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The Corporate Sustainability Due Diligence Directive (CSDDD): Everything, Everywhere, all at once?

*David RAMOS MUÑOZ**

La directive sur le devoir de vigilance des entreprises en matière de durabilité: tout, partout, en même temps?

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企业可持续性尽职调查指令（CSDDD）：无所不在、无所不能、一网打尽？

Résumé

La CSDDD constitue une étape majeure dans l'intégration, en droit de l'Union européenne, de normes de durabilité

Abstract

The CSDDD is a major step to integrate supply chain sustainability standards in EU Law, moving beyond voluntary

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applicables aux chaînes d'approvisionnement, dépassant les engagements volontaires et les approches fondées sur la divulgation. Les oppositions exprimées durant et après le processus législatif ont mis en lumière, selon les perspectives, les limites de la CSDDD (pour les défenseurs des droits humains) ou ses excès (pour l'industrie). Si ce débat est utile, il détourne toutefois l'attention de deux éléments essentiels: l'ambition propre à la directive et son principal défi, celui de transformer une source de coûts et de risques en une véritable proposition de valeur.

Les Principes directeurs de l'OCDE – norme volontaire qui inspire la CSDDD – précisent qu'ils n'attendent pas des entreprises qu'elles soient «parfaites en tout, partout et en même temps». En transformant cette soft law volontaire en obligations juridiquement contraignantes, la CSDDD risque néanmoins de tendre vers une telle exigence. La directive ne pourra devenir un texte réellement transformateur, plutôt qu'un simple cadre de conformité, que si plusieurs conditions sont réunies: l'expertise des autorités compétentes (et des tribunaux), l'évolution vers des relations plus collaboratives entre entreprises et parties prenantes, et la création d'incitations positives permettant aux entreprises de considérer le suivi de leurs chaînes d'approvisionnement comme une source d'information stratégique et d'avantage concurrentiel. Cet article met l'accent sur ces conditions préalables au succès de la CSDDD.

Resumen

La CSDDD (por sus siglas en inglés) representa un avance significativo en la integración, al derecho de la Unión Europea, de normas de sostenibilidad aplica-

commitments and disclosure-based approaches. The opposition to the CSDDD during the legislative process and after has placed the focus on some of the CSDDD limitations (according to human rights advocates) or excesses (according to members of industry). Although a thorough debate is welcome, it largely distracts from the CSDDD's distinct feature: its ambition; and from its main challenge: turning a source of costs and risks into a value proposition.

The OECD Guidelines, a voluntary standard that inspires the CSDDD, state that they do not expect companies "to be perfect in everything, everywhere, all at once". The CSDDD, by turning voluntary soft law into mandatory law obligations risks doing exactly that. The CSDDD can only become a transformative text, instead of a box-ticking compliance framework if certain underlying conditions are met. First, the expertise of competent authorities (and courts) that enforce the Directive. Second, the transformation of adversarial dynamics between firms and stakeholders (typically NGOs) into more collaborative ones. Third, the presence of positive incentives for companies to use their tracking of their supply chains as a source of relevant intelligence, and thus competitive advantage. This paper places the focus on these aspects, as a precondition for the CSDDD's success.

Resumo

No direito da EU, a CSDDD é um grande passo para integrar parâmetros de sustentabilidade aplicáveis à cadeia de abastecimento, indo além de compromi-

bles a las cadenas de suministro, que superan los compromisos voluntarios y los enfoques basados en la divulgación. Las oposiciones manifestadas durante y después del proceso legislativo han puesto bajo la luz, según la perspectiva adoptada, las limitaciones de la CSDDD (para los defensores de los derechos humanos) o sus excesos (para la industria). Si bien este debate resulta útil, desvía la atención de dos aspectos esenciales: la ambición intrínseca de la directiva y su principal reto, consistente en transformar lo que podría considerarse como una fuente de costos y riesgos en una auténtica propuesta de valor.

Los principios rectores de la OCDE – norma voluntaria en la que se inspira la CSDDD – señalan que no se espera que las empresas sean «perfectas en todo, en todas partes y al mismo tiempo». Al transformar esta *soft law* voluntaria en obligaciones jurídicamente vinculantes, la CSDDD corre el riesgo de aproximarse a tal exigencia. La directiva solo podrá convertirse en un texto verdaderamente transformador, en lugar de un simple marco de cumplimiento, si se cumplen ciertas condiciones: la experiencia de las autoridades competentes (y de los tribunales), la evolución hacia relaciones más colaborativas entre las empresas y las partes interesadas, y la creación de incentivos positivos que permitan a las empresas considerar el seguimiento de sus cadenas de suministro como una fuente de información estratégica y una ventaja competitiva. Este artículo se centra en estas condiciones previas para el éxito de la CSDDD.

voluntários e de abordagens baseadas na divulgação. As posições contrárias à CSDDD durante e depois do processo legislativo e depois colocaram buscaram evidenciar, segundo as perspectivas, as limitações da CSDDD (segundo defensores dos direitos humanos) ou seus excessos (segundo os industriais). Embora esse debate seja útil, ele desvia a atenção de dois elementos essenciais: a ambição da diretiva e seu maior desafio, que é o de tornar uma fonte de custo e risco em uma proposta de valor.

Os princípios diretores da OCDE – norma voluntária que inspira a CSDDD – deixam claro que eles não esperam que as empresas “sejam perfeitas em tudo, em todo lugar, ao mesmo tempo. Ao tornar uma *soft law* voluntária em obrigação jurídica vinculante, a CSDDD arrisca fazer exatamente isso. A CSDDD pode se tornar um texto realmente transformador, em vez de simples quadro de *compliance*, se certas condições subjacentes forem respeitadas. Primeiro, a expertise das autoridades competentes (e tribunais) que que fazem cumprir a diretiva. Segundo, a transformação da dinâmica opositiva entre empresas e partes interessadas (tipicamente ONGs) em uma mais colaborativa. Terceiro, a presença de incentivos positivos para as empresas usarem o rastreamento de sua cadeia de abastecimento como um fonte de informação estratégica e, portanto, uma vantagem competitiva. Este trabalho coloca o foco nesses aspectos, como uma precondição para o sucesso da CSDDD.

摘要

CSDDD是将供应链可持续性标准整合进欧盟法律的重要一步,超越了自愿承诺和基于披露的方法。在立法过程中及其后对CSDDD的反对意见来看,强调了CSDDD《欧盟基本安全指令》的局限性(根据人权倡导者的看法)或过度之处(根据行业成员的看法)。尽管深入的讨论是受欢迎的,但这在很大程度上分散了对CSDDD对两个关键要素的关注:一是它的内在目标;二是其面临的主要挑战:即如何将成本和风险的来源转变为价值的主张。

OECD准则作为激励CSDDD的自愿标准,表明他们并不期望公司“在所有地方、所有事情上都做到完美”。CSDDD通过将自愿的软性规定转变为强制性法律义务,可能正是这样做的风险。只有在满足某些基本条件的情况下,CSDDD才能真正成为具有变革意义的文本,而不是一个走过场的合规框架。首先,执行该指令的主管机构(和法院)的专业知识。其次,企业与利益相关者(通常是非政府组织)之间对抗性动态的转变为更具合作性的关系。第三,企业使用其供应链追踪作为相关情报来源,从而获得竞争优势的积极激励的存在。本文将重点放在这些方面,作为CSDDD成功的前提。

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Supply chain sustainability¹ has taken center stage in the European Union (EU) agenda. The Corporate Sustainability Due Diligence Directive (CSDDD),² impinges on areas of corporate law and governance traditionally regarded as the prerogative of Member States. It goes beyond the “disclosures” of the Corporate Sustainability Reporting Directive (CSRD)³ by imposing “due diligence” conduct obligations on large corporations. These obligations may result in non-contractual liability, another “core” field of Member States’ legislation.

The CSDDD legislative process was unusually fraught. One supporting study on “sustainable corporate governance”⁴ was heavily criticized, whereas the study on “supply chain due diligence”⁵ – a more direct basis for the

¹ The concepts of “supply chain” and “value chain” are used in overlapping sense. The literature often refers to “supply chains” as comprising the parties that contribute to a product sold to a customer. See, e.g., Andreas RÜHMKORF, “Global Supply Chain Governance: the Search of What Works”, (2018) 23 *Deakin L.R.* 63; Sunil CHOPRA and Peter MEINDL, *Supply Chain Management: Strategy, Planning and Operation*, 5th ed, London, Pearson Publishing, 2013. The reference to “value chains” has been frequent in management literature, and also in political science: see Gary GEREFFI, John HUMPHREY and Timothy STURGEON, “The Governance of Global Value Chains”, (2005) 12:1 *Rev. Int. Polit. Econ.* 78. It typically comprises downstream clients, as well as upstream suppliers. Here I will generally refer to “supply chains”, and to “value chains” only when the expression intends to be more encompassing, or when it is directly taken from a specific legal text, e.g., in the Corporate Sustainability Reporting Directive (CSRD) no. 2023/2772 (*Commission Delegated Regulation 2023/2772, of 31 July 2023 supplementing Directive 2013/34/EU of the European Parliament and of the Council as regards sustainability reporting standards*, OJ, Series L, 22 Dec. 2023, online: <https://eur-lex.europa.eu/eli/reg_del/2023/2772/oj/eng> (hereafter “CSRD” or “CDR 2023/2772”).

² *Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859*, OJ, Series L, July 5, 2024, online:<<https://eur-lex.europa.eu/eli/dir/2024/1760/oj/eng>>.

³ *Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting*, OJ, L 322/15, 16 Dec. 2022, online: <<https://eur-lex.europa.eu/eli/dir/2022/2464/oj/eng>> (hereafter “Accounting Directive”).

⁴ EUROPEAN COMMISSION, *Study on directors’ duties and sustainable corporate governance*, Final Report, 2020, online: <<https://op.europa.eu/en/publication-detail/-/publication/e47928a2-d20b-11ea-adf7-01aa75ed71a1/language-en>>.

⁵ EUROPEAN COMMISSION, *Study on due diligence requirements through the supply chain*, Final Report, 2020, online: <<https://op.europa.eu/en/publication-detail/-/publication/>

Directive – was not. The Commission Proposal’s⁶ impact assessment received *two* negative opinions from the Commission’s Regulatory Scrutiny Board (RSB).⁷ Civil society advocates, in turn, alleged bias by the RSB before the European Ombudsman, which closed its investigation in 2024.⁸

The legislative project itself was picked up again in 2023; it was rejected by the Council on 28 February 2024, then approved, although some Member States threatened to withdraw their support.⁹ It was voted by the European Parliament in 24 April 2024.¹⁰ The CSDDD final text narrowed down its scope of application to the largest companies,¹¹ excluded financial entities’ “downstream” services,¹² and dropped provisions on directors’ duties and

8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en> (hereafter “Study on Due Diligence”).

⁶ EUROPEAN COMMISSION, *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937*, COM(2022) 71 final, Brussels, February 23, 2022, online: <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52022PC0071>> (hereafter “CSDDD Proposal”).

⁷ See, e.g., Véronique GIRARD, *Corporate sustainability due diligence. Initial Appraisal of a European Commission Impact Assessment*, EU Parliament Briefing, PE 734.677, 2022, online: <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/734677/EPRS_BRI\(2022\)734677_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/734677/EPRS_BRI(2022)734677_EN.pdf)>.

⁸ The Ombudsman closed the inquiry recommending RSB members to be cautious in their outreach activities, and consider not only risks to independence, but appearance of independence, and to ensure that the RSB composition reflects diversity of expertise: EUROPEAN OMBUDSMAN, *Decision on the composition of the European Commission’s Regulatory Scrutiny Board and how it interacts with interest representatives (439/2023/KR)*, 13 September 2024, online: <<https://www.ombudsman.europa.eu/en/decision/en/192464>>.

⁹ Beate SJÅFJELL and Jukka MÄHÖNEN, “The story behind the torturous road towards the EU’s Corporate Sustainability Due Diligence Directive”, 24 May 2024, online: University of Oslo <<https://www.jus.uio.no/english/research/areas/sustainabilitylaw/blog/2024/story-behind-road-towards-eu-csddd.html>>.

