ETUC preliminary assessment political agreement CSDD[1]

Summary: "glass half empty/half full" but good starting point?" and "potential to strengthen it over time"

- **First set of legally binding rules on DD but impact will only be partial and retarded due to limits on personal scope, implementation cascade, use of delegated acts to change Annex,**
- **TU/workers' reps involvement: overall a proper involvement by TUs and/or workers' reps can be/ is ensured throughout whole DD process (certainly compared to COM proposal where those reps where only referred to in relation to "complaints" under Article 9); all depends on the implementation process.**
- **Personal scope: weakest point compared to ETUC (too?) ambitious call to cover all businesses irrespective legal form, size, sector,…. And all business models**
- **Material scope**: employment, social and TU rights are clearly covered, explicit reference to fair wages, adequate living wage and even living income; however several important UN, ILO and CoE HR instruments "got lost in the negotiation process" but which contain very important trade union and social rights! But there is the use of COM delegated acts and the review process (after at least 6 years) to rectify eventually.
- **Civil liability/Remedies/penalties/access to justice:** all is provided for but seems to be (for the moment) very poor, the bare minimum and very conditional (incl. for TUs)

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1. Binding rules (i.e. Directive)

There is a Directive which is also the first set of legally binding rules on DD in the world.

According to the new title it will also bring amendments to Directive (EU) 2019/1937 ("Whistleblower Directive") **and** Regulation (EU) 2023/2859 of the European Parliament and of the Council of 13 December 2023 establishing a European single access point providing centralised access to publicly available information of relevance to financial services, capital markets and sustainability

However is not that immediately "binding" for the moment because of:

- **Implementation cascade** over 3 -4 -5 years depending on the size of companies (Article 30)
- The use of **COM delegated acts** (Article 3 §1(qi) to add texts/references to the annex which is particular relevant for the inclusion ILO OHS conventions n° 155 and 187 ("which

[1] Based on Doc "2022/0051(COD) DRAFT [CSDD 4CT Post ITM on 22-23.1.2024 (final)] 24-01-2024 at 20h39".

form part of the ILO fundamental instruments") in the annex, see recital 25b on this ("Commission should be empowered to use delegated acts to…). The requirement that they can be added if all EU MS have ratified them could be problematic as many EU MS have not ratified them over time under the excuse that they had to comply with more comprehensive and detailed EU acquis in the area of OHS.

- In connection to the previous point it needs to be checked is what Article 28(4) on adoption of **delegated acts** by COM actually implies when it states "**COM shall consult experts designated by each MS in accordance with Interinstitutional Agreement of 13/4/2016 on Better Law-making**"; so not involvement of other experts/stakeholders than those designated by MS?
- The COM also still has to establish the **sector specific guidelines under Article 13** but not later than 30 to 36 months after entry into force of Directive; but involvement of EU (sectoral) social partners is secured there.
- Article 29 Review **and Reporting**
    - §1 is on COM obligation to report to EP/Council on **necessity** to lay down **additional sustainability due diligence requirements tailored to regulated financial undertakings** with respect to the provision of financial services and investment activities; the latest 2 years after entry into force of Directive and if necessary accompanied with legislative report
    - §2 is on COM obligation to report to EP/Council on implementation and effectiveness of Directive no later than 6 years after entry into force (this due to implementation cascade of 3-4-5 years) and then every 3 years on different; "where appropriate" report can be accompanied with legislative proposals; the aspects to be covered are amongst others:
        - Impact of Directive on SMEs (including the effectiveness of measures and tools for support for SMEs ?!)
        - Need to revise/adapt the personal scope of the Directive i.e. list of companies; thresholds of employees; turnover thresholds; sectors; to add other business models other than franchising; (revision of) definition of "chain of activities"; modification of Annex I on HR and HR instruments in light of international developments and whether "aspects of good governance" (directors' duties?) need to be added; the effectiveness of the enforcement mechanisms put in place at national level, the penalties and the rules on civil liability; the level of harmonisation clause

      So the review after 6 years only (if lucky) would apply to all most contentious aspects/issues of the Directive; and the review should only "where appropriate" be accompanied with legislative proposals.

2. **<u>Trade union/workers representatives involvement in whole DD process</u>**

Overall positive assessment given that:

- Article 3(1)n on ""**stakeholders"** clearly refers (twice) to the trade unions and workers' reps in both (parent) companies and subsidiaries and this in a preferential order i.e. after the employees of the (parent) companies/subsidiaries BUT before any other stakeholders such as consumers, NGOs, human rights institutes/defenders,….

