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CS3D: GREEN LIGHT FROM THE COUNCIL

European Law | 17/04/24 | Marc Mossé David Zygas

The corporate sustainability due diligence directive (“CS3D”), proposed by the European Commission on February 23rd, 2022,[1] should be adopted before the end of this mandate. On December 14th, 2023, a provisional agreement was reached between the European Parliament and the Council. Despite this agreement, the Committee of the Permanent Representatives (COREPER II) failed to vote it on February 28th, 2024, following concerns expressed by several Member States about the scope of application of CS3D, the constraints it would entail for businesses and risks in terms of liability.

After being postponed several times, COREPER I reached an agreement on March 15th, 2023 on a compromise text[2] proposed by the Belgian presidency. In essence, the compromise is as follows.

The undertakings concerned: CS3D would apply to companies with a **headcount of >1,000 employees** and **turnover of >€450 million** (versus a headcount of >500 and turnover of >€150 million in the December 2023 version of the provisional agreement). As a result, CS3D would apply to approximately 5,300 companies (that is to say, almost 70% fewer than in the provisional agreement).
High-risk sectors: the high-risk sector approach (which was based on the premise that risks to human rights and environmental risks are more prevalent in certain economic sectors) has been abandoned.

Chain of activities: this was one of the most contentious points. Its definition has been amended to focus on **direct business partners** (and no longer indirect).

Also, for regulated financial undertakings, only *upstream* activities are now covered by the definition of “chain of activities”. All references to the *downstream* financial activities in the chain, as well as all references to the specificities of the financial sector in the due diligence procedure have been removed.

However, no later than two years after the Directive enters into force, the Commission will have to submit a report to the European Parliament and the Council on the need for additional due diligence requirements tailored to the financial sector.

Climate transition plans: climate transition plans will remain mandatory (including in the financial sector) but large companies will no longer be required to promote them (for example, through financial incentives).

Also, during the last trilogue on December 13th, 2023, it had been agreed to strengthen the obligation for companies to adopt and implement a climate transition plan for climate change mitigation in line with the Paris Agreement, by including an obligation to take appropriate measures (“obligation of means”), rather than holding them to a higher standard under an “obligation of results”. The content of the plans will be aligned with the directive concerning the publication of corporate sustainability reports (“CSRD”) and, to avoid any duplicative reporting requirements, companies complying with the CSRD would be exempt from the obligation to adopt a climate transition plan. The financial sector is also covered by these rules.

Civil liability: the controversial provision on civil liability was amended to give Member States more flexibility. Henceforth, Member States will have to provide for “reasonable conditions” under which injured parties may authorize NGOs or other organizations to enforce their rights.

Phased-in application: a progressive approach, based on the size of the company has been introduced, with application:

- 3 years after entry into force for companies with >5,000 employees and turnover of >€1,500 million;
- 4 years after entry into force for companies with >3,000 employees and turnover of >€900 million;
- 5 years after entry into force for companies with >1,000 employees and turnover of >€450 million.

Next steps. – The March 15th, 2023 compromise was approved on March 19th, 2024 by the European Parliament's JURI committee. A vote in plenary session is slated for April 24th next before the CS3D can then be formally approved by the Council. Once that happens, it will enter into force twenty days after its publication in the Official Journal of the EU.

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[1] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52022PC0071

[2] https://data.consilium.europa.eu/doc/document/ST-6145-2024-INIT/en/pdf