¹⁰ EUROPEAN PARLIAMENT NEWS, “Due diligence: MEPs adopt rules for firms on human rights and environment”, 24 April 2024, online: <<https://www.europarl.europa.eu/news/en/press-room/20240419IPR20585/du-diligence-meps-adopt-rules-for-firms-on-human-rights-and-environment>>.

¹¹ Article 2(1) and (2) CSDDD.

¹² The concept of “chain of activities” encompasses downstream activities of “distribution, transport and storage of a product” (Article 3(1)(g) CSDDD). It does not include downstream services (Recital (26) CSDDD).

liability, and on remuneration.¹³ All this makes the future of the CSDDD uncertain. The legislative drama risks turning its implementation into a re-enactment of past battles, and the amendments and carve-outs risk placing the focus on what the CSDDD lacks, not what it offers.

This debate largely distracts from the CSDDD's main challenge: how to turn a source of costs and risks into a value proposition. The OECD Guidelines, a voluntary standard, are clear about their aim, which is to *improve* the impact of business. They do not expect companies "to be perfect in everything, everywhere, all at once".¹⁴ However, by transforming voluntary soft law standards into mandatory obligations, the CSDDD risks doing precisely that – effectively asking companies to tackle nothing. The new rules can transform behavior only under certain conditions, including the expertise of enforcement bodies, the presence of collaborative firm-stakeholder relationships, and positive incentives for firms. This is where attention should be focused.

This article introduces the topic by presenting the CSDDD precedents and comparators in Section I and discussing the CSDDD scope of application and obligations in Section II. Section III examines its underlying assumptions ("bets") and the elements required to transform them into a value proposition

I. Supply Chain Standards

Supply chain sustainability standards have undergone important changes in recent years. This section briefly discusses international soft law standards (A), national legislation and standards (B), and the due diligence reporting provisions of the Corporate Sustainability Reporting Directive (CSRD) (C).

¹³ Articles 25-26 (directors' duties) and 15(3) (climate-related remuneration incentives) of the CSDDD Proposal.

¹⁴ OECD, "Due diligence for responsible business conduct", online: <<https://www.oecd.org/en/topics/sub-issues/due-diligence-guidance-for-responsible-business-conduct.html>>.

A. International Soft Law Standards¹⁵

The United Nations Global Compact (UNGC) sets out substantive principles for multinational enterprises (MNEs), covering human rights, labour, environment and anti-corruption.¹⁶ The UN Guiding Principles (UNGP) on Business and Human Rights focus on human rights (including labour rights) principles.¹⁷ They operationalize these principles through three pillars: States' duty to protect human rights (Pillar I), corporate responsibility and due diligence (Pillar II), and States' duty to provide access to remedies (Pillar III).¹⁸

The UNGP explicitly contemplates corporations' duty to exercise "human rights' due diligence" across their "value chains".¹⁹ However, these are not self-standing standards. They aspire to function as "social norms" and therefore depend on voluntary corporate compliance,²⁰ supplemented by legal norms.²¹

¹⁵ This does not cover the countless private, industry-wide initiatives, also based on voluntary adherence. See UN CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD), *Understanding Voluntary Sustainability Standards. A strengths, weaknesses, opportunities, and threats analysis*, UNCTAD/DITC/TAB/2023/3, online: <https://unctad.org/system/files/official-document/ditctab2023d3_en.pdf>.

¹⁶ UNITED NATIONS GLOBAL COMPACT (UNGC), "The Ten Principles of the UN Global Compact", online: <<https://unglobalcompact.org/what-is-gc/mission/principles>>.

¹⁷ UNITED NATIONS HUMAN RIGHTS (OFFICE OF THE HIGHT COMMISSIONER), *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, 2011, UNGP Operational Principle 12, online: <https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusiness_hr_en.pdf> (hereafter "UN Guiding Principles").

¹⁸ *Ibid.*

¹⁹ *Ibid.* UNGP Operational Principle 17, and its Commentary.

²⁰ JOHN G. RUGGIE, "The social construction of the UN Guiding Principles on Business and Human Rights", in Surya DEVA and David BIRCHALL (eds), *Research Handbook on Human Rights and Business*, Northampton (MA), Edward Elgar Publishing, 2020, at 63.

²¹ Surya DEVA, "The UN Guiding Principles' Orbit and Other Regulatory Regimes in the Business and Human Rights Universe: Managing the Interface" (2021) 6:2 *BHRJ* 338; JOHN G. RUGGIE and JOHN F. SHERMAN, "The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale", (2017) 28 *EJIL* 921, 923.

Another key set of standards is the OECD Guidelines for Multinational Enterprises.²² The OECD currently includes 38 high-income countries²³, along with additional adherents,²⁴ which together host the majority of the world's largest multinational companies. Their 2011 update incorporated a chapter on human rights and due diligence, to align with UN Guidelines;²⁵ the 2023 update²⁶ included climate change and biodiversity. The text is more detailed than the UN Guidelines.

However, the OECD Guidelines too rely on voluntary commitments or outside enforcement. In contrast with the UN Guidelines, though, the signatory states commit themselves to set up National Contact Points (NCPs) to handle grievances, although States have flexibility in setting up the NCPs, and the grievance procedure is not “enforcement”, but complaint handling and mediation.

Soft law, industry-wide and unilateral voluntary commitments have often failed to deliver clear, convincing, and durable improvement in supply chain sustainability. This is why the UN established in 2014 an open-ended intergovernmental working group on transnational corporations to elaborate an international legally binding instrument.²⁷ The current draft refers expressly to “human rights due diligence”.²⁸ However, as a global instrument, its chances of being adopted (and ratified) soon are not high.

²² OECD (2023), *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct*, Paris, OECD Publishing, online: <https://www.oecd.org/content/dam/oecd/en/publications/reports/2023/06/oecd-guidelines-for-multinational-enterprises-on-responsible-business-conduct_a0b49990/81f92357-en.pdf> (hereafter “OECD Guidelines”).

²³ OECD, “Members and partners”, online: <<https://www.oecd.org/en/about/members-partners.html>>.

²⁴ OECD LEGAL INSTRUMENTS, “Adherents”, in *Declaration on International Investment and Multinational Enterprises*, OECD/LEGAL/0144, June 21, 1976, online: <<https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0144#adherents>>.

²⁵ OECD (2011), *OECD Guidelines for Multinational Enterprises*, Paris, OECD Publishing.

²⁶ OECD, *supra* note 22.

²⁷ UN HUMAN RIGHTS COUNCIL, “Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights”, online: <<https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/igwg-on-tnc>>.

²⁸ UN HUMAN RIGHTS COUNCIL, *Text of the updated draft legally binding instrument with the textual proposals submitted by States during the ninth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises*

B. National Standards

Various jurisdictions have stepped up efforts to adopt their own standards. Progress is undeniable but uneven. Some countries were forerunners, like Brazil, with its Dirty List of employers that failed to prevent forced labor and similar practices and were excluded from public contracts.²⁹ Then, the *California Transparency in Supply Chains Act* of 2010,³⁰ the UK *Modern Slavery Act* 2015³¹, and the Australian *Modern Slavery Act* of 2018³² exemplified a first generation of “supply chain” statutes, with a “disclosure based” and “narrower” approach, focused on slavery and forced labor. This was mirrored by more recent initiatives, like the Canada *Fighting Against Forced Labour and Child Labour in Supply Chains Act* of 2024,³³ or New Zealand’s *proposed Modern Slavery Reporting Bill*.³⁴

Other jurisdictions have maintained a “disclosure-based” focus, while encompassing *environmental* matters, such as the *Swiss Code of Obligations* in 2022,³⁵ or the *proposed* measures in New York for a *Fashion Sustainability*

with respect to human rights, 13 February 2024, A/HRC/55/59/Add.1, Articles 1.8 and 6, online: <<https://docs.un.org/en/A/HRC/55/59/Add.1>>.

²⁹ BRAZIL, INSPEÇÃO DO TRABALHO, *Cadastro de Empregadores que tenham submetido trabalhadores a condições análogas à de escravo*, 13 Sept. 2024, online: <https://www.gov.br/trabalho-e-emprego/pt-br/assuntos/inspecao-do-trabalho/areas-de-atuacao/cadastro_de_empregadores.pdf>.

³⁰ STATE OF CALIFORNIA DEPARTMENT OF JUSTICE, *The California Transparency in Supply Chains Act*, online: <<https://oag.ca.gov/SB657>>.

³¹ LEGISLATION.GOV.UK, “Table of Contents”, *Modern Slavery Act 2015*, online: <<https://www.legislation.gov.uk/ukpga/2015/30/contents>>.

³² AUSTRALIAN GOVERNMENT, “Modern Slavery Act 2018”, *Federal Register of Legislation*, online: <<https://www.legislation.gov.au/C2018A00153/latest/text>>.

³³ GOVERNMENT OF CANADA, *Fighting Against Forced Labour and Child Labour in Supply Chains Act*, S.C. 2023, c. 9, online: <<https://laws.justice.gc.ca/eng/acts/F-10.6/>>.

³⁴ NEW ZEALAND PARLIAMENT, *Modern Slavery Reporting Bill Draft for Consultation*, online: <<https://www.parliament.nz/media/9121/modern-slavery-reporting-bill.pdf>>.

³⁵ Section Six (“Transparency in Non-Financial Matters”) of Title Thirty Two of the *Swiss Code of Obligations*, inserted by No I and III 1 of the FA of 19 June 2020 (indirect counter-proposal to the responsible business popular initiative “For responsible businesses – protecting human rights and the environment”), in force since 1 Jan. 2022, online: <https://www.fedlex.admin.ch/eli/cc/27/317_321_377/en>.

and *Social Accountability Act*,³⁶ or India's SEBI consultation on ESG Disclosures, Ratings, and Investing.³⁷

"Conduct" legislation is less common. Brazil's blacklisting system seeks to change conduct indirectly, through exclusion from public contracts. The US *Uyghur Forced Labor Prevention Act* may be the strictest supply chain legislation, with an outright import prohibition, and a requirement of certification, but also the narrowest, focusing on goods manufactured totally or partially with forced labor in China, especially in the Xinjiang region.³⁸ The main examples are the French *Vigilance Law*³⁹ and the German *Supply Chain Act*.⁴⁰ The European Corporate Sustainability Due Diligence Directive (CSDDD) follows in their steps. There is also a South Korean *proposed Act on Human Rights and Environmental Protection for Sustainable Management of Companies*.⁴¹

Some initiatives are harder to classify, such as the *Chinese Due Diligence Guidelines for Responsible Mineral Supply Chain* of 2015,⁴² or the *Japanese Guidelines on Respecting Human Rights in Responsible Supply Chains*, of

³⁶ NEW YORK STATE SENATE, *Senate Bill S4746A*, online: <<https://www.nysenate.gov/legislation/bills/2023/S4746/amendment/A>>.

³⁷ SECURITIES AND EXCHANGE BOARD OF INDIA (SEBI), *Consultation Paper on ESG Disclosures, Ratings and Investment*, 20 February 2023, online: <https://www.sebi.gov.in/reports-and-statistics/reports/feb-2023/consultation-paper-on-esg-disclosures-ratings-and-investing_68193.html>.

³⁸ *Uyghur Forced Labor Prevention Act*, Public Law No. 117-78, 23 Dec. 2021, online: U.S. Customs and Border Protection <<https://www.cbp.gov/trade/forced-labor/UFLPA>>.

³⁹ *Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*, JO, 28 March 2017, 74, online: <<https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000034290626/>> (hereafter "French Vigilance Law").

⁴⁰ GERMANY, FEDERAL MINISTRY OF LABOUR AND SOCIAL AFFAIRS, "Supply Chain Act. Act on Corporate Due Diligence Obligations in Supply Chains", online: <<https://www.bmas.de/EN/Europe-and-the-World/International/Supply-Chain-Act/supply-chain-act.html>> (hereafter "German Supply Chain Act").

