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To the Negotiating Parties
of the Trialogues on the
Corporate Sustainability
Due Diligence Directive

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Deutsches Aktieninstitut's comments on the Corporate Sustainability Due Diligence Directive in light of the Trialogue Negotiations

Dear Madam,
Dear Sir,

As association of German listed and capital markets-oriented companies, Deutsches Aktieninstitut represents almost 90 percent of the DAX-market capitalization. Recognizing the importance of the sustainable transition, companies throughout the EU are deeply committed to the preservation of human rights and have been so for decades. They have underscored responsible business conduct as a priority in their strategies and operations. As this aligns with the objectives of the Corporate Sustainability Due Diligence Directive (hereinafter "CSDDD"), the objectives of the Directive are generally welcomed.

However, the Commission proposal and the positions of the Council and Parliament introduce legal, practical and operational uncertainties that must be addressed in order to make the CSDDD operable while preserving the competitiveness of European companies and retain the European Union as an attractive location for businesses. This too will play an essential role in financing and ensuring a successful green transition. In light of the developing Trialogue negotiations, we would like to highlight the following essential issues:

Legal Certainty and Harmonisation

To successfully combat severe adverse impacts, it is essential that the Directive provides legal certainty. Legal terms and definitions as well as the obligations must be clearly outlined so that companies can focus on implementing the Directive. Additionally, the Directive should be sufficiently clear to ensure that there will not be divergent interpretations, which would inevitably lead to fragmentation in the market. This would not only hinder the protection of human rights, but also put companies in some member states at a disadvantage to others. Additionally, companies that conduct business in multiple member states would be subject to differing obligations which would be confusing at best and at worst lead to detrimental legal liabilities. Therefore, harmonisation across the European Union is vital. Accordingly, we strongly support the single market clause introduced by the European Parliament in Article 3a.

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Moreover, the directive should be aligned with existing international standards such as the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises as their effectiveness and practicability has been demonstrated.

Significant Financial and Administrative Burdens

To make the Directive work, we need consolidation of due diligence obligations at group level and a clarification of roles and responsibilities. Fulfilling due diligence reporting at the legal entity level results in groups have to report redundantly and on many fragments which, however, only provide an incomplete overall picture due to functional task divisions. (See Annex for examples). Accordingly, we strongly support the approach introduced by the European Parliament and European Council in Article 4a.

Additionally, while the support for SMEs is extremely important, the financial and administrative burden should not become unmanageable. For example, the obligation to provide financial support for direct suppliers for audits could result in excessive costs depending on the number of suppliers the company has. (See Annex for examples) Accordingly, we oppose the approach from the European Parliament in Article 7(2).

Risk-based Approach

A risk-based approach with prioritization of risks is crucial. It is important that companies can focus on the material risks that can arise from the activities of the company and its subsidiaries (analogous to the UN Guiding Principles on Business and Human Rights). This allows companies to enter into a meaningful dialog with suppliers and address any adverse impacts that may occur. Positively, both the Council and Parliament Position include the prioritisation of risks. Companies must be able to determine which risks are relevant on the basis of a materiality analysis. By allowing companies to focus on the most material risks, the objectives of the directive can be better furthered. Accordingly, we support the Council's position on Article 6a regarding the prioritisation of identified actual and potential adverse impacts and the Parliament's position in Article 6 allowing for risk prioritisation.

Definition of the Value Chain

The value chain is understood to encompass a company's direct and indirect suppliers and customers, including both the up- and downstream. Due to the vast number of suppliers that would be included within this definition, it would be impossible for companies to continuously monitor all. (See Annex for examples) Therefore, to ensure the effectiveness of this legislation, it should consider that companies' abilities to exert leverage when due diligence violations occur vary across the global value chain. The scope of this directive should focus on direct suppliers/customers, and indirect suppliers should only be included if the company receives substantiated knowledge of a breach of due diligence obligations. This ensures that the companies can enter into a productive dialogue between the company and its business partners to address the adverse impacts and create improvements. Accordingly, we support the Council's position on Article 3(g) regarding the definition of the value chain as it encompasses a more manageable definition that will enable companies to better implement the objectives of the CSDDD.