- Article 4 on "**due diligence actions**» (horizontal clause) includes « meaningful engagement with stakeholders in line with Article 8d"; see bullet above
- Article 5 on **what a "DD policy" needs to contain**; this needs to be **developed in prior consultation with "employees and their representatives**"; this is deliberately kept vague and can thus include TUs and workers' reps depending on the IR system.
- Article 8d (and Recital 44c) "**engagement with stakeholders**"
    - The **consultation of employees and their representatives should be conducted in accordance with relevant EU law**, where applicable, national law and collective agreements and without prejudice to their applicable rights to information, consultation and participation, and in particular those covered by relevant EU legislation in the field of employment and social rights, including **Directive 2002/14/EC (IC Dir), Directive 2009/38/EC (EWC) and Directive 2001/86/EC (SE Directive).**
    - **Use of multi-stakeholder initiatives is not enough to fulfil the consultation obligation with workers' reps**
    - Without prejudice to relevant EU/national law and collective agreements in the field of employment and social rights
- Article 9 – **complaints** can be made by TU's and other workers' reps representing individuals in the chain of activities; there is also a **reference to "collaborative complaints'** procedures and notification mechanisms **as established via "global framework agreements"; accompanying recital 42 also states that**
    - Companies should establish a fair, publicly available, accessible, predictable and transparent procedure for dealing with those complaints and **inform the relevant workers, trade unions and other workers' representatives, about such procedures.**
    - Workers and their representatives should also **be properly protected, and any non-judicial remediation efforts should be without prejudice to encouraging collective bargaining and recognition of trade unions and should by no means undermine the role of legitimate trade unions or workers' representatives in addressing labour-related disputes.**
- Article 14 – **accompanying measures**
    - §1: websites for **information and support** to companies, their business partners and **stakeholders including information for stakeholders and their representatives on how to engage throughout the DD process**
    - §2 the **support other than financial** should not only be provided to SMEs but **also tostakeholders**
    - **However** accompanying recital 47 only refers to the SMEs not the stakeholders (idem for recitals 48 and 49 on support by MS and COM.
- Article 22 (2)(d) "**civil liability**" provides under certain conditions for **representation of victims by TUs** whereby recital 58c specifies that " Member States should provide for the reasonable conditions under which any alleged injured party should be able to **authorise a trade union**, a non-governmental human rights or environmental organisation or other non-governmental organisation, and, according to national law, national human rights' institutions, based in any Member State to bring civil liability actions to enforce victims' rights in its own capacity, where such entities comply with the requirements laid down in national law, for instance, where they maintain a permanent presence of their own and, in accordance with their statutes, are not engaged commercially and not only temporarily

in the realisation of rights protected under this Directive or the corresponding rights in national law."

On the "negative side" in this sense:

- Article 3 -**definition of "industry or multi-stakeholder initiatives**" does not explicitly refer to TUs (unlike CSO's); on the other hand TUs could be falling under what is in this article referred to "interested organisation"
- Article 13 (and recital 46) – general and sector **guidelines** – should be **developed by COM in consultation with stakeholders" so we lost the explicit reference to EU (sectoral) SPs as proposed by EP and** from a content point of view they should also **touch upon stakeholder engagement** as referred to in Article 8d; here there is a reference to ELA and FRA, the reference to "international organisations and other bodies having expertise in due diligence" could imply that UN, ILO, CoE and OECD bodies could be called in.
- Article 17 -21 on **(Network of) supervisory authorities**: no (real) role for SPs provided in work of network; COM only obliged to invite EU agencies to the work of the network; on the other hand there are some references to e.g. ELA so there will be a need to ensure an "indirect" involvement of social partners by strengthening their direct role in those agencies!