⁴¹ See, e.g., Sejin AHN, "S. Korea: 'Act on Human Rights and Environmental Protection for Sustainable Business Management' proposed by lawmakers", *Business & Human Rights Resource Centre*, 1 Sept. 2023, online: <<https://www.business-humanrights.org/en/latest-news/s-korea-act-on-human-rights-and-environmental-protection-for-sustainable-business-management-proposed-in-congress/>>.

⁴² CHINA CHAMBER OF COMMERCE OF METALS, MINERALS & CHEMICALS IMPORTERS & EXPORTERS, *Chinese Due Diligence Guidelines for Responsible Mineral Supply Chain*, online: <https://www.voluntaryprinciples.org/wp-content/uploads/2022/02/Chinese-DD-Guidelines-for-Responsible-Mineral-Supply-Chains_English.pdf>.

2022.⁴³ Both focus on human rights violations, the Chinese guidelines more targeted (on minerals), the Japanese more broadly. Neither set of guidelines is explicitly mandatory, yet both are difficult to ignore.

How should this patchwork of initiatives be interpreted? A pessimistic view would remark the prevalence of voluntary, disclosure-based, and forced labor-focused standards. A more optimistic view would point that the majority of jurisdictions home to the largest multinational companies are decidedly trying to improve supply chain accountability, and that mandatory legislation is an important driver of behavioral change, but not the only one. This is the context of the CSDDD, which, however, followed the Corporate Sustainability Reporting Directive (CSRD).

C. The CSRD: a Disclosure Norm, or a CSDDD Forerunner?

The Corporate Sustainability Reporting Directive (CSRD) modified the Accounting Directive,⁴⁴ and is, formally speaking, a “disclosure” text. However, it requires firms to report on business strategy, processes, mitigating actions in such minute detail that, by implication, it nudges firms to establish the very strategies processes and actions they are required to disclose.

The CSRD has implications for value chain management. It requires reporting on business model and strategy, policies, risks and risk management, and Key Performance Indicators (KPIs).⁴⁵ Article 19a of the Accounting Directive, for individual firms, and Article 29a, for consolidated reporting, as amended by the CSRD, now enshrine in Section (1) the principle of “double materiality”: firms must report both on sustainability risks (outside-in) and on sustainability impacts (inside-out). Section (2)(f) of these provisions states that the company’s sustainability reporting shall contain a description of:

⁴³ INTER-MINISTERIAL COMMITTEE ON POLICY PROMOTION FOR THE IMPLEMENTATION OF JAPAN’S NATIONAL ACTION PLAN ON BUSINESS AND HUMAN RIGHTS, *Guidelines on Respecting Human Rights in Responsible Supply Chains*, 22 Sept. 2022, online: <https://www.meti.go.jp/english/policy/economy/biz_human_rights/1004_001.pdf>.

⁴⁴ Accounting Directive, *supra* note 3.

⁴⁵ Articles 19a(2)(e), 20a(2)(h) of the Accounting Directive, as modified by the CSRD.

- (i) the due diligence process implemented by the undertaking with regard to sustainability matters, and, where applicable, in line with Union requirements on undertakings to conduct a due diligence process;
- (ii) the principal actual or potential adverse impacts connected with the undertaking's own operations and with its value chain, including its products and services, its business relationships and its supply chain, actions taken to identify and monitor those impacts, and other adverse impacts which the undertaking is required to identify pursuant to other Union requirements on undertakings to conduct a due diligence process;
- (iii) any actions taken by the undertaking to prevent, mitigate, remediate or bring an end to actual or potential adverse impacts, and the result of such actions;

The Level 2 text⁴⁶ includes the European Sustainability Reporting Standards (ESRS), developed by the European Financial reporting Advisory Group (EFRAG⁴⁷), and endorsed by the Commission.⁴⁸

ESRS 1 “General Requirements”, no. 4 on “Due Diligence”, insists that the CSRD does not impose any conduct requirement.⁴⁹ However, ESRS 1 defines “due diligence” by reference to UN and OECD standards, describes the steps of the process (identify, prioritize, assess material impacts, and then risks and opportunities),⁵⁰ and specifies the purposes of supply chain due diligence, notably (a) “embedding due diligence in governance, strategy and business model”; (b) “engaging with affected stakeholders”; (c) “identifying and assessing negative impacts on people and the environment”;

⁴⁶ The concept of “Level 2” comes from the “Lamfalussy process”, whereby, in order to foster convergence of capital markets and financial services legislation, in addition to general “Level 1” texts, in the form of a Directive or Regulation by the Council and Parliament, there would be a “Level 2”, more specific text, in the form of a delegated or implementing text by the Commission. See EUROPEAN COMMISSION, “Regulatory process in financial services”, online: <https://finance.ec.europa.eu/regulation-and-supervision/regulatory-process-financial-services_en>.

⁴⁷ See EFRAG, “About us”, online: <<https://www.efrag.org/en/about-us>>.

⁴⁸ *Commission Delegated Regulation 2023/2772, of 31 July 2023 supplementing Directive 2013/34/EU of the European Parliament and of the Council as regards sustainability reporting standards*, OJ, Series L, 22 Dec. 2023.

⁴⁹ ESRS 1, para. 58: “ESRS do not impose any conduct requirements in relation to due diligence; nor do they extend or modify the role of the administrative, management or supervisory bodies of the undertaking with regard to the conduct of due diligence”.

⁵⁰ ESRS 1, paras. 59-60.

(d) “taking action to address negative impacts on people and the environment”; or (e) tracking the effectiveness of these efforts.⁵¹

ESRS 2 (“General Disclosures”) breaks down the reporting categories to comply with those purposes, comprising governance (GOV), strategy and business model (SBM), impact, risk and opportunities (IRO) management, or minimum disclosure requirements on policies (MDR-P), actions (MDR-A), metrics (MDR-M), and targets (MDR-T).⁵² ESRS 1 no. 5 requires firms to encompass their supply chain in their reporting, based on their due diligence process.⁵³ This reinforces the requirement of Section (3) of Articles 19a and 29a, which states that:

3. Where applicable, the information referred to in paragraphs 1 and 2 shall contain information about the undertaking’s own operations and about its value chain, including its products and services, its business relationships and its supply chain.

For the first three years of the CSRD firms may indicate where the value chain information is unavailable, why, and their plans to obtain the information.

Thus, even if the CSRD is formally a “comply-or-explain” regime and the *ESRS impose no conduct requirements regarding due diligence*, their peremptory language effectively shifts the *social* norm of what must be reported, and, by implication, what firms must do in order to report.

II. The CSDDD Scope and Substantive Obligations

Having examined its precedents, it is now time to briefly present the CSDDD’s scope (A), its substantive obligations (B), and its provisions on transition plans (C)

A. The CSDDD Scope

The threshold for a “Public Interest Entity” (PIE) under the CSDDD was raised from 500 to 1,000 employees in the final text, and from EUR 150

⁵¹ ESRS 1, para. 61, cross-referring to ESRSs 2 GOV-2, GOV-3, SBM-2, SBM-3, IRO-1,

⁵² ESRS, para. 61

⁵³ ESRS 1, paras. 62-67.

million in turnover to EUR 450 million.⁵⁴ EUR 450 million is also the threshold for non-EU companies, based on their turnover *in the EU*,⁵⁵ regardless of employee headcount. For parent companies, the Directive applies by reference to group-wide turnover.⁵⁶ The Directive also applies to franchisors/licensors with a global turnover of EUR 80 million or more, which receive at least EUR 22,5 million in royalties.⁵⁷

This is a broader scope than that of the French “Loi de vigilance”, which applies to firms with 5,000 employees or more,⁵⁸ and the initial scope of the German Supply Chain Act, applicable to firms over 3,000 employees (the threshold was lowered to 1,000 employees from 2024 onwards⁵⁹). The CSDDD includes a generous phase-in period (3 years after entry into force for companies of 5,000 employees and EUR 1,5 billion turnover, 4 years for companies with 3,000 employees and EUR 900 million, and 5 years for companies of 1,000 employees and EUR 450 million turnover⁶⁰). The Directive also applies to financial entities.⁶¹

The Directive applies to a company’s “chain of activities”,⁶² which encompasses (i) “upstream” business partners involved in the production of goods or provision of services, i.e., design, extraction, sourcing, manufacture, transport, storage and supply of raw materials, products or part of the products and development of the product or the service, and (ii) “downstream” business partners involved in the distribution, transport and storage of the product.⁶³ This does not include disposal of products, nor the downstream activities related to the provision of services.⁶⁴

⁵⁴ Article 2(1)(a) CSDDD.

⁵⁵ Article 2(2) CSDDD.

⁵⁶ Article 2(1)(b) CSDDD.

⁵⁷ Article 2(1)(c) CSDDD.

⁵⁸ *Supra* note 39; art. L. 225-102-4.-I, para. 1 Commercial Code.

⁵⁹ S. 1(1) German Supply Chain Act, *supra* note 40.

⁶⁰ Article 37(1) CSDDD.

⁶¹ Article 3(1)(a)(iii) CSDDD.

⁶² Article 3(1)(g) CSDDD.

⁶³ “[W]here the business partners carry out those activities for the company or on behalf of the company”: article 3(1)(g), and recital (25) CSDDD.

⁶⁴ Recital (26) CSDDD.

This excludes financial services⁶⁵ – the most significant aspect of financial firms –, where the CSDDD could arguably have the greatest impact. The original Commission Proposal included such downstream (financial) services.⁶⁶ However, this ignored the potential complications and incoherences with financial regulation and supervision.⁶⁷

Finally, the “chain of activities” includes “subsidiaries” and “business partners”, including “direct business partners”, with a commercial agreement, and “indirect business partners”, which perform business operations related to the operations, products or services of the company.⁶⁸ Thus, the Directive does not make as clear-cut a distinction between direct and indirect suppliers as, for example, the German Supply Chain Act⁶⁹ or the French Vigilance Law,⁷⁰. However, some company obligations may be calibrated according to how far removed the “partner” is.⁷¹

B. The CSDDD Substantive Obligations in a Nutshell

The CSDDD due diligence obligations follow an approach close to the French and German laws. The French law requires a “vigilance plan”,⁷² but

⁶⁵ *Ibid*: “[A]s regards regulated financial undertakings, only the upstream but not the downstream part of their chains of activities should be covered by this Directive.”

⁶⁶ Article 3(1)(g) of the Commission Proposal included upstream and downstream activities.

⁶⁷ See, e.g., EUROPEAN CENTRAL BANK, *Opinion of the European Central Bank (ECB) of 06 June 2023 on a proposal for a directive on corporate sustainability due diligence (CON/2023/15)*, online: <https://www.ecb.europa.eu/pub/pdf/legal/ecb_leg_con_2023_15.en.pdf>.

⁶⁸ Article 3(1)(f) CSDDD.

⁶⁹ Both the CSDDD and the German Supply Chain Act differentiate between “direct” and “indirect” business partners or suppliers (see Article 3(1)(f) CSDDD, and s. 2(7) and (8) German Supply Chain Act). However, the German Supply Chain Act, in s. 5, contemplates risk analysis obligation *vis-à-vis* direct suppliers; s. 6, which contemplates “preventive measures” differentiates between the company’s “own area of business” (s. 6(2) and (3)) and the company’s “direct” business partners (s. 6(4)) and s. 9 contemplates limited obligations concerning indirect suppliers.

⁷⁰ Art. L. 225-102-4.-I, para. 3 of the French Vigilance Law refers to contractors or suppliers with which the company has an “established relationship”.

⁷¹ Articles 10(1) and 11(1) letters (a) to (c) CSDDD state that the “appropriate measures shall take into account who causes the adverse impact, and the company’s ability to influence its business partner. Recitals (45) and (53) CSDDD refer to the company’s “level of involvement” when determining the “appropriate measures” adopted.

