



## STATEMENT

# LuxCMA feedback on the proposal for a Directive on CSDD

**Luxembourg, 20 July 2022**

### **LuxCMA feedback on the European Commission’s proposal for a Directive on corporate sustainability due diligence, adopted on 23 February 2022 (COM/2022/71 final)**

LuxCMA welcomes the European Commission’s proposal for a Directive on corporate sustainability due diligence ([COM/2022/71 final](#)), adopted on 23 February 2022 (“CSDD” or the “Proposal”).

We believe that the overall objective of CSDD is crucial to foster sustainable and responsible corporate behaviour and to anchor human rights and environmental considerations in companies’ operations and corporate governance. If adopted, the new rules should ensure that businesses address adverse impacts of their actions, including in their value chains inside and outside the European Union (“EU”).

In this context, we intend to present below some general observations and a detailed review of specific articles and related requirements.

#### **1. General observations**

- **Lack of clear standards:** The CSDD incorporates obligations from international environmental and human rights conventions. These conventions are generally directed at Member States as parties and formulated in vague terms, making them unsuitable to serve as legal standards applicable to corporate conduct.
- **Group or entity-level:** It is not clear whether disclosure of any details is required to be published at group level, or entity level only. From our view, parent undertakings should be able to secure compliance with the CSDD for themselves and for their subsidiaries on a consolidated basis.

- **Potential or adverse impacts, 'brought to an end':** The CSDD sets out a list of actions to be taken in order to bring an adverse impact 'to an end', including neutralizing the damage, payment of financial compensation, other corrective actions, establish any necessary contractual assurances from direct partners, provide proportionate support to small and medium enterprises ("SMEs") where there is an established business relationship. It should be clarified, in the CSDD itself, if and how regulated financial undertakings can comply with this obligation as it is difficult to apply in the financial services context.
  
- **Mandatory assurance of the disclosed information:** Article 11 of CSDD establishes the obligation for Member States to ensure that companies that are not subject to reporting requirements under Directive 2013/34/EU on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings (the "Accounting Directive"), report on the matters covered by the CSDD and publish an annual statement on their website. We did not see any reference to the third-party assurance of the statement (limited or reasonable). We also understand that the European Commission shall adopt delegated acts to specify the content and the criteria. Will further specification on the mandatory assurance on CSDD's disclosures be introduced likewise to the proposed Corporate Sustainability Reporting Directive ("CSRD") requirements?
  
- **Corporate objective:** The CSDD states that directors should take sustainability matters into account when acting in the best interests of the company. The extent and implications of this obligation are unclear, especially as it clouds the distinct roles of corporate governance and environmental regulation. It would be beneficial specifying if such rules apply to non-executive directors as well. Finally, we believe that CSDD should also address the existence of national rules, to avoid increasing regulatory complexity and avoidable costs of compliance.
  
- **Enforcement:** The CSDD should provide more non-judicial grievance mechanisms and extra-judicial remedies that precede administrative actions and civil liability. These mechanisms are better suited to address the interactive and consultative nature of sustainability due diligence and the importance of information sharing and learning in this context.

## 2. Detailed comments

### Article 2 CSDD:

- The Proposal to consider the third country companies according only to their EU turnover, and EU companies according to their global turnover seem to put

the EU companies at a disadvantage in respect to their international peers. Therefore, LuxCMA would propose to replace reference to ‘worldwide’ by “in the Union” in the EU threshold so to allow EU companies the same starting point as their third country counterparts.

- In relation to the “high impact sectors” listed in Article 2.1.b, would other sectors be considered? Policymakers should take a clear position as to how the regime would be carried out and enforced from the perspective of a specific entity.
- It is important that any EU due diligence duty is proportional and does not increase administrative costs and procedural burdens, notably for SMEs.
- Effective and efficient implementation for national and international corporate groups should be facilitated, avoiding requirement for double/redundant structures on legal entity level.
- The scope of potential due diligence obligations in the value chain should be clearly differentiated. Companies should be prevented from incurring high administrative costs by monitoring their value chain down to the last link in the chain regarding due diligence obligations.

