



The EU Corporate Sustainability Due Diligence Directive and its Extraterritorial Effect: Promise and Pitfalls

Roundtable Discussion

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Roundtable on
Climate Change and
Sustainable Transition

The Proposed CSCDDD: Rationale and Evolution

Context & Broader Trend

Several European countries, but also third countries such as the UK and the US, are increasingly embracing the implementation of mandatory human rights and environmental due diligence (mHREDD)

Due diligence procedures should enable companies to identify, prevent, mitigate, and account for how they address both current and potential adverse impacts regardless of their geographic occurrence

Note, however, that there is no harmonized or universally accepted definition or model for corporate due diligence currently in place

The Proposed CSCDDD: Rationale and Evolution

History & Evolution

In 2020, the European Commission launched a preparatory phase for a legislative procedure focused on sustainable corporate governance

On 10 March 2021, the European Parliament adopted a Resolution recommending that the European Commission prepare a legislative proposal concerning corporate due diligence and corporate accountability

On 23 February 2022, the European Commission issued a legislative proposal for a Corporate Sustainability Due Diligence Directive (CSDDD)

The Proposed CSCDDD: Rationale and Evolution (1)

Contested Issues in the debate

The CSCDDD has prompted political debate across various design and implementation aspects, encompassing policy, economic, and legal considerations

One of the central debates revolves around its geographical scope, which extends beyond the territory of the European Union

Stakeholders have raised concerns about this extraterritorial reach

Does the European Union have the intent and authority to impose its fundamental values, including the enforcement of human rights and sustainability standards, on transnational economic activities linked to the European market?

The Proposed CSCDDD: Rationale and Evolution (2)

Contested Issues in the debate

What is/(can be) the view from outside the EU, e.g. Developing countries?

What are the implications:

- As a matter of “principle”
 - Practical/Operational
-

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Extraterritorial Regulation and the “Brussels Effect”

Europe has seen a growing trend towards seeking global reach of its legislative efforts as a way to influence global markets and regulatory practices beyond its borders

This “Brussels Effect” has been justified with a commitment to upholding core European values and principles, such as high standards in environmental protection and human rights

Some have argued that this does not constitute genuine extraterritorial regulation, but rather a “territorial extension” to govern transactions that are not centered on the territory of the EU

Still, this approach has raised concerns about regulatory overreach and implications for international trade and national sovereignty, and is contingent on the EU maintaining market attractiveness

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Past Examples of Regulation with Extraterritorial Effect

International Aviation and its Inclusion in the EU ETS

Regulating the Sustainability of Timber and Biofuel Imports

Globalizing EU Chemicals Rules: The REACH Regulation

Extending Carbon Pricing to Imported Goods: the Carbon Border Adjustment Mechanism

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Experiences under National Due Diligence Legislation

France: *Loi sur le Devoir de Vigilance*

Germany: *Lieferkettensorgfaltspflichtengesetz*

United Kingdom: Modern Slavery Act

The United States: the Federal Uyghur Forced Labour Prevention Act and the California Climate Corporate Data Accountability Act

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The EU CSDDD Directive Proposal: Comparison with National Legislation

Comprehensive approach to addressing human rights and environmental concerns

The CSDDD draws from a broader array of environmental treaties, such as the CBD, but the Annex does not mention the Paris Agreement as a whole

Member States are required to appoint a minimum of one supervisory authority responsible for overseeing and enforcing compliance with corporate obligations

The EU Directive establishes a framework for cooperation among supervisory authorities

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The EU CSCDD Directive Proposal: Comparison with National Legislation

The CSCDDD require companies to prepare and publish on their website an annual report on the fulfilment of their due diligence obligations in the previous year (art. 11)

The relevant body has the authority to order cessation of any violations and that specific action be adopted (such as remedial action) to ensure the fulfilment of due diligence obligations, as well as impose financial penalties (arts. 18(5), 20)

Possibility of enforcement being triggered on the request of persons who have reason to believe that a company is failing to comply with their obligations (art. 19)

Sanctions for noncompliance with due diligence obligations are not only financial but also include exclusions from public support (art. 24)

Provide for enforcement via the triggering of civil liability where a company has failed to comply with their obligations and this failure has resulted in harm

Economic and Political Impacts of Due Diligence Legislation

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Cost Implications, Risk and Uncertainty for Business and Management

Due diligence procedures required under the CSDDD will incur significant costs, which could disproportionately affect smaller companies

Companies that fail to comply are exposed to a wide range of liabilities and increased litigation risk, as already evidenced at the Member State level

Aspects of the CSDDD leave room for interpretation, introducing conceptual uncertainties and uncertainty regarding enforceability outside the EU and potential conflicts with third country legal systems

Implementation may lead to a reconfiguration of supply chains or affect investment flows, and *de facto* restrict market access for suppliers especially in developing countries

Economic and Political Impacts of Due Diligence Legislation

Potential Impacts on EU Competitiveness

A high standard of corporate responsibility can bolster the image of the EU as a leader in sustainability, but the additional compliance burden could also create barriers to entry in the European market

This could reshape the competitive landscape for businesses operating within the EU and have profound implications for the attractiveness of the EU as a business location

if similar due diligence requirements are not adopted in third countries, the CSCDDD could disadvantage EU businesses relative to their international counterparts

Sectors deemed high-impact, such as manufacturing textiles, agriculture, and mineral resource extraction, would be particularly vulnerable to such impacts

Conclusions and recommendations

CSDDD marks a pivotal development in the political and regulatory landscape of corporate accountability. At its heart lies the justification for the need to establish a uniform standard for corporate supply chain due diligence

Past experiences with EU legislation seeking extraterritorial reach as well as Member State initiatives to advance domestic supply chain due diligence obligations suggest that the CSDDD will have far-reaching economic, legal and financial impacts –

- on issues of principle
- on practical operational matters

Fundamental principles of national sovereignty under the UN Charter

Sustainable development definition is a national prerogative under the Rio Convention

Conclusions and recommendations

Its design and implementations should therefore be sensitive to the different capacities and scales of businesses, particularly small and medium-sized enterprises and suppliers in developing countries, and avoiding exacerbating inequalities or creating trade barriers

Civil liabilities exist and are placed in national legislations. Should they remain in CSDDD they need to be carefully defined, including who can bring action which should be limited to those that are directly affected, not left to open interpretation allowing intervention that could lead to stopping activities due to litigation or threat of litigation

Decision makers also should be mindful of potential impacts on the attractiveness of Europe as a competitive location for economic activity, and the possibility that the CSDDD might prompt relocation of such activity or deter investment

Conclusions and recommendations

Companies would also be made responsible for value chains over which they have no reasonable control

Companies could face liability in Europe for actions of business partners that occur anywhere in the world

A multinational company operating in the EU may confront multiple, overlapping due diligence obligations outside of the EU

The CSDDD can have the impact of turning obligations by Member States under the Paris agreement, and other international agreements into obligations for individual companies – both domestically and internationally. This was not the intention of the Paris Agreement.

Conclusions and recommendations

EU legislation should not require non-EU companies to perform activities that not be aligned with with their local legal requirements

Political & trade implications – views from developing countries:

- EU sustainable development standards are being imposed on countries, yet sustainable development is a national prerogative. This can make sustainable development be seen as a tool of developing countries

Infringes on national sovereignty of developing and other countries, risking counterreaction (cf. e.g. US law banning airlines from responding EU ETS in aviation)

Paris Agreement is a Party Agreement, based on NDCs which are nationally determined – the EU can be seen as undermining the fundamentals of the Paris Agreement

Thank you!

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