⁷² Art. L. 225-102-4.-I, para. 1 of the French Vigilance Law.

the Directive places due diligence as part of “risk management”, like the German Act does.⁷³

The CSDDD requires companies to identify, analyze, and prioritize actual or potential harms, and to prevent and mitigate them. It also requires notification mechanisms and procedures to monitor the effectiveness of due diligence measures.⁷⁴ Like the German Act, it expressly regulates remedial action, including termination of business relationships.⁷⁵ Like the French Law, it also requires meaningful stakeholder engagement and refers to multi-stakeholder initiatives.⁷⁶

Thus, while similar to both, the Directive is more precise than the French law. Its level of detail is similar to the German Act, which requires a “human rights strategy”,⁷⁷ in relevant business processes, procurement strategies, training and risk control and verification measures, contractual assurances and controls (on prevention),⁷⁸ and the duty to end a human rights or environmental violation, or jointly develop plans or initiatives to put an end to them (remedial action).⁷⁹ However, the CSDDD also requires companies to make changes to their business plans where necessary, including financial or non-financial investments to adjust or upgrade facilities or support business partners.⁸⁰ It extends to *indirect* business partners⁸¹ and contemplates remediation of harm that goes *beyond* merely ending the violation.⁸²

C. The CSDDD and Transition Plans

The CSDDD's inclusion of an obligation for firms to develop “transition plans” is a distinctive feature of supply chain legislation. The French and German laws encompass environmental interests too, but the German

⁷³ Articles 5(1)(a) and 7 CSDDD, and s. 4 of the Germany Supply Chain Act.

⁷⁴ Articles 5(1)(b), (c), (f), and (g), 8, 9, 10, 11, 14, 15 CSDDD; art. L. 225-102-4.-I, para. 4 nos. 1° - 5° of the French Vigilance Law; s. 3(1) nos. 1-9, German Supply Chain Act.

⁷⁵ Articles 3(1)(d) and 12 CSDDD; s. 3(1) nos. 6, and 7 German Supply Chain Act.

⁷⁶ Articles 3(1)(e) and 13 CSDDD and art. L. 225-102-4.-I, para. 4 Commercial Code.

⁷⁷ S. 6 German Supply Chain Act.

⁷⁸ S. 6(3) and (4) German Supply Chain Act.

⁷⁹ S. 7(1) and (2) Germany Supply Chain Act.

⁸⁰ Articles 10(2)(c) (prevention) and 11(3)(d),(e), and (f) CSDDD.

⁸¹ Article 10(4) CSDDD.

⁸² Article 12 CSDDD. The “remedial action” of s. 7 of the German Supply Chain Act is similar to a duty of “bringing actual adverse impacts to an end”.

Act focuses on “concrete” harm/risk,⁸³ while the French Law does not specify whether the “vigilance plan” should comprise emissions reduction planning. Some plaintiffs sued French firms to force them to do so,⁸⁴ but the broad language of the French law can make courts reluctant to impose it.⁸⁵

In fact, the precedent is not in supply chain standards, but in the Recommendations of the Task Force on Climate-related Financial Disclosures (TCFD), which grouped such disclosures into (i) governance, (ii) strategy, (iii) risk management, and (iv) metrics and targets.⁸⁶ The TCFD did not explicitly refer to “transition plans”, but “strategy” disclosures emphasized the need for financial “planning”.⁸⁷

The Glasgow Financial Alliance for Net Zero (GFANZ) in 2021⁸⁸ helped shape the concept of “transition plans” and gave them a central role in climate disclosures. The TCFD’s 2021 document, *Guidance on Metrics, targets and Transition Plans*,⁸⁹ went so far as to classify them as a component of “business strategy”.⁹⁰ The GFANZ provided its own guidance on transition plans for financials in 2022.⁹¹

⁸³ E.g., mercury and organic pollutants, waste management or hazardous waste disposal.

⁸⁴ See, e.g., *Notre Affaire à Tous and Others v. Total*, [2019], Nanterre District Court, online: <<https://climatecasechart.com/non-us-case/notre-affaire-a-tous-and-others-v-total/>>.

⁸⁵ This was, in fact, the conclusion of the Paris Judicial Tribunal: Trib jud Paris, 6 July 2023, (2023) N° RG 22/03403, N° Portalis 352J-W-B7G-CWN5A. The Paris Court of Appeal ruled against it, and declared the complaint admissible: CA Paris, 18 June 2024, (2024) N° RG 23/14348, N° Portalis 35L7 – V- B7H – CIFBK. The fact that it took 4, 5 years for a decision shows how difficult this kind of litigation can be.

⁸⁶ TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES (TCFD), *Recommendations of the Task Force on Climate-related Financial Disclosures*, Final Report, June 2017, online: <<https://assets.bbhub.io/company/sites/60/2021/10/FINAL-2017-TCFD-Report.pdf>>.

⁸⁷ *Ibid.*

⁸⁸ Th GFANZ was established by Mark Carney, the FSB Chair who set up the TCFD, who was then joined by Michael Bloomberg, who chaired the TCFD, and by Mary Shapiro, who was the Head of the TCFD Secretariat. See GLASGOW FINANCIAL ALLIANCE FOR NET ZERO, “About us”, online: <<https://www.gfanzero.com/about/>>.

⁸⁹ TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES (TCFD), *Guidance on Metrics, Targets and Transition Plans*, October 2021, online: <https://assets.bbhub.io/company/sites/60/2021/07/2021-Metrics_Targets_Guidance-1.pdf>.

⁹⁰ *Ibid.*

⁹¹ GLASGOW FINANCIAL ALLIANCE FOR NET ZERO (GFANZ), *Financial Institution Net-zero Transition Plans. Fundamentals, Recommendations, and Guidance*, November

The CSRD incorporated this guidance into EU Law. Recital (30) states that companies:

should also be required to disclose any plans they may have to ensure that their business model and strategy are compatible with the transition to a sustainable economy and with the objectives of limiting global warming to 1,5 °C in line with the Paris Agreement and achieving climate neutrality by 2050, as established in Regulation (EU) 2021/1119, with no or limited overshoot.

Articles 19a and 29a state, in Section (2), that companies shall report:

(a) a brief description of the undertaking's business model and strategy, including:

[...]

(iii) the plans of the undertaking, including implementing actions and related financial and investment plans, to ensure that its business model and strategy are compatible with the transition to a sustainable economy and with the limiting of global warming to 1,5 °C in line with the Paris Agreement under the United Nations Framework Convention on Climate Change adopted on 12 December 2015 (the 'Paris Agreement') and the objective of achieving climate neutrality by 2050 as established in Regulation (EU) 2021/1119 of the European Parliament and of the Council, and, where relevant, the exposure of the undertaking to coal-, oil- and gas-related activities;

Thus, the "any plans they may have" of recital (30) is transformed into disclosure of "the plans of the undertaking" and accompanied by an explicit reference to the Paris Agreement⁹², and the Regulation 2021/1119 (the Climate Law)⁹³ suggesting that transition plans are a preferred (or *the* preferred) form to be aligned with said laws.

2022, online: <<https://assets.bbhub.io/company/sites/63/2022/09/Recommendations-and-Guidance-on-Financial-Institution-Net-zero-Transition-Plans-November-2022.pdf>>.

⁹² *Paris Agreement to the United Nations Framework Convention on Climate Change*, TIAS No. 16-1104, Dec. 12, 2015, online: <<https://www.un.org/en/climatechange/paris-agreement>> (hereafter "Paris Agreement").

⁹³ *Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law')*, OJ, L 243/1, 9 July 2021, online: <<https://eur-lex.europa.eu/eli/reg/2021/1119/oj/eng>>.

Level 2 ESRS takes this one further step, stating that “[t]he undertaking shall disclose *its transition plan for climate change mitigation*” (emphasis in the original⁹⁴). Furthermore, it describes in great detail the elements of a transition plan, including climate change mitigation actions, decarbonization levers, quantification of investments and funding supporting the plan, assessment of locked-in emissions and investments in greenhouse gas (GHG)-intensive activities, etc.⁹⁵ Disclosures must also include the plan’s embeddedness into the entity’s business strategy and financial planning, its approval by management bodies, and the entity’s progress in its implementation.⁹⁶ If the firm does not have a transition plan, it must indicate whether, and, if so, when, it will adopt one.⁹⁷ ESRS 4 requires disclosing biodiversity considerations in the transition plan.⁹⁸

Under the CSDDD companies must “adopt and put into effect” a transition plan for climate change mitigation, which seeks to render the company’s business model and strategy compatible with the transition to a sustainable economy, and with the limiting of global warming to 1.5 °C, in line with the Paris Agreement and the European Climate Law, and the company’s exposure to coal-, oil- and gas-related activities.⁹⁹

The plan shall contain (a) time-bound targets for 2030, and in five-year steps up to 2050, based on scientific evidence, and absolute emissions reduction targets for Scope 1, 2 and 3 emissions, (b) a description of decarbonization levers, including changes in products/services, (c) a quantification of investment and funding supporting the plan, and (d) a description of the role of management and administrative bodies;¹⁰⁰ they must be updated every 12 months, including with an explanation of the progress made.¹⁰¹

Companies reporting their transition plans under the CSRD will be deemed to comply with the obligation to develop a transition plan under the CSDDD.¹⁰² However, the CSRD’s Level 2 text is more precise, including

⁹⁴ ESRS E1 (Climate Change), para. 14.

⁹⁵ ESRS E1, para. 16(a)-(g).

⁹⁶ ESRS E1, para. 16(h)-(j).

⁹⁷ ESRS E1, para. 17.

⁹⁸ ESRS E4, E4-1.

⁹⁹ Recital (73) and article 22(1) CSDDD.

¹⁰⁰ Recital (73) and article 22(2) CSDDD.

¹⁰¹ Article 22(3) CSDDD.

¹⁰² Article 22(2) CSDDD.

references to potential locked-in emissions and biodiversity considerations.

III. The CSDDD'S Ambition, and the Uncertain Conditions to Deliver

The CSDDD seeks to transform soft law standards (the UNGP and OECD Guidelines) into binding legal obligations, while adding transition plans on top. This is ambitious and far-reaching, and its success will depend on factors beyond the Directive itself. First, comparative analysis shows how much the CSDDD “broadens” companies’ obligations, which will require technical expertise by authorities and courts (A) Second, success will also require turning adversarial relationships into more collaborative ones (B) Third, the CSDDD and CSRD try to nudge companies to use due diligence and sustainability goals for risk management, but also strategy, which requires a clearer identification of incentives for firms (C).

A. The CSDDD “Broadening” Ambition: Is There Expertise to Deliver It?

Both the UN Principles and OECD Guidance are broad in scope. The UN Principles cover “human rights”,¹⁰³ encompassing all “internationally recognized” human rights,¹⁰⁴ while its commentary clarifies that “[b]ecause business enterprises can have an impact on virtually the entire spectrum of internationally recognized human rights, their responsibility to respect applies to all such rights”.¹⁰⁵ This is in line with UN doctrine, which holds human rights as “indivisible”.¹⁰⁶ The OECD MNE Guidelines and Due Diligence

¹⁰³ UN Guiding Principle no. 11.

¹⁰⁴ UN Guiding Principle no. 12.

¹⁰⁵ UN Guiding Principle no. 12 and commentary.

¹⁰⁶ *Proclamation of Teheran, Final Act of the International Conference on Human Rights*, 22 April-13 May 13 1968, UN Doc A/CONF. 32/41 at 3 (1968), §13, online: <https://legal.un.org/avl/pdf/ha/fatchr/Final_Act_of_TehranConf.pdf>: “[H]uman rights and freedoms are indivisible”. See also *UN Vienna Declaration and Programme of Action*, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, no. 5 (“All human rights are universal, indivisible and interdependent and interrelated”).