### **Article 3 CSDD:**

- The Proposal introduces the concept of ‘adverse environmental impact’, ‘adverse human rights impact’ and ‘severe adverse impact’, while financial undertakings in scope of the Regulation (EU) 2019/2008 on sustainability related disclosures in the financial services sector (“SFDR”) should take into consideration the ‘principal adverse impacts’ (PAIs) of their investment decision or advice. Better alignment and consistency across EU sustainable finance regulations is a paramount to avoid misinterpretation and misleading between similar definitions.
- There seem to be overlaps between the CSDD due diligence policy requirements and CSRD sustainability reporting requirements. To create a more consistent approach, we suggest at both EU and national level, to set up a sector-specific approach for due diligence requirements and leverage on the similar requirements that are covered by the other Sustainable Finance regulations.
- Practicability (especially for real economy), legal certainty (e.g. new concept of “established relationships” – may be unclear and ambiguous) and clear definitions for financial products are necessary.
- Following terms need further clarification, for businesses to assess what is in scope:
  - established business relationship
  - indirect established business relationship
  - linked indirect business relationships
- How is the supervision foreseen?
- Article 3 lit. q includes a legal definition of “appropriate measures”, yet we believe this is still vague.

### **Article 1, Article 4, Article 5, Annex CSDD:**

- We support that overall legislation builds on UN Guiding Principles on Business and Human Rights and OECD Guidelines for Multinational Enterprises, but would like to ask how the cited conventions will be translated into concrete requirements for companies?

### **Article 11 CSDD:**

- It is important to ensure consistency between different pieces of legislation<sup>1</sup>.

### **Article 14 CSDD:**

- We overall agree with the provision of this article, which is key with EU action in particular in relation to Member States actions to support SMEs.

### **Article 15 CSDD:**

- We would like to address a concern on how the climate plans' compatibility with 1.5°C will be assessed? (Art.15.1). Legal certainty in particular around Art. 15 (in conjunction with Art. 22) will be important to avoid unclear and potentially significant liability risks for companies.

### **Articles 17 and 18 CSDD:**

- Level playing field between Member States is very important; what is the role of current due diligence acts in MS, as well as the role of established financial sector supervision – risk of fragmented supervisory regime.
- Overall, we support responsibility of supervision by national competent authorities with a mechanism of EU cooperation/coordination to ensure consistency throughout the EU.

### **Article 22 CSDD:**

- We would caution against measures that could potentially lead to disproportionate liability against third parties. Extensive civil liability rules beyond the actual sphere of influence of companies, e.g., in supply chains, are not expedient. Particularly, we would like to bring to your attention an example that the German Sorgfaltspflichtengesetz clarifies that a violation of an obligation under the law does not give rise to any civil liability under the law itself

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<sup>1</sup> We are specifically referring to Articles 19a and 29a of Directive 2013/34/EU

while general liability rules remain unaffected. This approach seems more adequate given that to some extent companies are in this context also fulfilling a social responsibility/public task that the enforcement should rather sit (exclusively) with a regulatory authority than a civil liability scheme.

**Race to the bottom:** We would like to highlight that the UK Government has recently stated<sup>2</sup> that it does not intend to replicate CSDD in the UK's framework of corporate governance and reporting. We believe that the UK position should be taken into consideration moving forward in order to avoid the EU to lose competitiveness towards key financial jurisdictions as the UK.

### 3. Conclusion

The entry into force of CSDD is crucial to develop more sustainable and responsible corporate behaviours and to further integrate human rights and environmental considerations in companies' decision-making processes and governance systems. If adopted, CSDD would ensure that businesses mitigate adverse impacts of their decisions. However, LuxCMA believes that some points of improvements are necessary before the final publication of the new rules.

Having said that, LuxCMA intends to present above the main concerns of the industry in relation to the proposal of CSDD.

All those who would like to become a LuxCMA member should visit [www.luxcma.com](http://www.luxcma.com) or contact [info@luxcma.lu](mailto:info@luxcma.lu).

#### ABOUT LUXCMA

The Luxembourg Capital Markets Association (LuxCMA) represents the common interest of all stakeholders of the primary capital markets industry of Luxembourg. Its mission is to promote Luxembourg's capital markets, provide networking and collaboration opportunities and foster innovation in the industry. LuxCMA's is to become the single point of contact for authorities, associations, market practitioners and other actors.

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<sup>2</sup> For more information, please refer to the following link: <https://committees.parliament.uk/publications/22498/documents/165851/default>