

SINGLE MARKET CLAUSE IN THE DIRECTIVE ON CORPORATE SUSTAINABILITY DUE DILIGENCE



FEDIL – The Voice of Luxembourg’s Industry

1. Introduction

Founded in 1918, FEDIL – The Voice of Luxembourg’s Industry (hereinafter “FEDIL”), is a multi-sector business federation, giving a voice to nearly 700 industrial members, service providers and construction companies and fostering economic activity in Luxembourg. Today, FEDIL represents 95% of Luxembourg’s industrial production, 75% of Luxembourg’s private research activity, 25% of national employment and 35% of national GDP.

FEDIL is a founding member of the European business association BusinessEurope and has a representative office in Brussels to ensure that its member companies’ voice is heard in European policymaking. To this end, FEDIL is registered in the EU Transparency Register (number 286194516022-33).

FEDIL closely follows on behalf of its members the legislative procedure concerning the European Commission’s Proposal for a Directive on Corporate Sustainability Due Diligence (CSDD), presented on 23 February 2022, which imposes upon in-scope companies far-reaching obligations to set up and implement due diligence policies to identify, prevent or mitigate, and ultimately end, adverse impacts of their activities on human rights and the environment.

FEDIL welcomed the CSDD Proposal. However, FEDIL raised significant concerns in its Joint position paper drafted with the Chamber of Commerce of Luxembourg (link [HERE](#)).¹

One of the most worrying aspects of the Proposal is that it included no provisions to limit the ability of EU Member States to legislate beyond the provisions of the Proposal and to diverge from its text, thus creating the risk of a patchwork of 27 different Member States’ legal frameworks. Not only would this not deliver a level playing field among Member States but would also contradict the main justification of the Proposal which underpins the used legal basis (Article 50(1) and (2), point (g) of the TFEU), namely, to fight legal fragmentation to ensure one of the EU fundamental freedoms (right of establishment), fair competition and ultimately to stimulate sustainable investment.

We consider that this real risk of fragmentation of EU Member States’ legal frameworks could be really harmful to European and especially Luxembourg’s economy. To limit this risk, targeted full harmonisation on essential elements should be ensured ad minimum. One technique could be the use of a so-called “Single Market Clause”.

This note explains the structure and functioning of a Single Market Clause and outlines its importance for Luxembourg businesses in the context of the obligations introduced by the CSDD.

2. What is the Single Market Clause

The Single Market Clause, or clause of full harmonisation, is a legislative technique used in European directives that ensures maximum (or total/full) harmonisation of rules. In other

¹ FEDIL is member of BusinessEurope; the Luxembourg Chamber of Commerce is member of Eurochambres. For more information, see also BusinessEurope position paper “Proposal for a Directive on corporate sustainability due diligence (CSDD) - BusinessEurope comments” [HERE](#); BusinessEurope position paper “Due diligence - BusinessEurope’s main messages” [HERE](#) and the “Joint business statement on the due diligence proposal (CS3D)” [HERE](#).

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words, maximum harmonisation does not allow Member States transposing an EU directive into their national law to deviate from the directive. In this way, harmonisation guarantees that one uniform set of rules applies in the whole EU territory. This contributes to legal certainty for both citizens and businesses and reduces gold plating by MS while making more feasible the task of companies to comply with the rules.

The Single Market Clause typically is an article in the beginning of a directive saying roughly that Member States *“shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more, or less, stringent provisions, unless otherwise provided for in the Directive”*.

For example, this kind of clause is commonly used in the field of EU consumer law, see, as example Directive 2019/771 on sale of goods from 2019 (link [HERE](#)) or the Unfair commercial practices directive.

3. Why the Single Market Clause is important for Luxembourg economy

For a small country and a like Luxembourg’s, harmonisation of rules is essential, as it facilitates trade, commercial transactions, and exchange of services with partners in other EU Member States, by reducing unnecessary regulatory differences. Harmonisation also reduces legal risks in the transaction between companies and creates a positive environment for companies in trading their products and services.

On the contrary, when rules in Member States are different, companies operating across borders need to adapt to the legal requirements in the national markets. If Luxembourg has legal requirements which are harsher and stricter (or simply very different) from other Member States’ legal frameworks, there is the risk that companies in other Member States would simply disengage from doing business with Luxembourg companies and choose to do business with companies based in other Member States with less strict (or simply less in number or more convenient) legal requirements.

Furthermore, the Single Market Clause could help companies with implementation and compliance of the rules of the Directive. Having one common legal framework to adapt with, instead of 27 different EU Member State’s legal frameworks, would make implementation and compliance of rules more workable and feasible for companies.

4. European Parliament’s Committee on the Internal Market and Consumer Protection

In the European Parliament, the Committee on the Internal Market and Consumer Protection (IMCO) voted on 2 March 2023 its draft opinion, which included a Single Market Clause to ensure further harmonisation in the EU due diligence system in the future. IMCO voted the following clause *“Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more, or less, stringent provisions, (...)”* (see Amendment 25 of the opinion report, link [HERE](#)).

This is a positive sign, and we welcome it. We urge the European Parliament’s Committee on Legal Affairs (JURI) to insert this clause in the final text and to submit to the final European Plenary vote.

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5. Council of the European Union

On 1 December 2022, the Council adopted its general approach – that is its negotiating position – on CSDD (link [HERE](#)). Unfortunately, the Council did not adopt any provisions on harmonisation or single market clause in its position.

6. Conclusion

The Commission’s Proposal on CSDD leaves too much discretion to Member States to legislate when transposing the CSDD Directive into their national law. Such an important leeway left for Member States may lead to further fragmentation of rules within the EU internal market.

The Directive should ensure full harmonisation of key provisions to deliver an adequate level playing field among Member States and to ensure uniform rules within the EU single market. At least key provisions, especially those imposing obligations and requirements related to due diligence plans, reporting and information sharing obligations and liability, should be fully harmonised and coherent.

This would be very important to help the feasibility and workability of CSDD rules in a small country like Luxembourg that is so much dependant on a smooth functioning of the EU single market. The best way to achieve harmonisation is through the insertion of a Single Market Clause in the final text of the Directive on CSDD.

We therefore urge the European Parliament, both its JURI Committee and its Plenary, to vote favourably to keep the Single Market Clause in the final text of the Directive as well as the Council of the European Union to support it in the final negotiations with the European Parliament.