Guidance cover human rights, employment relations, the environment, bribery and corruption and consumer interests.¹⁰⁷

In practice, however, broad obligations are hard to impose, monitor, and enforce. Indeed, the CSDDD focuses on “human rights and environmental” due diligence, leaving aside consumer issues, and bribery and corruption, save when the latter may be important for human rights and environmental issues.¹⁰⁸ The CSDDD also tries to enhance legal certainty, by cross-referring to specific rights and international instruments.¹⁰⁹

Some human rights advocates argue that this curtails protection by omitting reference to international instruments on indigenous rights, migrant workers, human rights defenders, discrimination against women, and humanitarian law.¹¹⁰ This criticism is unwarranted. The CSDDD recitals state that human rights are “universal, indivisible, interdependent and interrelated”;¹¹¹ and that the Directive’s aim is to “comprehensively cover” human rights.¹¹² They also indicate that “[d]epending on the circumstances, companies may need to consider additional standards”, and make express reference to “intersecting factors”, and to the circumstances of indigenous peoples, and discrimination against women.¹¹³ They also refer to the “One Health” approach recognized by the World Health Organization (WHO), corruption and bribery, and the UNGP and Guides,¹¹⁴ as well as to OECD Guidance.¹¹⁵

¹⁰⁷ “Due diligence addresses actual adverse impacts or potential adverse impacts (risks) related to the following topics covered in the OECD Guidelines for MNEs: human rights, including workers and industrial relations, environment, bribery and corruption, disclosure, and consumer interests”: OECD, *OECD Due Diligence Guidance for Responsible Business Conduct*, 2018, at 15, online: <https://www.oecd.org/content/dam/oecd/en/publications/reports/2018/02/oecd-due-diligence-guidance-for-responsible-business-conduct_c669bd57/15f5f4b3-en.pdf> (hereafter “OECD Due Diligence Guidance”).

¹⁰⁸ Recital (36) CSDDD.

¹⁰⁹ Annex I, Parts I and II CSDDD.

¹¹⁰ Nele MEYER and Christopher PATZ, “Dividing the Indivisible. Human Rights under the EU Corporate Sustainability Due Diligence Directive”, *Verfassungsblog*, 1 June 2024, online: <<https://verfassungsblog.de/dividing-the-indivisible-human-rights-under-the-eu-corporate-sustainability-due-diligence-directive/>>.

¹¹¹ Recital (7) CSDDD.

¹¹² Recital (32) CSDDD.

¹¹³ Recital (33) CSDDD.

¹¹⁴ Recitals (35)-(37) CSDDD.

¹¹⁵ Recital (6) CSDDD.

In fact, the CSDDD's real challenge is that it extends far beyond other supply chain laws and standards,¹¹⁶ as the following tables illustrate. Some jurisdictions have cautiously adopted soft law standards, reluctant to impose mandatory obligations.

Jurisd.	Year	Norm	Scope	Substantive focus	Nature of duties
China	2015	<i>Due Diligence Guidelines for Responsible Mineral Supply Chain</i>	Companies extracting, using minerals or part of supply chain	Human Rights	Conduct; identify, prevent, mitigate HH.RR. violations
Japan	2022	<i>Guidelines on Respecting Human Rights in Responsible Supply Chains</i>	General application	Human Rights	Conduct; identify, prevent HH.RR. abuse

Table 1. Jurisdictions with soft law standards

The CSDDD also differs from “narrower” statutes focusing on slavery and forced labor, and limited to disclosures. This is the case of the laws in the UK, Australia, Canada or California, as well as a legislative proposal in New Zealand.

Jurisd.	Year	Norm	Scope	Substantive focus	Nature of duties
Australia	2019	<i>Modern Slavery Act</i>	> 100M A\$	Human Rights	Disclosure; risks of slavery across supply chain
California	2010	<i>California Transparency in Supply Chains</i>	Rev. > 100M	Human Trafficking & Slavery	Disclosure verific., audit, certific., internal accountability, training

¹¹⁶ LRQA, “Supply chain due diligence legislation map”, online: <<https://www.lrqa.com/en/supply-chain-due-diligence-legislation-map/>>.

Canada	2024	<i>Fighting Against Forced Labour and Child Labour in Supply Chains Act</i>	Producers, distributors, importers goods	Forced labor, child labor	Disclosure mitig. measures; prohibit import. goods produced with forced/ child labor
New Zealand	2023 (proposals)	<i>Modern Slavery Reporting Bill</i>	> 20M NZ\$ & 50M NZ\$	Slavery & forced labor	Disclosure
United Kingdom	2015	<i>Modern Slavery Act</i>	>£36M	Slavery	Disclosure + implied obligation to mitigate risks

Table 2. Jurisdictions with binding laws on slavery, forced labor and human rights disclosures

Some laws go beyond slavery and forced labor, but maintain a *disclosure* focus. This is the case of the disclosures required by the Swiss Code of Obligations,¹¹⁷ or the proposals in India or New York.¹¹⁸

Jurisdictions with binding legislation beyond forced labor and human rights, but focused on disclosure					
India	2023 (proposal)	Proposal for ESG Disclosures, Ratings, and Investing	Top 250 companies, then 500, then 1,000	ESG topics	Disclosure
New York	2022 (proposal)	<i>Fashion Sust. and Social Accountability Act</i>	Fashion retail manufact. & sellers	Human rights & environment	Disclosure; env. & social due dilig.; impact of s. chain.
Switzerland	2022	<i>Code of Obligations</i>	>500 empl. & CHF 40M revenues	ESG	Disclosure

Table 3. Jurisdictions with binding legislation on disclosures beyond slavery or forced labor

¹¹⁷ Section Six (“Transparency in Non-Financial Matters”) of Title Thirty Two of the *Swiss Code of Obligations* (*supra* note 35).

¹¹⁸ New York Senate Bill S4746A, *supra* note 36; SECURITIES AND EXCHANGE BOARD OF INDIA (SEBI), *supra* note 36.

Jurisdictions going beyond disclosure-based approaches are still rare. The US UFLPA is the more targeted, focusing on Uyghur forced labor, an issue with human rights and geopolitical implications.¹¹⁹ Also unique is Brazil's "Black List" system.¹²⁰ The CSDDD goes beyond them with a broader range of human rights and environmental concerns, in line with the French Vigilance Law and the German Supply Chain Act.

	Year	Norm	Scope	Substantive focus	Nature of duties
Brazil	2004 (update 2020)	Dirty List	Employers	Slave labor, exploitation	Firms in list excluded from state loans + other restrictions
European Union	2024	<i>Corporate Sustainability Due Diligence Directive</i>	>1,000 emp. & EUR 450M; certain franchisors	HH.RR., climate & environment	Conduct; due diligence risk management system.
France	2017	Duty of Vigilance Law	> 5000 employees	HH.RR., climate & environment	Conduct; due diligence Plan
Germany	2023	<i>Supply Chain Due Diligence Act</i>	> 3,000 employees	HH.RR. & environment	Conduct; due diligence risk management system.
South Korea	2023 (proposal)	Proposed Act Human Rights & Environm. Protection for Sustainable Management of Companies	>500 employees; 200B KRW revenue	Human rights, environmental	Conduct; due diligence system

¹¹⁹ "[T]he United States is in a survival struggle with an authoritarian state that seeks global hegemony and the fundamental displacement of the United States and the liberal economic order.": Rep. Christopher Smith's Opening Statement on the "Implementation of the Uyghur Forced Labor Prevention Act and the Impact on Global Supply Chains" at the Congressional-Executive Commission on China (CEEC), 18 April 2023, online: <<https://www.cecc.gov/events/hearings/implementation-of-the-uyghur-forced-labor-prevention-act-and-the-impact-on-global>>.

¹²⁰ BRAZIL, INSPEÇÃO DO TRABALHO, *supra* note 29.

United States	2022	<i>Uyghur Forced Labor Prevention Act</i>	Companies importing goods from Xinjiang region	Slavery, forced labor	Conduct (certify goods not produced using forced labor)
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Table 4. Jurisdictions with binding legislation with conduct obligations, or blacklisting

Even compared to them, the CSDDD is more detailed than the French law, and more encompassing than the German law.¹²¹ The French Vigilance Law encompasses human rights, health and safety and environmental risks,¹²² and relies on companies for specifying which harms they monitor.¹²³ This can be integrated with French statutory law and international commitments,¹²⁴ but the language is vaguer than the Directive's Annex I, which is closer to the German Supply Chain Act's long list of human rights risks¹²⁵ (comprising environmental-based human rights¹²⁶) and environmental risks.¹²⁷ The CSDDD's list is, if anything, more ambitious, with references to trade in endangered species, ozone-depletion, natural heritage, etc.¹²⁸, not to mention transition plans.¹²⁹

Thus, critics miss the CSDDD's real challenge: choosing between many (and potentially competing) impacts.

On this, the CSDDD states that companies should "prioritise the adverse impacts based on their severity and likelihood".¹³⁰ This is a sensible idea, also inspired by international guidance.¹³¹ However, consider the risk

¹²¹ German Supply Chain Act, *supra* note 40.

¹²² Art. L. 225-102-4.-I, para. 3 Commercial Code.

¹²³ Art. L. 225-102-4.-I, para. 4 no. 1^o Commercial Code.

¹²⁴ FRANCE, ASSEMBLÉE NATIONALE, *Rapport fait au nom de la Commission des lois constitutionnelles, de la législation et de l'administration générale de la République sur la proposition de loi (n^o 2578), relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*, by Dominique Potier, Report No 2628, 11 March 2015 (texts of constitutional status, as well as international and European conventions).

¹²⁵ S. 2(2) n. 1-12 German Supply Chain Act.

¹²⁶ S. 2(2) n. 9 German Supply Chain Act.

¹²⁷ S. German Supply Chain Act.

¹²⁸ Annex, Part II CSDDD.

¹²⁹ Article 1(1)(c), and 22 CSDDD.

¹³⁰ Recitals (38), (44), (80), and articles 5(1)(b) and 9 CSDDD.

¹³¹ OECD Guidelines, Chapter II, Commentary, paras. 19, 20, 28.

of adverse selection: “honest” firms may assess a broad range of adverse impacts, but this may expose them to responsibility if they fail to prevent or bring to an end the adverse impacts (articles 10 and 11 CSDDD); “dishonest” firms may prioritize a narrow range of impacts, and disavow responsibility over those not prioritized.

To counter this, the Directive provides that (i) “prioritizing” does not mean “dismissing” least severe/likely impacts: “once the most severe and likely adverse impacts are addressed in reasonable time, the company should address less severe and less likely adverse impacts”;¹³² and (ii) in determining liability, authorities may assess “the correctness of the company’s prioritization”.¹³³

However, this ability to assess the correctness of a company’s assessment relies on the expertise of administrative authorities and courts to assess the adequacy of the prioritization, and whether firms adequately dealt with non-priority impacts. In a new field like this, that is by no means guaranteed. In theory, the Directive mandates Member States to ensure that competent authorities have adequate resources to carry out their tasks,¹³⁴ but this is easier said than done, or enforced, especially as pressure mounts in Member States to ensure that companies remain competitive.

In practice, the CSDDD relies on a European Network of Supervisory Authorities, Commission sector-specific guidelines on risk factors, due diligence processes, model contract clauses, fitness criteria, data and information sources and transition plans, as well as Member States’ initiatives to provide information and support for companies.¹³⁵ This can be a massive system of rules and resources for their administration. In any event, national authorities and courts, entrusted with processing such rules, are likely to be the weakest link. This is compounded by another risk: that CSDDD obligations will be shaped not in cooperative, but in “adversarial” scenarios.

¹³² Article 9 (3) and recital (44) CSDDD.

¹³³ Recital (80) CSDDD.

¹³⁴ Article 25 (1) CSDDD.

¹³⁵ Articles 28 (network), 19 (Guidelines) and 20 (accompanying measures) CSDDD. See also EUROPEAN COMMISSION, *Frequently asked questions on the implementation of the EU corporate sustainability reporting rules*, 7 August 2024, online: <https://finance.ec.europa.eu/document/download/c4e40e92-8633-4bda-97cf-0af13e70bc3f_en?file_name=240807-faqs-corporate-sustainability-reporting_en.pdf>.