3. <u>Personal scope</u>

- Despite the numerous limitations in personal scope, there is the general recognition in Recital 6a that " **<u>All businesses</u>** have a responsibility to respect human rights, which are universal, indivisible, interdependent and interrelated."
- Article 2 on scope implies that :
    - The contested/unclear definition of "established business relations" is out and that "business relationship" is replaced by " "business partner"
    - The threshold of companies covered remains largely as to the one in the COM proposals (500 employees/150 million turnover for EU companies//non-EU: no employee threshold/150 million turnover)
    - Parent companies are covered as well as franchising and licensing agreements
    - The definition of high risk sectors (companies +250 employees/40 million turnover) is slightly improved by adding "beverages" next to "food" and also construction is
    - financial sector is excluded!
    - Unclear what the impact is of Article 2(3a) (and Recital 21) that "this Directive should only apply if the company has met them for each of the last two consecutive financial years and should no longer apply where they cease to be met for each of the last two relevant financial years".
    - Article 2(3) (and recital 21, 28 (at the end) and 44c) on "**employees to be calculated**" for "**employees threshold"** is quite broad: As regards the employee thresholds, **temporary agency workers, including those workers posted** under Article 1(3), point (c), of Directive 96/71/EC of the European Parliament and of the Council1, as amended by Directive 2018/957/EU of the European Parliament and of the Council11, should be included in the calculation of the number of employees in the user company. **Posted workers** under Article 1(3), points (a) and

(b), of Directive 96/71/EC, as amended by Directive 2018/957/EU, should only be included in the calculation of the number of employees of the sending company. **Other workers in non-standard forms of employment** should also be included in the calculation of the number of employees insofar as they **meet the criteria** for determining the status of a worker established by the **Court of Justice of the European Union. Seasonal workers** should be included in the calculation of the number of employees proportionally to the number of months that they are employed for. The calculation of the thresholds should **include the number of employees and the turnover of a company's branches**, which are places of business other than the head office that are legally dependent on it, and therefore considered as part of the company, in accordance with EU and national legislation. This **also applies for the group companies in case the thresholds are calculated on a consolidated basis.** Where this is not specified otherwise, the thresholds mentioned in order for a company to be covered by this directive should be understood as thresholds calculated on an individual basis.

- Recital 14 specifies that this Directive does NOT apply to pension institutions operating social security systems under applicable Union law. Where a Member State has chosen not to apply Directive (EU) 2016/2341 in whole or in parts to **an institution for occupational retirement** in accordance with Article 5 of that Directive, this Directive does not apply to those institutions.
- Article 3 "definitions" There is still a long list of "companies" in different sectors/activities as in the COM proposal and which could lead to eventual exclusions
- Large definition "chain of activities" (instead of supply/value chain) in Article 3: upstream ok, downstream only under certain conditions; see also Recital 18 and 19 on what is to be covered or not; and that the term "chain of activities" as defined in this directive is without prejudice to the terms "value chain" or "supply chain" as defined in or within the meaning of other EU legislation.
- Despite efforts of EP to delete it there is still a definition of "severe adverse impact" (Article 3§1, point (l)); compared to only adverse impact in Article 3§1point (c).

4. Material scope

- Article 1(2) and (3) (and recital 14) – **non-regression clause**: covers employment and social rights provided for by the law of Member States and those in collective agreements applicable at time of adoption of Directive;
    - and the Directive is without prejudice to obligations in the areas of human, **employment and social rights**, protection of the environment and climate change **under other Union legislative acts**. **If the provisions of this Directive conflict with a provision of another Union legislative** act pursuing the same objectives and providing for more extensive or more specific obligations, the **provisions of the other Union legislative act should prevail** to the extent of the conflict and should apply to those specific obligations. Examples of these obligations in Union legislative acts include obligations in the Regulation (EU) 2017/821 of the European Parliament and of the Council (Conflict Minerals Regulation)1, Regulation (EU) 2023/1542 of the European Parliament and of the Council (Batteries Regulation)2 or Regulation (EU) 2023/1115 of the European Parliament and of the Council (Regulation on deforestation-free supply chains).

- And -as this Directive is focussing on company DD obligations – recital 14 states that "This Directive is without prejudice to the responsibility of Member States to respect and protect human rights and the environment under international law."

