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Ceemet's views on possible due diligence and corporate accountability proposal

At EU level, discussions are ongoing regarding a possible EU legislation on due diligence. In this respect, the Committee of Legal Affairs (JURI) in the European Parliament adopted the "Wolters report" which comprises a Directive on corporate due diligence and corporate accountability. With this report, the JURI Committee calls on the European Commission to present legislation in this respect. The Commission already announced last year a legislative proposal in its work programme for 2021. As EU based companies already comply with existing legislation laying down the rules on Corporate Social Responsibility, human rights and good governance, Ceemet sees no need to propose additional legislation on this matter.

Key messages

- Companies have a responsibility to take social, environmental and human right issues into account in addition to their financial performance and adhere to existing legal frameworks.
- The European Commission should not propose any additional mandatory due diligence legislation at this point.
- In the undesired event that the Commission does propose additional legislation, it must be based on existing international principles and without adding new reporting and administrative burden on companies. It must also avoid fragmentation of legislation within the EU.
- Any proposal for legislation regarding due diligence requirements should solely apply to large companies, i.e. companies which have over 5,000 employees and must ensure that the obligation to carry out due diligence is limited only to the first tiers of the companies' supply chain located outside of the EU.
- Any proposal cannot suggest the change of the rules regarding international private law as stipulated in the Brussels I and Rome II Regulation.

General remarks

Ceemet acknowledges that companies have a responsibility to take social, environmental and human right issues into account in addition to their economic and financial performance. European companies take the stakeholder interests' into account when taking decisions, notably those affecting the financial interests of shareholders as they expressly recognise their responsibility on these important issues.

European companies are world leading in monitoring supply chains' adherence to human rights and environmental protection. For instance, many of members of Ceemet already include environmental, social, and corporate governance ("ESG") factors in their ongoing due diligence measures through robust and tested frameworks, such as the UN Guiding Principles

on Business and Human Rights and the OECD guidelines, and mandatory regimes, such as the UK and Australian Modern Slavery Acts, the US Conflict Minerals Rule, and the EU Non-Financial Reporting Directive.

These rules already require large public-interest companies to disclose information on policies they implement in relation to environmental protection, social responsibility and treatment of employees, respect for human rights, measures to counter corruption and bribery, and measures to ensure diversity on company boards.

We thus agree that companies should be in line with existing legislation and have for example a voluntary corporate social responsibility (CSR) policy in place which applies to their company. However, creating additional obligations on companies will only create a lot of red tape and legal uncertainty without any added value. Ceemet thus believes that the Commission should not propose any additional due diligence requirements at this point as companies do not exclusively prioritise shareholder value and social, human rights and environmental issues are already taken into consideration. Any legislative proposal will inevitably have a critical impact on European based companies, their operations and supply chains, as well as on their global competitiveness.

Ceemet also has a more principled objection. It is unreasonable that companies have to take over the traditional role of the State in ensuring adherence to rules and introducing liability for other third parties' action. Companies do not have the mandate nor the capability to solve all the problems arising from weak governance that may, for instance, cause human rights breaches in domestic supply chains. Further, far reaching legislation could have unwanted consequences, such as dampening investment in third countries and thus result in less growth and more poverty in such countries.

If legal action is taken

Nonetheless, in case the Commission considers it necessary to proceed with proposing additional legislation, it must guarantee that any proposal will be based on existing international principles and without adding new reporting and administrative burdens that could detract from company efforts to address and minimize ESG risks in their operations and supply chains. Moreover, it is of vital importance that any legal framework avoids the fragmentation of legislation within the EU.

If Member States can gold plate and add further requirements to the EU framework there is a great risk of fragmentation, which may result in unmanageable administrative burden for EU companies. Therefore, an EU legislation (if any) must be developed in close cooperation with Member States with the aim of creating a level playing field on the appropriate level and with competitiveness as the main driving factor.

Specific remarks as regard content of possible legislation

- Scope

Ceemet is of the opinion that any proposal for legislation regarding due diligence requirements should solely apply to large companies, i.e. companies which have over 5,000 employees as any proposal will inevitably impose heavy additional administrative costs and procedural burden on companies. It is therefore even for big companies a challenge to fulfil additional obligations in this regard. Smaller companies, which often have fewer resources, should be excluded or will otherwise have to shift a lot of their time and resources from their core corporate activities to carrying out due diligence.

Ceemet therefore considers that any future proposal should explicitly exclude *all* micro companies and Small and Medium-sized Enterprises (SMEs) from its scope.

Moreover, to carry out due diligence for the entire value chain is quite simply unworkable, also for larger companies as it is impossible to manage all the risks related to all of their suppliers. Large companies sometimes have over 100.000 direct suppliers and further upstream suppliers could comprise millions of micro-companies. This will put European based companies in an enormous competitive disadvantage in comparison to third country companies which are not subject to these heavy administrative burdens. Ceemet therefore considers that any proposal must ensure that the obligation to carry out due diligence is limited only to the first tiers of the companies' supply chain located outside of the EU as a targeted scheme is more efficient and effective. This goes with the risk-based principle that should be used for any legislation. As there are very high social standards in the EU and also effective systems of control and enforcement in place in the EU Member States, companies should focus on tier-1 suppliers outside the EU. This approach was already taken with the Conflict Minerals Regulation.

Furthermore, by limiting the due diligence duties of big companies on their suppliers outside the EU, it would ensure that SMEs within the EU are really exempted from the scope – and are not indirectly affected by the legislation as it is the case with the Non-financial Reporting Directive. As regards stakeholders, each company should be able to determine which stakeholders are most relevant to its activities and to decide how to best organize the dialogue with them. Indeed, companies can have thousands of stakeholders who are impacted by their activities (directly or indirectly, including in a positive way).

- Liability

As regards liability, it is important to bear in mind that companies can only be liable for damages which they directly cause or at least that they can directly control or influence. In this regard, due diligence should remain an obligation of means and not an obligation of results: the concepts of 'reasonable efforts', 'risk-based', 'proportionate and context specific' are key. They should come through clearly in any Commission proposal and with precise legal definitions. It is of vital importance that any regulation covering enforcement mechanisms and competent bodies or enforcement authorities emphasize and specify these concepts and ensure that companies are not subject to subjective or unreasonable interpretations of the due diligence requirements.

A risk-based approach entails that the risks should be, for instance, defined by a company specific materiality assessment. Dependent on company operations different issues will turn out to be relevant and of high-risk. Thus, a company should not be liable for a specific outcome, but only when not making a proper evaluation of the risks. Further, it must be clear for a company when they have done enough to avoid liability.

Finally, any proposal cannot suggest the change of the rules regarding international private law as stipulated in the Brussels I and Rome II Regulation. This may have heavy consequences and open the door to empty claims and litigation. Moreover, if far-reaching liability rules are introduced, EU companies might be forced to shorten their supply chains and withdraw from some countries to not risk liability claims. By this, the economic and social situation in these countries would be deteriorated and not improved.

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