B. The CSDDD “Tightening” Aspiration into Duty: Can Adversarial Dynamics Become Collaborative?

Transforming international soft law standards into binding rules has major implications for corporate responsibility. The CSDDD includes one provision on penalties (Article 27), typically under Public (administrative or criminal) Law, and another on civil liability (Article 29), a statement to signify that the Directive has teeth. The risk is that the Directive will fall into the already fertile and expanding field of supply chain litigation.

In France, several lawsuits were filed under the Duty of Vigilance Law. In *Friends of the Earth et al. v. Total*, six NGOs sought to halt an oil project on the shores of Lake Albert in Uganda, along with a pipeline crossing Tanzania, alleging human rights and environmental violations.¹³⁶ After a jurisdictional challenge was settled by the Cour de cassation,¹³⁷ and the Law clarified jurisdiction, the Judicial Court of Paris, held that, in a summary procedure it could order an injunction over, e.g., the absence of a vigilance plan, but that it could not decide urgently over the reasonableness of the plan’s measures.¹³⁸ In *AFIEGO et al. v Total*,¹³⁹ the plaintiffs pursued a claim over the same facts, and the case is pending.

In *Envol Vert v. Casino*, eleven NGOs alleged that Casino’s Brazilian subsidiary sourced cattle from suppliers linked to deforestation, destruction of carbon sinks, and the occupation of indigenous lands, in breach of the Duty of Vigilance Law.¹⁴⁰ In *Comissão Pastoral da Terra v. BNP Paribas*, NGOs alleged that the bank breached the Vigilance Law by financing Marfrig, a major beef producer whose suppliers were implicated in Amazon deforestation, land-grabbing of indigenous territories, and forced labour.¹⁴¹ Both cases are pending.

¹³⁶ *Friends of the Earth et al. v. Total*, [2019] Nanterre High Court, online: <<https://climatecasechart.com/non-us-case/friends-of-the-earth-et-al-v-total/>>.

¹³⁷ Cass civ 2^e 15 December 2021, 21-11.883 21-11.959.

¹³⁸ Trib jud Paris, decisions of 28 February 2023, N^o RG 22/53943 - N^o, Portalis 352J-W-B7G-CXC7 V, and N^o RG 22/53942 - N^o Portalis 352J-W-B7G-CXB4 M.

¹³⁹ *AFIEGO et al. v. Total*, [2023] Judicial Court of Paris, online: <<https://climatecasechart.com/non-us-case/afiego-et-al-v-total/>>.

¹⁴⁰ *Envol Vert et al. v. Casino*, [2021] Saint-Étienne Judicial Court, online <<https://climatecasechart.com/non-us-case/envol-vert-et-al-v-casino/>>.

¹⁴¹ *Comissão Pastoral da Terra and Notre Affaire à Tous v. BNP Paribas*, [2023] Judicial Court of Paris, online: <<https://climatecasechart.com/non-us-case/comissao-pastoral-da-terra-and-notre-affaire-a-tous-v-bnp-paribas/>>.

In Germany initial complaints before the Federal Office of Economics and Export Control (BAFA), the administrative authority entrusted with applying the Supply Chain Act, focused on the workers' rights. FEMNET, ECCHR and the National Garment Workers Federation (NGWF) of Bangladesh, three NGOs, complained against Tom Tailor, Amazon and IKEA (multinational companies), alleging that, the companies had not signed the "Accord for Building Safety and Fire Protection in Bangladesh", established in 2013 in response to the Rana Plaza incident or its successors, despite having supplier factories in Bangladesh.¹⁴² ECCHR filed another complaint against Volkswagen (VW), BMW and Mercedes-Benz, alleging failures to take appropriate measures to identify, prevent or remediate alleged human rights violations in their supply chains in the Xinjiang Autonomous Uyghur Region (XUAR).¹⁴³ The cases are ongoing.

In the Netherlands, in *Akpan v. Royal Dutch Shell*¹⁴⁴ the court held that it was competent to decide over a negligence claim under Nigerian law against both the parent company (Royal Dutch Shell) and its Nigerian subsidiary. To accept jurisdiction over both the parent and the subsidiary the court made a relatively broad interpretation of the provision in the Dutch code of civil procedure for cases where, lacking jurisdiction over one defendant, reasons of efficiency justify joining the causes.

This is similar to some UK cases, where plaintiffs filed important "supply chain" lawsuits based on common law torts. In *Vedanta Resources PLC*

¹⁴² BUSINESS AND HUMAN RIGHTS RESOURCE CENTRE, "NGOs file complaint under new German Supply Chain Act against IKEA and Amazon over alleged failure to meet their due diligence obligations by not signing Bangladesh Accord", 24 April 2023, online: <<https://www.business-humanrights.org/en/latest-news/ngos-file-first-complaint-under-new-german-supply-chain-act-against-ikea-and-amazon-over-alleged-failure-to-meet-their-due-diligence-obligations-by-not-signing-bangladesh-accord/>>.

¹⁴³ BUSINESS AND HUMAN RIGHTS RESOURCE CENTRE, "Germany: ECCHR files complaint against Volkswagen, BMW & Mercedes under Supply Chain Act over forced labour risks in Xinjiang", 21 June 2023, online: <<https://www.business-humanrights.org/en/latest-news/lieferkettensorgfaltspflichtengesetz-ecchr-reicht-wegen-verdacht-auf-menschenrechtsverletzungen-in-xinjiang-beschwerde-gegen-vw-bmw-und-mercedes-benz-ein/>>.

¹⁴⁴ *Akpan v. Royal Dutch Shell PLC Arrondissementsrechtbank Den Haag*, 30 January 2013, Case No C/09/337050/HA ZA 09-1580, online: <<https://elaw.org/wp-content/uploads/archive/final-judgment-shell-oil-spill-ikot-ada-udo.pdf>>, aff'd The Hague Court of Appeal, 18 December, 2015.

and another v. *Lungowe and others*,¹⁴⁵ 1,826 Zambian citizens alleged harm from toxic discharges at the Nchanga Copper Mine. The UK Supreme Court held that *Vedanta* could owe a duty of care, given its close involvement in the subsidiary's operations.¹⁴⁶

In *Okpabi v. Royal Dutch Shell*,¹⁴⁷ the UK Supreme Court, relying on *Vedanta*, allowed claims by Nigerian communities to proceed on the basis that the parent company could arguably owe a duty of care for environmental and human rights harms caused by its subsidiary¹⁴⁸

In *Municipio de Mariana*¹⁴⁹, the UK High Court allowed a claim by over 700,000 plaintiffs to proceed to trial, seeking damages for Brazil's Fundão Dam collapse, one of the country's largest environmental disasters, against BHP, an Anglo-Australian mining giant, whose subsidiary, BHP Billiton Brasil Ltda, was the 50/50 owner, together with Vale SA (a Brazilian company) of Samarco, the joint venture responsible for the project.

¹⁴⁵ *Vedanta Resources PLC and another v. Lungowe and others*, [2019] UKSC 20, online: <https://supremecourt.uk/uploads/uksc_2017_0185_judgment_ee7cbbdb9f.pdf> (hereafter "*Vedanta*").

¹⁴⁶ The High Court and Court of Appeal also held that the plaintiffs could bring suit in the UK, and the Supreme Court dismissed *Vedanta*'s argument that the plaintiffs had incurred an abuse of EU Law (the EU Jurisdiction regulation (*Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)*, OJ, L 351/1, 20 Dec. 2012, online: <<https://eur-lex.europa.eu/eli/reg/2012/1215/oj/eng>>) was applicable) because, although establishing the English courts jurisdiction over *Vedanta* as an "anchor" defendant was a key factor to litigate in England, the plaintiffs had a bona fide case against the parent too: *Vedanta* at paras. 121, 128-132. The Supreme Court considered that the Court of Appeal erred in law when it dismissed the possibility that the disclosure of internal documentation in trial could reveal the parent's operational control: *Vedanta* at paras. 134-140.

¹⁴⁷ *Okpabi and others v. Royal Dutch Shell Plc and another*, [2021] UKSC 3, online: <https://supremecourt.uk/uploads/uksc_2018_0068_judgment_fd7f555f07.pdf> (hereafter "*Okpabi*").

¹⁴⁸ The Court of Appeal was wrong in treating the liability of the parent as a "novel" or "distinct" type of liability, deserving a rigorous analysis. It was a matter of establishing whether there was de facto control by the parent over the subsidiary's operations: *Okpabi*, at paras. 147, 149, 151, and 154.

¹⁴⁹ *Municipio De Mariana v. BHP Group UK Ltd and Ors*, [2023] EWHC 2030 (TCC).

Public enforcement cases include *R. v. NCA*,¹⁵⁰ where the Court of Appeal held that the NCA decision not to investigate exports of cotton products manufactured in the Xinjiang Uyghur Autonomous Region (XUAR) from China to the UK as a money laundering offence under the *Proceeds of Crime Act, 2002*, was unlawful, on the face of evidence of human rights abuses in the XUAR offered by the plaintiffs.

On other occasions courts have been less willing to engage. In *AAA and Others v. Unilever*,¹⁵¹ the Court of Appeal flatly rejected the possibility that the parent company could owe a duty of care to individuals affected by violence at a tea plantation operated by its Kenyan subsidiary. More recently, in *Limbu v. Dyson Technology*¹⁵² the High Court declined to exercise jurisdiction in a claim filed against Dyson by 24 migrant workers from Nepal and Bangladesh based on forced labor and other human rights' abuses by Dyson's suppliers in Malaysia. However, *Vedanta* and *Okpabi*, have showed a more open approach, holding that the focus should not be in the parent's "control" over the subsidiary's activities, but on "the extent to which the parent did take over or share with the subsidiary the management of the relevant activity".¹⁵³

Some aspects of this litigation stand out. Ambitious supply chain legislation has aided plaintiffs in France or Germany, while plaintiffs in the UK were sued anyway under general tort law, reinforcing the point that courts, and enforcement bodies are key. Furthermore, numerous cases involved disputes over competence and jurisdiction. The assumption that courts in the parent company domicile will play a positive role by enforcing human rights and environmental standards still needs to meet the test of practice, where local courts may not welcome what they see as interference.

Most importantly, due diligence duties will be shaped differently by adversarial, as opposed to collaborative processes. The UN or OECD frameworks calibrate due diligence duties based on the company's "level of

¹⁵⁰ *R. (on the application of World Uyghur Congress) v. National Crime Agency*, [2024] EWCA Civ 715.

¹⁵¹ *AAA & Others v. Unilever PLC and Unilever Tea Kenya Limited*, [2018] EWCA Civ 1532.

¹⁵² *Limbu & Ors v. Dyson Technology Ltd & Ors*, [2023] EWHC 2592 (KB).

¹⁵³ *Okpabi*, at para. 147.

involvement” with the adverse impact.¹⁵⁴ They encompass cases where companies “cause or contribute to” adverse impacts,¹⁵⁵ while distinguishing between cases where the company *alone* causes an adverse impact, and cases where the *combined* effect of the company’s activity, and other entity’s activity caused the harm, or the company facilitated or incentivized another company to cause the impact.¹⁵⁶

If the goal is not to *encourage* companies to go as far as possible, but to impose mandatory obligations and liability, the language must be more precise. Thus, the CSDDD reflects “level of involvement”¹⁵⁷ by stating that a company will be responsible for events “caused only” by it, or “caused jointly” with a subsidiary or business partner.¹⁵⁸

This does not entirely clarify the matter, though. Due diligence is preventative,¹⁵⁹ and the Directive’s sequence comprises (i) identification and assessment of adverse impacts (Article 8), and prioritisation (Article 9); (ii) taking “appropriate measures” to prevent, mitigate, and bring to an end adverse impacts “caused or jointly caused” by the company (Articles 10-11); and (iii) liability for damages “caused” by the failure to prevent, mitigate or bring to an end (Article 29).

