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CONSULTATION
DUTCH LAW ON CORPORATE SUSTAINABILITY DUE DILIGENCE

RESPONSE ON BEHALF OF KOCH COMPANIES

Introduction

The EU must become a more attractive destination for investment to maintain and develop its industrial base. It is in the interest of the EU, its citizens, and companies operating in Europe that the barriers to growth and greater productivity are vigorously addressed to tackle the current competitiveness crisis.

The EU policy and regulatory framework does not adequately support businesses to operate or develop projects efficiently and competitively compared to regions like the U.S. and China. Europe will miss out on investments and risks deindustrialization if businesses continue to face excessive regulatory barriers and significantly higher costs, leading to job losses, greater dependency on imports for crucial technologies and materials, and the weakening of Europe's economic influence.

Need for a Competitive Regulatory Framework

According to the Draghi Report, 'the only way to become more productive is for Europe to radically change'. It is imperative that the EU changes its approach from regulatory inputs to regulatory objectives to help create the right conditions for companies. To unlock the needed €800 billion in additional annual investment to meet the EU's economic and climate goals, the Draghi Report calls for successfully implementing the Commission's commitment to cut 25% of reporting requirements and introducing "competitiveness checks" on legislation.

The EU must act quickly. The Corporate Sustainability Due Diligence Directive (CSDDD) is a prime example of new regulatory burden that, while initiated with legitimate objectives on best practice and transparency, ultimately imposes insurmountable challenges for companies operating in Europe. Excessive, inconsistent and redundant requirements are also a disproportionate burden for small and medium sized enterprises (SMEs). Even if nominally outside the scope, they will be required to engage in complex compliance processes due to their role in larger companies' value chains.

The CSDDD introduces a range of onerous and costly obligations, many of which duplicate or conflict with other regulations, and has raised concerns among both multinational companies investing in the EU and SMEs regarding compliance costs, potential impact on value chains, extraterritorial application, and exposure to increased legal risks. The CSDDD impact assessment received two negative opinions by the Commission's own Regulatory Scrutiny Board before its proposal. Its impact has not been properly assessed, especially given the changes made by the Council even after the trilogues.

European Commission's Omnibus Review

We understand that an Omnibus package (which will include amendments to some parts of the CSDDD) will be proposed by the European Commission in late February 2025. Progressing the transposition process of a Directive while at the same time the Directive itself will be amended is going to create uncertainty and inefficiencies for both the companies and the institutions involved. We believe that the Dutch government – as well as the other Member States – should require the European Commission to adjust the deadline for transposition into national legislation in such a way that the Omnibus changes can be considered properly and without causing further undue inefficiencies. We therefore urge the Dutch authorities to postpone their transposition process of CSDDD until the European Commission's suggested changes are known.

Detailed Comments on CSDDD

1. *Extraterritorial implications of scope*. The reporting requirements from the financial consolidation and accounting laws should be disassociated so that the reporting requirements focus on entities within the EU's jurisdiction. The reporting obligations should only cover impacts within the EU and EU entities. There is potential for inconsistent compliance obligations between EU and other jurisdictions creating a heavy regulatory burden on multinational companies with complex

global supply chains. Multinational companies may be motivated to restructure their companies and consolidate for financial reporting purposes, with second order impacts on some jurisdictions.

2. *Comparative disadvantage*. The reporting requirements on customers' and suppliers' behavior will push these requirements into the supply chain. European companies will be forced to obtain information and enforce certain actions vis-à-vis their customers and suppliers in Third Countries (restructure contracts, supplier codes of conduct, etc.). These customers and suppliers will therefore be more inclined to work with non-European competitors (for example from China) who will not require any additional information from them, nor will they demand that they change their way of doing business.

The EU institutions become an arbiter of who you can contract with and who is a good actor. Negotiations with customers and suppliers may become impossible if based on such contractual clauses. This could also impose conflicting obligations with other countries' local laws (see comments in paragraph 1 above). We could put suppliers in jeopardy of sanctions/other actions by local governments (China, national security allegations).

3. *Compliance*. Confirmation from suppliers that they meet the requirements of CSDDD should be sufficient to show compliance, instead of supply chain code of conduct being pushed through supply chain. Many companies already have robust codes of conduct of their own. Asking them to sign on to several customer supplier codes of conduct becomes a compliance and logistical impossibility given the likely variations in scope between codes depending on the nature of the respective businesses.

4. *"Minimize or end"*. The appropriate measures to "minimize or end" negative impacts are not currently defined. What will this mean, and do we have an option for addressing? If reasonable attempts are demonstrated to address negative impacts through commercial means, and if switching to another supplier is not technically or commercially feasible, then that should suffice.

5. *"Meaningful engagement"*. With thousands of suppliers – what does this mean? How can this be "right" sized to allow for it to be meaningful? Expectation is unreasonable if you must often audit or engage with ALL suppliers. One option is for this to be risk based.

6. *Climate Transition Plans*. The Corporate Sustainability Reporting Directive (CSRD) requires disclosure of climate transition plan if the group has one; CSDDD requires that the group has one and must be based on the Paris Agreement CO2 reduction target of 1.5%. For many industries, including flat glass manufacturing, it is not technologically or economically feasible to meet this target. Companies have not signed on to the Paris Agreement and have no binding obligations to align their business activities to the UN negotiated agreement. Incorporating it by reference in CSDDD only complicates the ability of companies to effectuate real emission reduction strategies.

