

# Common rules for the common market - the CSDDD is needed for businesses and human rights

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The Corporate Sustainability Due Diligence Directive (CSDDD) is on the Council's agenda for this week, which might be one of the last chances for the urgently needed directive to be adopted before the EP elections. There still seems to be a lack of understanding regarding the substantive arguments raised by some in criticism of the directive. Upon closer investigation, these arguments are based on an inaccurate understanding of the law. As professionals working with companies on how to implement human rights in their activities and supply chains, the authors of this text address them from a practical standpoint.

It is also worth remembering from the outset that, in the seminal study on due diligence through the supply chain, the vast majority of stakeholders (including notably businesses, civil society, academics and government officials) were in favour of the introduction of mandatory due diligence at the European level in order to identify, prevent and address the adverse human rights and environmental impacts that companies can have in their operations and throughout their global value chains. It was perceived as the regulatory option which would yield the greatest positive social, environmental, and human rights impacts. Interestingly, only some of the business associations (which are now the most vocal group against the directive) were not in favour of the adoption of a mandatory due diligence law at the European level, unlike all other stakeholder groups including companies themselves and their own member companies which saw the benefits of an EU legislation on mandatory due diligence. Indeed, nearly 70% of companies surveyed anticipated that mandatory human rights and environmental due diligence legislation would benefit business by providing legal certainty and leveling the playing field by holding all competitors in the EU to the same standards.

The study also highlighted the potential of such type of regulation in improving access to remedies for affected individuals and communities and improving the implementation of due diligence practices and processes by companies. The study, which gathered over 600 responses from key stakeholders throughout the European Union highlighted the limitations of soft law and voluntary approaches in regulating corporate behaviour in relation to adverse human rights and environmental impacts, since, just over one-third of business respondents indicated that their companies undertake human rights and environmental due diligence, and in the majority of cases, the due diligence exercise was limited to first-tier suppliers.

## **A bureaucracy monster, harmful to companies?**

Some political parties and business associations have criticised the directive and alleged it would overly burden companies, especially SMEs. It has also been wrongly argued that the directive requires companies to guarantee that there are no potential or actual adverse impacts in their supply chain. That would indeed be impossible. However, a careful analysis of the directive shows that it does in fact not set forth such requirements. On the contrary, and in line with international standards in the field which impose an obligation of means and not an obligation of result, the directive simply requires companies to put in place due diligence processes which are appropriate to their size and influence, including the possibility to prioritize the most severe risks. In other words, the directive sets out a standard of conduct, what society expects from a reasonable company behaving in a responsible and sustainable way. Nothing more, nothing less. There is no expectation for companies to be perfect, they only have to show that they are doing their best efforts to avoid harming human rights in their activities and throughout their supply chains and remedy any such harm when they do occur. Also, and in line with international standards, it embeds the proportionality principle whereby companies that have more means (i.e. larger companies) are required to do more. Furthermore, the CSDDD contains provisions that specifically protect small and medium enterprises (SMEs): they have to be treated fairly and cannot be overburdened. In practice, SMEs are already facing increasing demands from their buyers in relation to human rights and the environment (regardless of the directive), but are not afforded any support for doing so. The directive seeks to change this and SMEs would benefit from these rules.

## **Level playing field and uniform standard instead of patchwork legislation**

The CSDDD would create a common standard for the common market of the EU. Having one uniform standard in the whole EU benefits competition. In the study on due diligence through the supply chains, 70% of the companies surveyed affirmed that having one uniform standard at the EU level rather than a patchwork of different standards at the national levels would actually benefit business.

Currently, France, Germany and Norway have due diligence laws, the Netherlands adopted the Child Labour Due Diligence Act in 2019 (even though it is not yet into force), and legislative proposals in this field have emerged in many more countries. Other member states are likely to pass such laws should the CSDDD fail. The CSDDD is a chance to ensure efficiency and coherence.

The CSDDD ensures that European companies are not put at a competitive disadvantage compared to their non European counterparts by also requiring non-EU companies with a certain turnover in the EU or royalties from franchise or licensing agreements to put in place human rights and environmental due diligence processes. European companies who compete with companies from abroad would benefit from such a level playing field.

## **Withdrawal from difficult regions?**

The CSDDD does not require European companies to withdraw from difficult at risk countries, regions, supply chains or suppliers. Instead, in line with international standards, the directive provides that termination should be used only as a matter of last resort and guarantee a responsible exit. The examples of France and Germany have shown that the fear that suppliers from countries of the Global South will refuse to provide to European companies is completely unfounded. In fact, many of these suppliers are already in the process of developing due diligence processes to respond to the existing requirements of their buyers who are exercising due diligence throughout their supply chains to respond to

consumers and investors pressure. Due diligence will not offset the competitive advantage of lower production costs and many resources simply are not available in the EU (coffee, cocoa, cobalt to just name a few).

### **Clear rules on civil liability create legal security**

Among the most misleading claims in relation to the CSDDD is that companies will face unmanageable and unreasonable liability risks. In fact, it is quite the opposite since exercising appropriate human rights and environmental due diligence is actually the best way for companies to protect themselves from liability. As a result, by setting out requirements and clear expectations for companies in relation to due diligence, the CSDDD helps them address the liability risk.

In fact, however, the liability rule of the CSDDD is beneficial to companies since it would create a clear, balanced, uniform, and – most importantly – almost universally applicable liability standard. Currently, companies already face liability risks as exemplified by the recent cases against Shell in the Netherlands, and La Poste in France, amongst many others.

They might be liable under different national laws because the law applicable to a tortious act is (at least in most cases) the law where the damage occurred. This means that European companies have to consider potential liability risks under many different domestic laws, which might require understanding liability norms of other countries in other languages and even getting legal advice in different countries. The CSDDD only holds companies liable for damages resulting from the intentions or negligent violation of the obligation to implement preventive or remedial measures. If they conducted appropriate due diligence, they are exonerated, making liability manageable and foreseeable. This norm would be applicable as an overriding mandatory provision leading to the exclusion of other liability norms. Therefore, the CSDDD provides clear and fair rules on civil liability that create legal security for companies and victims.

### **Corporate sustainability with or without the CSDDD**

Whether or not the CSDDD is adopted, companies are already and will increasingly be subjected to expectations and requirements to put in place due diligence processes to ensure that they do not harm human rights and the environment in their operations and throughout their supply chains. Indeed, international standards like the UN Guiding Principles on Business and Human Rights, the OECD Guidelines for Multinational Enterprises and related guidance, and the ILO Tripartite Declaration of Principles concerning multinational enterprises and social policy already exist and are being implemented by a growing number of companies. They are also influencing States to adopt laws in this respect. In addition, companies are increasingly subjected to the pressure from consumers and investors to behave responsibly and sustainably. Recent studies estimate that 160 millions children are in child labour (that is one child out of 10 on the global scale), a number which has been increasing in recent years, especially amongst children between 5 and 11 years old working in hazardous conditions. The ILO estimates that 18 million people are exploited as forced labour in the private sector. Other studies have consistently shown that companies can be involved in adverse human rights impacts covering the whole spectrum of internationally recognised human rights. Preventing and addressing such involvement through policies and practices is core to sustainable development as recognised by the UN Sustainable Development Goals which affirm that human rights are at the core of all 17 goals and 169 targets. At the end of the day, the CSDDD simply turns already existing international standards and societal expectations on corporate behaviour into hard law in order to ensure companies are on the right side of history.

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