Thus, firms are, first, subject to the obligation to take “appropriate measures”, seeking to prevent, mitigate, etc. adverse impacts “caused or jointly caused” by the company,¹⁶⁰ and, second, firms will be liable for the damages “caused” by a breach of such obligation. Thus, a court would have to determine whether the adverse impact was “caused” by the company, to determine the appropriate measures, and then whether the damages were “caused” by a failure to adopt such appropriate measures. This dual assessment of causation can be confusing.

¹⁵⁴ UN Guiding Principles nos. 17 Commentary, and 19.1.b)i); OECD Due Diligence Guidance, no. 2.3.

¹⁵⁵ UN Guiding Principle no. 13; OECD Guidelines, Chapter II, Commentary, para. 16; Chapter IV, no. 2; Chapter VI, Commentary, para. 68.

¹⁵⁶ See, e.g., OECD Guidelines, Chapter VI, Commentary, para. 68.

¹⁵⁷ Recital (45) CSDDD.

¹⁵⁸ Recital (53) and articles 10(1)(a), (c), 11(1)(a), (c), and 12(1) CSDDD.

¹⁵⁹ OECD Due Diligence Guidance, p. 16.

¹⁶⁰ Respectively, articles 10 and 11 CSDDD. It also shapes the duty to remedy, under article 12.

This illustrates the difficulty of reconciling two competing aims. The CSDDD, influenced by the UNGP and the OECD framework, remains “aspirational” in spirit, and configures due diligence in an open-ended way. Law, however, embeds a “morality of duty”,¹⁶¹ and requires legal certainty. On one hand, making due diligence mandatory, and accompanying it with liability provisions sends a strong message. On the other hand, courts and authorities confronted with numerous and complex complaints may tend to narrow the scope of duties to what they consider legally certain. This, in turn, can make companies adjust their behavior to (just) avoid liability.

Whether companies adhere to strict duty or aspiration will depend on the interplay between adversarial or collaborative dynamics. The CSDDD drafters were aware of this, including a provision, on “stakeholder engagement”,¹⁶² and multiple references to it, and this is also highlighted in preparatory work, such as a Commission Study on Due Diligence.¹⁶³ However, this study also points out in a case study that active engagement and transparency by companies like Nestlé did not prevent the filing of lawsuits against them, raising questions on the counter-effects of a company’s public engagement.¹⁶⁴ Engagement is the socially optimal strategy, but whether it is also the privately efficiently approach for companies depends on other factors.

In this regard, whether adversarial or collaborative dynamics prevail depends not only on the company, but also on stakeholders like NGOs, which, in turn, depend on those stakeholders’ incentives. NGOs may be a force for good, but their actions are shaped by their mission, priorities, and funding structures. Whether a collaborative or adversarial strategy is pursued may depend not only on the “effectiveness” of the strategy to achieve a goal, but also on the perceived “impact” of that strategy in society, or among donors. Whether one specific interest (e.g., forced labor) or another (e.g., climate change) is prioritized may depend on stakeholders’ own priorities, raising issues of representativeness and legitimacy.¹⁶⁵

¹⁶¹ On “morality of duty” v. “morality of aspiration”, see Lon FULLER, *The Morality of Law*, rev. ed., New Haven (CT), Yale University Press, 1969, p. 5.

¹⁶² Article 13 CSDDD.

¹⁶³ Study on Due Diligence, *supra* note 5, p. 80.

¹⁶⁴ *Ibid.*

¹⁶⁵ Délber ANDRADE LAGE and Leonardo Nemer CALDEIRA BRANT, “The Growing Influence of Non-Governmental Organizations: Chances and Risks”, (2008) 1:1 *Anu. Bras. Dir. Int.* 81.

Thus, stakeholders' role remains a blind spot. On the companies' side, the Directive's broad and aspirational language is not matched by positive incentives, or a clear value proposition.

C. The CSDDD “Straddling” between Risk Management and Strategy: are There Carrots to Accompany the Sticks?

The CSDDD is unique in that it combines human rights, the environment, and transition plans. Does this call for a separate (“modular”) or integrated view?

The question is far from academic. Plaintiffs in strategic litigation lawsuits have strongly tried to promote an integrated view, framing climate change as a human rights issue in a first generation of lawsuits against governments,¹⁶⁶ and a second generation of lawsuits against corporations.¹⁶⁷ Plaintiffs in supply chain cases have alleged both environmental and personal harms in *Vedanta*,¹⁶⁸ *Okpabi*,¹⁶⁹ or *Municipio de Mariana*.¹⁷⁰ Cases in France have used the Vigilance Law as a basis, combining human rights and environmental violations, e.g., in *Total* (displacement of people and environmental impact¹⁷¹) *Casino* (deforestation, destruction of carbon sinks and occupation of indigenous territory¹⁷²) or *BNP Paribas* (deforestation,

¹⁶⁶ See, e.g., *Urgenda Foundation v. The Netherlands*, [2015] HAZA C/09/00456689 (24 June 2015); aff. by The Hague Court of Appeal, 9 October 2018; aff. by the Supreme Court, 20 December 2019.

¹⁶⁷ *Milieudefensie and Others v. Royal Dutch Shell PLC and Others*, [2021] HAZA C/09/571932 (26 May 2021; The Hague District Court). The Court of Appeal of The Hague recently overturned the decision, holding that, although reducing emissions formed part of Shell's duty of care, there were legal obstacles, as well as insufficient scientific consensus to impose a specific emissions reduction target: *Milieudefensie et al. v. Royal Dutch Shell*, case no. 200.302.332/01, 12 November 2024, ECLI:NL:GHDHA:2024:2099.

¹⁶⁸ *Vedanta*, *supra* note 145.

¹⁶⁹ *Okpabi*, *supra* note 147.

¹⁷⁰ *Municipio De Mariana v. BHP Group UK Ltd and Ors*, *supra* note 149.

¹⁷¹ The boreholes to be drilled in the Murchison Falls National Park would affect many endangered species and the pipeline, crossing Tanzania up to the Indian Ocean; see *Friends of the Earth et al. v. Total*, *supra* note 136.

¹⁷² *Envol Vert et al. v. Casino*, *supra* note 140.

land-grabbing of protected indigenous territories, forced labour in cattle farms¹⁷³).

These lawsuits also raise the question whether supply chain due diligence should be seen as part of corporate “risk management”, as previously discussed,¹⁷⁴ or straddling across this and corporate “strategy”. “Strategy”, under classical definitions, is a series of goals and policies or actions to achieve those goals, which *define* what the company is.¹⁷⁵ This contrasts with risk management’s protective function and its “closed-end” approach (risks are “identified”, “prioritised”, and “mitigated”¹⁷⁶). As part of “risk management” due diligence can constrain *elements* of corporate strategy, but as part of corporate “strategy” it can be a defining feature of the firm. Is that what soft law standards and the CSDDD try to do?

A textual analysis suggests that the answer is “no”. UNGPs require human rights protection be “embedded” at the highest level by a “policy commitment”, and in “operational policies and procedures”.¹⁷⁷ However, the “identify, prevent, mitigate and account for”¹⁷⁸ language is risk management-oriented. Same for the OECD Guidelines.¹⁷⁹ The CSDDD uses similar language, such as “risk based due diligence”.¹⁸⁰

However, strategic litigation has sought to transform climate change and human rights from “risk management” into a business “strategy” matter. In both *Envol Vert* and *Comissão Pastoral*, the alleged risk management

¹⁷³ *Comissão Pastoral da Terra and Notre Affaire à Tous v. BNP Paribas*, *supra* note 141.

¹⁷⁴ *Supra* section 3.2.

¹⁷⁵ See, e.g., Kenneth ANDREWS, *The Concept of Corporate Strategy*, Homewood (Ill.), Dow Jones-Irwin, 1971, Preface, p. iii; or Alfred CHANDLER, *Strategy and Structure: Chapters in the History of the Industrial Enterprise*, Cambridge (Mass.), MIT Press, 1962.

¹⁷⁶ Tony MERNA and Faisal F. AL-THANI, *Corporate Risk Management*, Hoboken (NJ), Wiley and Sons, 2008, p. 2.

¹⁷⁷ See UN Guiding Principle no. 16, (a) through (e).

¹⁷⁸ See UN Guiding Principle no. 15. The UN Guiding Principles employ the word “risk” 42 times, without once using terms like “strategy”, or “business model”, and they refer to “governance” structures once.

¹⁷⁹ OECD Guidelines recommend that “enterprises undertake risk-based due diligence to identify, prevent, mitigate and account for how they address actual and potential adverse impacts” (emphasis added). See OECD Guidelines 2023, p. 10 (preface), para. 4.

¹⁸⁰ Article 5(1) of the CSDDD states that “Member States shall ensure that companies conduct risk-based human rights and environmental due diligence”.

failures could not be easily disentangled from considerations of strategy and business model.

An even clearer example is the series of “transition plans” lawsuits, in which plaintiffs argued that a company’s failure to adopt an adequate transition plan to limit carbon emissions amounted to a failure to identify and mitigate environmental (and human rights) harms, in breach of the French Vigilance Law. In *Notre Affaire à Tous et al. v. Total*, the plaintiffs sought a court order forcing Total to issue a corporate *strategy* that 1) identified the risks resulting from GHG emissions from Total’s activities, 2) identified the risks of serious climate-related harms as outlined in the 2018 IPCC special report¹⁸¹, and 3) undertook action to *align* the company’s activities with the Paris Agreement goals,¹⁸² e.g., adopting a transition plan. In *Notre Affaire à Tous et al. v. BNP Paribas* the plaintiffs alleged that BNP’s vigilance plan lacked binding commitments, an identification of the risks of its financed activities, and a commitment to stop financing fossil fuels, and thus that it lacked the means to respect the Paris Agreement.¹⁸³

Indeed, CSDDD “climate transition plans” are undeniably a strategic, not risk mitigation, tool. They are included as part of “strategy and business model” disclosures in the CSRD, and the CSDDD also characterises it as part of “strategy”.¹⁸⁴ Are they an exception, or part of an attempt to re-purpose due diligence as a hybrid between risk management and strategy?

A contextual analysis suggests that transition plans are an exception. Transition plans’ special treatment is in line with climate’s unique setting, which favours its forward-looking, goal-oriented treatment, based on global warming “scenarios”, emissions “targets”, or decarbonization “pathways” or “trajectories”. Furthermore, the CSDDD makes scant reference to

¹⁸¹ INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (IPCC), *Global Warming of 1.5 °C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty*, Cambridge (UK), Cambridge University Press, and New York, 2019, online: <https://www.ipcc.ch/site/assets/uploads/sites/2/2022/06/SR15_Full_Report_LR.pdf>.

¹⁸² *Notre Affaire à Tous and Others v. Total*, *supra* note 84.

¹⁸³ *Notre Affaire à Tous Les Amis de la Terre, and Oxfam France v. BNP Paribas*, [2023] Judicial Court of Paris, online: <<https://climatecasechart.com/non-us-case/notre-affaire-a-tous-les-amis-de-la-terre-and-oxfam-france-v-bnp-paribas/>>.

¹⁸⁴ Article 1(1)(c), 6(3), and 22 recitals (10), (11), (21), (73) CSDDD.

due diligence as a strategic tool. Yes, under the CSDDD a company, as part of its duty to bring adverse impacts to an end, may have to make “modifications of, or improvements to, the company’s own business plan, overall strategies and operations”.¹⁸⁵ However, this is the kind of targeted (closed-end) intervention characterizing risk management, rather than an attempt to turn due diligence into something else.

And yet, if one broadens the contextual analysis, there are also signs that the EU legislature’s tries to “nudge” companies to use due diligence as an open-ended, goal-oriented process that one associates with corporate strategy. The CSDDD states, in Article 9(3) that a company’s right to prioritise between adverse impacts means that “[o]nce the most severe and most likely adverse impacts are addressed [...] within a reasonable time, the company shall address less severe and less likely adverse impacts”, a philosophy of constant improvement and goal-setting.