- **Annexes:**
  - Annex I, Part I, Part I: Rights and prohibitions included in international human rights instruments
    - Deletion of words "violations of" in title; but replaced by "abuse" "to be interpreted in line with international human rights law" (recital 25)
    - Replacing "agreements" by "instruments" in title, more legally correct
    - The list seems to be "closed" and only to be opened via the use of delegated acts; and attempt by EP to have an "open clause" to also cover under certain conditions rights/prohibitions not listed failed
    - Pt. 7 just and fair working conditions including fair wage **and adequate living wage and living income for self-employed workers and smallholders, which they earn in return from their work and production**
    - Pt.12 prohibition of forced **or compulsory labour**
    - Pt. 13 prohibition of slavery **and slave trade or human trafficking**
    - Pt. 15 FoA, RtoOrganise and CB: the list of TU rights/prerogatives is non-exhaustive, it includes anti-union busting protection, the word "workers' organisations" is replaced by TUs, and RtoStrike and CB are explicitly mentioned
    - Pt. 16 **unequal treatment in employment**, the list of equality rights is also non-exhaustive and includes equal pay for equal work, and several non-discrimination grounds
    - EP proposals to integrate several **rights of indigenous people** were deleted
  - Annex I, Part I, Part 2: Human rights and fundamental freedoms instruments
    - Deletion of UN Universal Declaration of Human Rights here as well as in Part I, Part 2, the recitals with the exception of recital 58a on "Rto effective remedy" (inconsistent?)
    - COM/EP proposals to integrate several key UN , ILO and CoE instruments and which contain important social rights deleted by Council, this includes amongst others the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention on the Rights of Persons with Disabilities; United Nations Convention against Corruption; OECD Anti-Bribery Convention, 1997; The International Labour Organization's Declaration on Fundamental Principles and Rights at Work; the International Labour Organization's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy; and the Council of Europe Convention on preventing and combating violence against women and domestic violence! But some of them are nevertheless referred to in Recital 25 and 25a. (inconsistent?)
    - ILO Fundamental Conventions are all in but not the two new fundamental OHS Conventions (see on this also recital 25 where they are recognised as "forming part of the ILO fundamental instruments")

5. Civil liability/Remedies/penalties/access to justice (still to be checked)

- Article 20 on **Penalties** – include financial ones but very conditional
- Article 22 civil liability **and right to full compensation**
    - Article 22(1)(1)(a) which we contested and could infringe on collective rights is still in (the company can be held liable if "the company intentionally or negligently failed to comply with the obligations laid down in Articles 7 and 8, when the right, prohibition or obligation listed in Annex I is aimed to protect the natural or legal person and; and")
    - Positive is the "full compensation" approach although not leading to "overcompensation"
    - Article 22 (3) and (4) – reference to joint and several liability and "without prejudice to provisions of national law but not EU law? Recitals to be checked.
- Link with **existing (EU) joint and several liability regimes**
- **Access to justice** – limitation to 5 years at least – ECCJ calls it the "bare minimum"
- **Article 24 Public support, public procurement and public concessions** – need for further check
- **No reversibility of the burden of proof**

6. Others

- Definition of "**Director" and "board of directors**" (Article 3§1(o) and (p) out; idem for Article 25 on **Directors duty**; however Recital 13 recalls the call in the EP report on directors' duties and the joint COM/EP/Council commitments in their Declaration on EU Legislative Priorities for 2022 to improve the regulatory framework on sustainable corporate governance.
- +/- Article 3(a) "**level of harmonisation" (I.e. "Single Market clause**") still in but limited to articles 6(1), 6(1a), 7(1) and 8(1) and without prejudice to the general non-regression clause in article 1§2 and 3 (see above); see on this also Recital 24a which states that " *(…) this Directive should not preclude Member States from introducing more stringent national provisions diverging from those laid down in Articles other than Articles 6(1), 6(1a), 7(1) and 8(1), including where such provisions may indirectly raise the level of protection of those Articles 6(1), 6(1a), 7(1) and 8(1), such as the provisions on the scope, on the definitions, on the appropriate measures for the remediation of actual adverse impacts, on the carrying out of meaningful engagement with stakeholders and on the civil liability; or from introducing national provisions that are more specific in terms of their objective or the field covered, such as national provisions regulating specific adverse impacts or specific sectors of activity, in order to achieve a different level of protection of human, employment and social rights, the environment or the climate."*
- + "**DD support at group level**"(Article 4a) is without prejudice to the role of supervisory authorities and the civil liability of subsidiairies
- Attempt of EP to bring in a recital on **SLAPP** (Recital 44d) failed (*Strategic lawsuits against public participation are a particular form of harassment brought against natural or legal persons to prevent or penalise speaking up on issues of public interest. Member States should provide necessary safeguards to address those manifestly unfounded claims or abusive court proceedings against public participation in accordance with national and EU legislation."*
- Recital 33 refers to "**international frameworks**" in relation to DD obligations??

- Introduction of "**fitness criteria** to assess and a methodology for companies to assess the fitness of third party verifiers, and guidance for monitoring the accuracy, effectiveness and integrity of third-party verification but also of industry schemes and multi-stakeholder initiatives" – Articles 14 (2) and (4) and Article 29 – check against vocabulary and content of Better Regulation agenda.