It is critical for policymakers to understand how industry functions and the technologies realistically available, to pursue transformations in our operations. These requirements go beyond the intent of the Directive. There are other climate transition/decarbonization plan requirements in Europe which are not necessarily consistent e.g. EU Climate Law targets transposed into Member State laws; Industrial Emissions Directive recast; EU Energy Efficiency Directive; and EU Emissions Trading Scheme. There are also some mandatory political processes, such as the French requirement on the top 50 emitters in the country to file a decarbonization plan.

7. *Flexibility of Guidance*. We must advocate against prescriptive guidance that does not allow for companies to have options, especially to allow companies to explain their approach to these important issues in their own voice and consistent with other publicly facing documents. Making sure that we maintain our high standards should be our due diligence. In order for the compliance burden to be reasonable, it is necessary to minimize the amount of centralized activity for work that is already underway on individual company level.

8. *Enforcement*. What will enforcement look like? Currently in CSDDD – fines up to 5% of global turnover. Is there a reasonableness threshold that can be included in the transposition?

9. *EC Guidance.* CSDDD guidance must be expedited as this is a complex regime and any large organization (wrapping up to a highest-level parent) will need time to understand the requirements.

10. *Country-specific transpositions*. Where a company needs to report under CSDDD is based on revenue, therefore which country we need to report into could change over time, so the rules due to country specific transposition could be different, including enforcement triggers and penalties. This is a fatal flaw and creates an unworkable level of uncertainty for reporting companies.

CSDDD contributes to the EU's declining competitiveness by increasing the regulatory burden on businesses, creating uncertainty, and raising costs – on top of an already significantly higher cost base in the EU. This has the effect of deterring much-needed investment in the EU's key industrial sectors.

Immediate Actions to Alleviate Regulatory Burden

To address these challenges and restore the EU's competitiveness, the following reforms should be implemented with utmost urgency:

1. **Pause and reflect before implementing new regulatory burdens**: Enact an immediate pause on new regulatory burdens, starting with the CSDDD's implementation and the sector-specific reporting standards under the CSRD. By halting new regulatory burdens, the EU can create the necessary space to better understand the impact of these frameworks, including alignment with global efforts, and ensuring they support competitiveness rather than stifling it.
2. **Allow time to get it right**: Ensure that the necessary guidance, implementing legislation, and regulatory amendments are in place at least two years before their application date and do not contain any inconsistencies. This may mean adopting amendments to delay the transposition and application of the provisions to ensure that the assessments, guidance, amendments, and internal preparation by companies are given sufficient time to be completed.
3. **Assess competitiveness**: Conduct a competitiveness check on each of the CSDDD and CSRD to thoroughly assess their practical impact on business and the economy. Identify and eliminate overlapping and repetitive regulatory obligations; clarify the direct scope and requirements; and assess the consequences of the regulatory framework to businesses and Europe's competitiveness. The competitiveness checks should incorporate consultation with potentially impacted industries.
4. **Simplify the CSDDD**: Based on the competitiveness assessment, address priority areas where simplification should be achieved and amend excessively burdensome provisions. Key considerations include:
    - Reducing compliance costs and improving efficiency by removing any conflicting or doubling of requirements in other legislation and limiting due diligence requirements to Tier 1 of the value chain. The full value chain should be considered covered when each company takes responsibility for its own tier 1 actions.
    - Limiting the scope of application in Article 2(2) to EU companies and non-EU companies conducting business within the borders of the EU. This is necessary to properly clarify the application of the law and to avoid encroaching on the sovereignty of third countries to set their own laws.
    - Reducing overlapping regulatory burden between CSDDD and other pieces of legislation by removing Article 22 regarding transition plans. Various provisions on transition plan disclosure obligations with inconsistent requirements have been established in recent years (e.g., CSRD, IED, ETS), leading to growing regulatory complexity and cost of compliance.
    - Removing article 29 on civil liability and relying on Member States' well-established principles of tort law to avoid introducing an undue responsibility on companies over business partner activities over which a company has no control, influence, or visibility and meritless, excessive, and expensive litigation by various parties.
5. **Simplify the CSRD**: Based on the competitiveness assessment, address priority areas where simplification should be achieved and amend excessively burdensome provisions. Key considerations include:
    - Addressing the impact of sector-specific ESRS on cost of conducting business in Europe. To manage the costs and complexity associated with the CSRD, sector-specific standards should not be layered on top of the existing sector-agnostic standards.
    - Ensuring that the EU institutions provide sufficient scrutiny over EFRAG's processes such that the standards remain pragmatic and feasible for companies to implement in practice. Modify EFRAG's mandates to ensure that it is consistent with simplification objectives.

- Better aligning disclosure requirements with global standards and allow companies already disclosing in accordance with other accredited standards, such as the ISSB, to be CSRD compliant by removing the obligation to carry out double materiality assessments until globally adopted.

6. **Enforce a frictionless Single Market**: Support effective functioning of the common market by preventing gold-plating by the Member States. The creation of unnecessary regulatory burden at national level under the guise of EU legislation leads to fragmentation and legal uncertainty in the EU, as stated by the Draghi Report. The lack of uniform implementation erodes clarity and simplicity, making Member State alignment essential during transposition.

We believe that the EU can restore its competitiveness and continue to be a leader in the global economy. The EU can create a simpler regulatory environment that supports its economic goals without stifling its industries. A significant first step is the pausing and revising of CSDDD and CSRD and implementing competitiveness checks on those Directives and future legislation.

Sincerely,

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