would create an unlevel playing field in the EU, not to mention confusion for companies seeking to apply the rules and Member States seeking to supervise application of the rules.

Transition plans

Amendment 3

Article 15 – Climate change

Text proposed by the Commission	*Amendment*
	(3a) By way of derogation, paragraph 1 shall not apply to companies referred to in Article 2(2) which comply with a third country's obligation to 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.

Justification

Non-EU companies could be subject to obligations within their home jurisdictions to adopt transition plans aligned with the Paris Agreement. For example, the UK will shortly legislate to require large companies and financial services firms to adopt a transition plan[6]. Switzerland introduced mandatory TCFD disclosures including on transition plans[7]. Given the different transition pathways of each jurisdiction, transition plans developed according to the EU rules might not be compatible with those developed according to third country rules. Overlapping and conflicting requirements will make it more difficult for non-EU companies to develop a coherent and consistent plan to align their business model and operations with a net zero economy, undermining the overall decarbonisation effort. Therefore, non-EU companies subject to obligations to implement transition plans in their home jurisdiction should be allowed to defer to their home jurisdiction's rules to comply with Article 15 of the CSDDD.

Clarifications regarding due diligence obligations of the financial services industry

A number of areas with respect to the application to financial institutions and financial services need further clarification, and it is important to bear in mind that such institutions and services are already

[6] HM Treasury Launches UK Transition Plan Taskforce (transitiontaskforce.net)

[7] Federal Council brings ordinance on mandatory climate disclosures for large companies into force as of 1 January 2024

subject to a significant number of EU regulations aimed at similar outcomes of the proposal and tailored to the particular nature of their business.

- ***Clear definition of value chain for the financial sector:*** In order to be able to fulfil due diligence obligations, financial institutions need to be provided with clarity and legal certainty with regard to the definition of value chain. We recommend that the value chain for financial services firms is limited to direct client relationships which are underpinned by contract. In the banking sector, for example, the value chain should be limited to the activities of the direct clients receiving loans or credit services.
- ***Risk-based and proportionate approach:*** Financial institutions provide many different types of financial products and services. For banks, these include activities related to financing or facilitating financing of projects and companies in the real economy, but also activities such as payments services, custody and related services and short-term trading activity. We believe the CSDDD should take a proportionate approach where due diligence measures should be focused on financial services and relationships which are capable of influencing sustainable impacts within the real economy (lending and credit services). Taking a risk-based approach to due diligence would also be consistent with the principle followed in the OECD guidelines for multinational enterprises on responsible business conduct.
- ***Exclusion of the investor-investee company relationship and investment management services***: Asset management's "investment value chain" is inherently different from traditional value chains as there is no direct contractual relationship between the investee company and the investor (institutional investors, asset managers acting on behalf of investors, etc.) and, as such, cannot apply due diligence in the way which applies to a contractual relationship. Moreover, due diligence processes are already embedded within sectoral legislation, e.g. Sustainable Finance Disclosure Regulation (SFDR), the Directive relating to Undertakings for Collective Investment in Transferable Securities (UCITS), the Alternative Investment Fund Managers Directive (AIFMD), and Markets in Financial Instruments Directive (MiFID). Therefore, the investor-investee company relationship and investment management services should be excluded from the scope of the CSDDD.

The signatories:

American Chamber of Commerce to the European Union (AmCham EU)
https://www.amchameu.eu/
Asia Securities Industry & Financial Markets Association (ASIFMA)
https://www.asifma.org/
International Regulatory Strategy Group (IRSG)
https://www.irsg.co.uk/
Japanese Bankers Association (JBA)
https://www.zenginkyo.or.jp/en/
Swiss Finance Council (SFC)
https://www.swissfinancecouncil.org/
UK Finance
https://www.ukfinance.org.uk/

Contacts:
Marco Gilotto, Policy Advisor, Swiss Finance Council
gilotto@swissfinancecouncil.org | +32 24303701

Diana Parusheva-Lowery, Head of Public Policy and Sustainable Finance, Asia Securities Industry & Financial Markets Association
DParusheva@asifma.org | +852 25371673

Ian Bhullar, Principal, Strategic & Sustainability Policy, UK Finance
ian.bhullar@ukfinance.org.uk | +44 7570951114