Liability

Companies should only be liable for damages they directly cause. Any additional liability under civil law would overburden companies as they would be held liable for incidents where a company is unable to exercise control. This would certainly be excessive and would not further the objective of enacting change to prevent future adverse impacts. Accordingly, we support the Council's position on Article 22 regarding civil liability. It is the position that best takes into account national torts law and provides the most legal certainty.

Corporate Governance


Corporate Governance measures should not be included in the CSDDD as determining corporate governance practices traditionally falls under the purview of member states. Consequently, corporate governance practices differ significantly throughout the EU. Introducing additional directors' duties through the CSDDD would significantly impact national practices and would not be practicable. Accordingly, we support the Council's position in which the articles addressing director's duties, Article 25 and 26, were deleted.

Article 15 Climate

We view the Directive's specific requirements for a climate action plan critically. The Paris Agreement is directed at states and cannot be broken down to individual companies. This means individual companies are not able to guarantee or ensure that they will meet the 1.5-degree target as part of their action plan because reaching the 1.5-degree target is dependent on the actions of all companies and individual consumers. If another company or countries, not subject to the CSDDD, do not make an effort to alter their behavior to reach the 1.5-degree target, the expectations and duty of any company attempting to reach this target changes. This change in expectation cannot be reflected in a climate action plan and therefore presents companies with significant legal uncertainty. Companies can only be required to make an effort as they are unable to ensure anything that is dependent upon the actions of others.

We would be very grateful if you could consider our comments in the current political discussions on the CSDDD and we remain at your disposal for any questions.

Yours faithfully



Dr. Uta-Bettina von Altenbockum
Head of Communications, Head of Sustainability Department

Annex: Specific Examples

Example on the Consolidation of Due Diligence Obligations at Group Level

A company will have to prepare three reports for the year 2023, but for 2024, it will need to prepare ten to twelve, as the scope of the act is gradually extended from enterprises with at least 3,000 employees in 2023 to enterprises with at least 1,000 employees in 2024. This increases the administrative and financial burden at group-level. These burdens for companies under the scope of the directive should be proportionate and furthermore aligned with the reporting obligations of the CSRD, reflecting the commitment of President von der Leyen to cut red tape for companies by 25 percent compared to recent regulatory requirements under the Green Deal. The scope should be defined as broad as possible to cover most companies in the value chain and furthermore to cover foreign competitors in order to achieve a level-playing field.

Example on the Definition of the Value Chain regarding Upstream and Downstream

A broad definition for upstream and downstream, including the entire life-span of a product or service, would impact the effectiveness of the directive and influence the range of companies. For example, a group operating in the strictly regulated postal market needs to abide by the privacy of correspondence and might not be responsible for the content of shipments. But depending on the definition of the value chain it needs to be clarified that the responsibility for the goods shipped remain with the producer. Otherwise, the directive would create further legal uncertainty and fragmentation of interpretation within the Member States.

Example on Significant Financial and Administrative Burdens

It is unrealistic to require companies to cover the significant financial burdens for SME due diligence capacity building and audit. A company reports that they have more than 200.000 tier-1 suppliers. If we would cover the audit for those companies with EUR 2.000 for one audit, we would end up with triple digit million costs.

Example on the Definition of the Value Chain regarding Upstream and Downstream

Obligations under CS3D cover company's whole upstream and downstream activity chain, which includes, among others, distribution, sale, transport, storing, waste management. The company's products and solutions are sold to both, distributors (approx. 30 percent) and direct customers (approx. 70 percent). These complex distribution structures lead to the fact that the company are not able to track downstream in any case. This planned obligation puts additional burden and complexities in existing and future business relationships. This is not fully traceable with reasonable effort to the extend required.

Example on the Definition of the Value Chain regarding Direct and Indirect Suppliers

The CS3D does not differentiate between direct suppliers (TIER-1) and indirect suppliers (TIER-N) and applies the same due diligence measures to both, only capping their duties by a criterion of "appropriateness" which is too vague to reasonably differentiate between suppliers on different levels of the supply chain. Roughly estimated example: The company's 2.000 largest direct suppliers each have on average 10.000 direct suppliers which leads to around 2 million Tier-2 suppliers. A supply does typically consist of 3-10 tiers. Implementing a Tier-N approach is not manageable without a clear set of appropriateness and risk criteria which brings the number of suppliers down to a feasible and reasonable scope.