

Insights

ADOPTION OF THE EU CSDDD (CORPORATE SUSTAINABILITY DUE DILIGENCE)

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On 23 February 2022, the European Commission published a proposal for a directive on Corporate Sustainability Due Diligence (CSDD or CS3D). On 1 June 2023, the European Parliament adopted its position. On 14 December 2023, a provisional agreement was reached in trialogue.

Although a provisional agreement was reached in trialogue on 14 December 2023, adoption of the text was postponed several times. The compromise reached was rejected by the Permanent Representatives Committee (Coreper) on 28 February 2024, and the concerns of several Member States had to be addressed, particularly with regard to the scope of the directive, by revising the thresholds to target the largest companies. After weeks of negotiations and several postponements of the vote, the 27 EU countries reached agreement on the directive on 15 March 2024. The text was approved by the European Parliament on 24 April 2024 by 374 votes to 235, with 19 abstentions before being officially approved by the European Council on May 24, 2024. The CS3D will soon be published in the official journal of the EU. It will come into force 20 days later. Member states will then have 2 years to transpose it into the national legislation.

Scope of companies covered by the Directive

With regard to the scope of application, whereas the initial proposal was aimed at European Union companies with 500 employees and worldwide net sales in excess of €150 million, as well as non-European companies with net sales in the European Union in excess of €150 million, with lower thresholds for so-called "high-risk" sectors, the adopted text provides that the rules will apply to :

- European companies and parent companies with more than 1,000 employees and worldwide sales of more than €450 million,
- franchises in the European Union with worldwide sales of more than €80 million if at least €22.5 million has been generated by royalties.
- non-European companies, parent companies and franchises from third countries that meet the same turnover thresholds in the European Union.

Under certain conditions, parent companies whose principal activity is the ownership of their operating subsidiaries will now be exempt.

The companies concerned will have to comply gradually, depending on their number of employees and their worldwide net sales, between 3 and 5 years after the directive comes into force:

- from 2027 for companies with more than 5,000 employees and worldwide net sales of more than €1,500 million;
- from 2028 for companies with more than 3,000 employees and a worldwide turnover of more than €900 million;
- from 2029 for all other companies falling within the scope of the directive (including those with more than 1,000 employees and a worldwide turnover in excess of €450 million).

Obligations of companies covered by the Directive

The CS3D Directive aims to make European companies responsible for preventing and mitigating the adverse effects that their activities may have on human rights and the environment. The European text was largely inspired by the French and German models. These companies will have to implement due diligence measures in order to identify, prevent, mitigate, stop, minimise and remedy actual or potential negative impacts on the environment or human rights with regard to their own activities, the activities of their subsidiaries and the activities of the value chain comprising their upstream commercial relations (activities linked to the production of goods or the provision of services by the company) and downstream commercial relations (activities linked to the distribution, transport and storage of products). They will have to incorporate the duty of care into their policies, make the necessary investments, obtain contractual guarantees from their partners, improve their management plan or provide support to small and medium-sized partner companies to ensure that they comply with the new obligations. Companies will also have to adopt a transition plan to make their business model compatible with the 1.5°C global warming limit set by the Paris Agreement.

Member States will have to provide companies with detailed online information on their duty of care obligations via practical portals containing the Commission's guidance.

Sanctions and liability regime under the Directive

Member States will also have to create or designate a supervisory authority responsible for investigating and imposing penalties on companies that fail to comply with their obligations. This will involve reporting companies and imposing fines of up to 5% of their worldwide net turnover. The Commission will set up a European network of supervisory authorities to support cooperation and the exchange of best practice.

The principle of companies' civil liability in the event of failure to comply with their due diligence obligations will be framed: companies will be liable for damage caused by failure to comply with their due diligence obligations and will have to compensate their victims in full.

A company may only be held liable for damage caused to a natural or legal person on the following two conditions:

- the company failed *intentionally or negligently* to comply with its due diligence obligations ;
- the company has caused damage to the legal interest protected by the national law of the natural or legal person.

Where the damage was caused jointly by the company and its subsidiary or a direct or indirect business partner, they are jointly and severally liable.

In addition, the company may, in all cases, exempt itself from liability if the damage was caused solely by its commercial partners in its chain of activities. Companies will be able to seek contractual guarantees with an indirect trading partner whose potential negative impact cannot be avoided or adequately mitigated.

Although the question of the liability of managers and directors - initially envisaged - has not been included in the compromise reached, it is still possible under French law in the light of article 1833 of the French Civil Code which, after enshrining the principle of management in accordance with the company's interests, states that social and environmental issues must also be taken into consideration.

The CSDD encourages companies to adopt responsible management, taking into account the social and environmental impacts of their activities. By promoting transparency, the CSDD encourages companies to become actively involved in identifying and reducing the risks associated with sustainable development. At a time when we are witnessing a veritable judicialisation of ESG, with the *domino effect* inherent in the duty of vigilance, companies subject to the directive are still struggling to gauge the extent of the additional risks and constraints.

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