Corporate Sustainability Due Diligence Directive (CSDDD)
ABBL & ACA positions on issues of scope and application

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1. General Comments

Comments are made jointly on behalf of the Association des compagnies d'Assurances et de Réassurances du Grand-Duché de Luxembourg (ACA) and the Association des Banques et Banquiers Luxembourg (ABBL). Reference in this paper to 'industry' refers to the respective memberships of those groups.

The Luxembourg industry supports the principal objectives behind the global strategy with regard to Environmental, Social and Governance (ESG) Standards, however we find that the European Commission (EC) legislative proposal on the Corporate Sustainability Due Diligence Directive (CSDDD) gives rise to complexity, and poses many questions as to how such principles can be applied in practice; and indeed be applied consistently on a global basis. It must be recognised that a vast array of sectors would be captured under scope of this framework, even within the financial services sector alone there are many particularities.

There is no evidence to suggest shortcomings in the more flexible approach adopted by international governance and due diligence standard setters, therefore we question the need for such far reaching legislation at the EU level.

The Luxembourg industry notes the recent decision of the EU Council of Ministers. As discussions on this dossier continue in the European Parliament, and wider stakeholder meetings; the Luxembourg industry would like to reinforce our key messages on the following themes:

- Role of financial services sectors;
- Obligations arising from the proposed due diligence requirements;
- Civil liability.

Role of Financial Services Sectors

The due diligence requirements introduced by the CSDDD should not result in a duplication, or transfer of responsibility, from those companies causing or contributing to an adverse impact, to the financial institutions funding/insuring them. The financial services sector is already subject to a high level of regulation spanning across prudential, conduct and financial stability measures; taking into account conglomerate, group and solo structures. Depending on the structure in question, supervision can be carried out at National, European and International levels.

We call for policymakers to take a reasoned approach towards these issues, by considering the actual role of the financial services sector in the ESG chain, against the ability to achieve the desired outcomes and the costs of applying such measures; which could otherwise be directed to the real economy. While we see merit that a common set of rules should apply to financial and non-financial undertakings, it should be kept in mind that financial institutions are essentially intermediaries in the process by distributing capital and underwriting risk, their fundamental purpose is to provide funding and resources

to the economy. The primary liability remains with the companies whose operations would be directly or indirectly harm human rights and/or environmental matters.

In order to support an efficient and consistent application of EU Sustainable Finance frameworks, we would support that CSDDD is considered at the EU ultimate group parent level. While CSDDD alludes to the possibility that ultimate groups are the intended recipient of these requirements, reference to financial undertakings creates a much more granular scope. It should not be the case that financial undertakings are brought back under scope in an indirect way, for example via a very large interpretation of the value chain.

On extraterritoriality issues, we have serious concerns with the proposal that EU financial undertakings would be expected to comply with due diligence requirements at a worldwide level. The global value chain is vast and given that 3rd country companies themselves would not be required to fulfil these requirements, the operational and legal burdens placed on those carrying out activities in the EU is disproportionate to any potential gains.

Financial services providers have the possibility to provide significant private sector investment to drive innovation and public sector spending, in order to fund the 'green transition'. The Luxembourg industry urges a responsible approach towards policy development and legislative drafting, so that these overarching objectives can be achieved.

Obligations Arising from Proposed Due Diligence Requirements

Extensiveness of the value chain

The scope and extensiveness of the value chain remains a major point of concern. For financial services companies, a complete 'look through' of the value chain has the potential to be incredibly burdensome, especially when those relationships are outside the EU.

As regards to the meaning of the value chain for regulated financial undertakings as proposed in Recital 19 of the original EC proposal, we strongly call for limiting the scope of services to the provision of financing (loans and other forms of credit), insurance and reinsurance.

Possibility of conflicting/ overlapping rules

The Luxembourg industry notes that the concept of 'adverse impacts' appears across multiple regimes. Alignment and consistency across regulations is essential to avoid misinterpretation, overlap and conflict between similar concepts; especially for financial services. Otherwise, we risk having multiple competing terms, and making a distinction would be very difficult and arbitrary.

For example, CSDDD introduces the concepts of 'adverse environmental impact', 'adverse human rights impact' and 'severe adverse impact', while financial undertakings in scope of the SFDR must take into consideration the 'principal adverse impacts' (PAIs) of their investment decision or advice. We believe that consideration of investment decisions and advice that result in negative effects on sustainability factors, is the most applicable measure for the financial sector. We propose that the concept of PAIs from SFDR should be leveraged in the context of this CSDDD proposal.

Additionally, we suggest that for all companies, the due diligence obligations apply to severe adverse impacts only. The EC proposal foresees this only for companies referred to in Article 2(1)(b) and Article 2(2)(b).

Preventing potential adverse impacts

It is proposed that the financial services provider (or company) would seek contractual assurances from a business partner and verify compliance of such assurances, we find that this is disproportionate and almost impossible to achieve. In addition, a business partner, including financial undertakings, should not be required to comply with the code of conduct of all companies, with which it has a direct business relationship, in addition to its own code of conduct.

The expectation that potential or actual adverse impacts should be identified, prevented, mitigated and 'brought to an end', would cause severe practical challenges. The proposal sets out a list of actions to be taken in order to bring an adverse impact 'to an 'end', including: neutralising the damage; payment of financial compensation; establishing any necessary contractual assurances from direct partners; providing proportionate support to any SMEs where there is an established business relationship.

Transition Plans

We would like to note that a requirement for transition plans is foreseen in the Corporate Sustainability Reporting Directive (CSRD). Companies subject to an obligation to create transition plans under the CSRD would already explain how their business model and strategy are compatible with the limiting of global warming to 1.5°C in line with the Paris Agreement and with the objective to achieve climate neutrality by 2050 at the latest, and therefore they should be exempted to adopt a similar plan via the CSDDD, or other regulatory frameworks.

Civil Liability

Civil liability is a national matter and to date, Member States have not been willing to harmonise their legal systems in that respect. Overall, the Luxembourg financial services industry does not consider that EU Law should seek specific grounds for legal action on civil liability matters. It is our view that the proposed civil liability regime would create unaccountable and uncertain legal risks, which would only result in increased legal expenses.

We would propose for the deletion of this section from the proposed Directive.

Duty of care for directors should also remain a matter defined at national level, Member States have different applicable legal frameworks at present. Additionally, 'sustainability matters' are not clearly defined which has the possibility to create legal uncertainty or a framework that in practice cannot be applied.

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