This intent is even clearer if one looks at the CSRD, with which the CSDDD is linked. The CSRD approach was partly inspired by the TCFD Recommendations on *climate-related* disclosures, which comprised metrics and targets and risk management, as well as *strategy and governance*.¹⁸⁶ Thus, CSRD disclosures comprise (letter (a)) the entity’s *business model and strategy*, including resilience to sustainability matters, sustainability *opportunities*, the entity’s *transition plan*, the involvement of stakeholders, or the strategy’s implementation on sustainability matters.¹⁸⁷ Then come (letters (b)-(e)) disclosures of *time-bound targets*, the role of management bodies in sustainability matters, the company’s sustainability policies, or incentive schemes;¹⁸⁸ then (letters (f)-(g)) disclosure of due diligence processes and sustainability risks. Thus, while due diligence is presented next to risk management, it is not insulated, but presented as part of a continuum of items that express an affirmative, goal-oriented, strategic view of sustainability.

CSRD Level 2 rules bring this point home, since its ESRS 1 (General Requirements) states that ESRS 2 (General Disclosures) shall ensure that

¹⁸⁵ Articles 10(2)(d) and 11(3)(e) CSDDD. See also recitals (46) and (54) CSDDD.

¹⁸⁶ TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES (TCFD), *supra* note 86.

¹⁸⁷ Article 19a(2)(a)(i)-(v) of the Accounting Directive, as amended by the CSRD.

¹⁸⁸ Article 19a(2)(b)-(e) of the Accounting Directive, as amended by the CSRD.

the firm reports on “(a) embedding due diligence in governance, strategy and business model”.¹⁸⁹

The CSRD does not impose conduct duties, nor presumes that firms must incorporate sustainability goals into their strategy.¹⁹⁰ It requires disclosure of sustainability “impact, risks and opportunities” (IRO) in business strategy, in line with the CSRD’s “double materiality” approach on risks (outside-in) and impacts (inside-out),¹⁹¹ but not more, in contrast with the treatment of transition plans as a strategic, goal-oriented tool.¹⁹²

However, the CSRD Level 2 European Sustainability Reporting Standards (ESRS) suggest otherwise. ESRS 1 (General Requirements) states that “due diligence” processes are key to identify the “impact, risks and opportunities” (IRO) that are closely linked to strategy and business model disclosures,¹⁹³ and also emphasizes the interconnectedness of all elements of sustainability reporting.¹⁹⁴ ESRS 2 (General Disclosures) reporting requirement for strategy and business model (SBM) number 1 (SBM-1) is titled “Strategy, business model and value chain”. The description of “business model and value chain” comprises “(b) its outputs and outcomes in terms of current and expected benefits for customers, investors and other stakeholders”.¹⁹⁵

The Level 2 more specific standards on climate change (ESRS 1), pollution (ESRS E2), etc., include more granular reporting requirements and

¹⁸⁹ ESRS 1, para. 61. This embeddedness includes “ESRS 2 SBM-3: Material impacts, risks and opportunities and their interaction with strategy and business model”. The ESRS 1, para. 61 refers to UN Guiding Principle 16 and its commentary; UNITED NATIONS HUMAN RIGHTS (OFFICE OF THE HIGH COMMISSIONER), *The Corporate Responsibility to Respect Human Rights. An Interpretive Guide*, 2012, online: <https://www.ohchr.org/sites/default/files/Documents/Publications/HR.PUB.12.2_En.pdf>, Questions 21 and 25, as well as OECD Guidelines, Chapter II on General Policies (para. A.10), and Chapter IV on Human Rights (para. 4; and para. 44 of the Commentary); and OECD Due Diligence Guidance, Section II (1.1 and 1.2) and Annex, Questions 14 and 15, as authoritative precedents. However, this can be misleading, since these do not require a similarly precise and comprehensive “embeddedness” into governance, strategy and business model.

¹⁹⁰ Articles 19a(2) and 29a(2) letter (a)(i)-(ii) CSRD.

¹⁹¹ Recitals (29), articles 19a(1) and 29a(1) CSRD.

¹⁹² Article 19a(2) and 29a(2) letter (a)(iii) CSRD.

¹⁹³ CDR 2023/2772, ESRS 1 (General Requirements), nos. 58-59.

¹⁹⁴ CDR 2023/2772, ESRS 1 (General Requirements), no. 123.

¹⁹⁵ CDR 2023/2772, ESRS 2, no. 42(b).

Application Requirements (AR – guidance to comply with reporting requirements). Many of them combine references to “value chains” with an emphasis on “strategy”, “policies”, “target setting”, etc. This is (unsurprisingly) the case for climate change, where transition plan disclosures include “levers” and “changes”,¹⁹⁶ but “biodiversity” (ESRS E4) follows close on its steps, by requiring disclosures of (i) how biodiversity and ecosystem impacts, dependencies, risks and opportunities originate from and trigger adaptation of business strategy and business model (emphasis added);¹⁹⁷ or (ii) the “resilience” of the business model and strategy in relation to biodiversity and ecosystems, including its value chain,¹⁹⁸ and (iii) its “biodiversity transition plan”.¹⁹⁹ Other “strategic” nudges can also be found for “pollution” (ESRS E2) with disclosures of “policies”²⁰⁰ and “engagements” through the supply chain,²⁰¹ or “targets”,²⁰² or “water and marine resources” (ESRS E3) with reporting of “(c) commitment to reduce material water consumption in areas at water risk in its own operations and along the upstream and downstream value chain”.²⁰³ Beyond environmental standards, the ESRS S2 (“Workers in the Value Chain”) requires reporting of “how the interests, views, and rights of its value chain workers could be materially impacted by the undertaking, including respect for their human rights, inform its strategy and business model”,²⁰⁴ as well as “material positive impacts”.²⁰⁵

The CSDDD due diligence requirements are very demanding. The CSRD data points are mind-boggling. However, the CSRD allows firms to report only on “material” aspects and provide reasons in cases where they

¹⁹⁶ The disclosure of the transition plan should include an explanation of decarbonization levers, changes in product or service portfolio, and adoption of new technologies “in its own operations, or *the upstream and/or downstream value chain*,” (emphasis added): CDR 2023/2772, ESRS E1, nos. 14 and 16(b).

¹⁹⁷ CDR 2023/2772, ESRS E4, no. 11.

¹⁹⁸ CDR 2023/2772, ESRS E4, no. 13, especially letter (b).

¹⁹⁹ CDR 2023/2772, ESRS E4, no. 15.

²⁰⁰ CDR 2023/2772, ESRS E2, no. 15, e.g., “substituting and minimizing substances of concern” and “phasing out substances of high concern”.

²⁰¹ CDR 2023/2772, ESRS E2, AR no. 13.

²⁰² CDR 2023/2772, ESRS E2, AR no. 19: “The targets may cover the undertaking’s own operations and/or the value chain.”

²⁰³ CDR 2023/2772, ESRS E3, no. 12(c).

²⁰⁴ CDR 2023/2772, ESRS S1, no. 9.

²⁰⁵ CDR 2023/2772, ESRS S1, no. 11(d), 31(b) and 39(b).

have not adopted policies, actions or targets for a specific sustainability matter.²⁰⁶

This presents companies – and society – with a stark choice: if the CSDDD and CSRD are interpreted uncompromisingly, firms will be judged for every omission and will likely respond by “ticking all the boxes” and offering expanded justifications to limit their liability. This is unlikely to lead to meaningful change. If the CSDDD due diligence is seen in strict risk-management terms, companies will prioritize certain adverse impacts and lay clear plans to prevent and end them, and, under the CSRD, they will explain, in transparent terms, what they have prioritized, and why, while stakeholders, customers and investors will assess whether the trade-offs are justified. If the CSDDD intelligence is given further use under CSRD, to help firms embed sustainability into its corporate strategy, firms will need to prioritize even more. A strategy cannot “define” a company unless it encompasses few goals, and clear plans to meet them. Firms will actively engage with stakeholders, customers and investors when deciding how to prioritize. This could turn the CSDDD and CSRD into transformational texts, incentivising firms to invest in processes and technology to gather intelligence and generate value. However, this is only possible if the CSDDD/CSRD tandem has a clear value proposition based on positive incentives.

However, there is little evidence to support this expectation. The preparatory Study on Due Diligence has a section on “Incentives for undertaking due diligence”,²⁰⁷ which includes the results of a survey. It shows that a majority of businesses and industry organisations identify as the three main incentives “reputational risks” (66,19% and 65,52%), “investors requiring a high standard” (51,08% and 55,17%) and “consumers requiring a high standard” (46,76% and 55,17%). Members of civil society and NGOs, for their part, highlight as the main incentives “regulation, and fines” (87,10%), “judicial oversight” (69,89%) and “risk of litigation” (66,67%) as the three main incentives.

The Report highlights these contrasting views.²⁰⁸ However, it does not point that “investors demanding a higher standard” was the *only* incentive

²⁰⁶ CDR 2023/2772, ESRS 1, no. 33, ESRS 2, nos. 62, 72.

²⁰⁷ Study on Due Diligence, *supra* note 5, p. 89-90.

²⁰⁸ *Ibid.*, p. 90. The Report attributed this contrast to the fact that businesses and industry organizations were thinking about potential threats at the moment when the survey

where both a majority of representatives from businesses (51,08%) and industry organisations (55,17%) and from civil society/NGOs (64,52%) agreed about its importance.

Crucially, the report combines a quantitative study of costs, which makes a great effort to provide concrete estimates,²⁰⁹ with a section on benefits that, by its own admission, “is based on a literature review as well as on the survey results from the business survey” and “mainly discuss qualitative aspects”.²¹⁰ There is also a divergence between the literature, which highlights benefits on brand and image reputation, human resources, operational efficiency, and financial and stock performance,²¹¹ i.e., traditional drivers of value creation, and the survey views, where businesses highlight as benefits “supply chain certainty”, “legal certainty”, “leverage over non-EU suppliers provided by a mandatory standard” and “levelling the playing field”,²¹² i.e., “defensive” aspects. The Report also candidly acknowledges the uncertainty about companies’ withdrawal from risky non-EU markets,²¹³ and the costs of mandatory due diligence on SMEs.²¹⁴

Thus, the preparatory study illustrates the narrative pervading the CSDDD, and the CSRD. Their vision is to become “strategic” value-creation tools; their reality is “regulatory”, i.e., a source of economic costs in exchange for non-economic benefits. If the Directive seeks to be a source of transformation, and not red tape, more precision is needed on due diligence as a source of long-term value creation. This requires better quantitative estimates, and engagement with business and industry. Otherwise, as costs begin to bite, pressure will mount to water down the requirements.

was conducted (where there were few mandatory “conduct” regulations on due diligence), while members of civil society and NGOs were, in a way, advocating for a future regulation.

²⁰⁹ *Ibid.*, p. 401-448.

²¹⁰ *Ibid.*, p. 448.

²¹¹ *Ibid.*, p. 450.

²¹² *Ibid.*, p. 460-461, Table 8.44.

²¹³ *Ibid.*, p. 439.

²¹⁴ *Ibid.*, p. 467, table 8.45. If mandatory due diligence was imposed on every company, even assuming a 10% reputation-induced revenue growth positive impacts would be expected only in construction (7% increase), wholesale and retail trade, repair of motor vehicles and motorcycles (8%) and administrative services (3%), while negative effects are expected in mining (-20%), electricity (-34%) transportation (-20%), or information and communication (-39%) among others.

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The Corporate Sustainability Due Diligence Directive (CSDDD) is a hotly debated measure with a contentious and protracted legislative process. Unfortunately, much of the discussion has focused on isolated provisions rather than the broader implications of the text.

The CSDDD is a consequential piece of legislation. It goes beyond “narrower” texts, limited to slavery and forced labor, by including a long list of protected interests, and much further than “disclosure” texts, by imposing conduct duties. Whether this leads to positive or negative outcomes will depend on factors beyond the Directive itself.

First, by *broadening* the scope of protected interests it places great importance on the process of prioritizing between impacts. This requires *expertise* in competent authorities and courts to sensibly assess companies’ choices and challenge them where they are found wanting. It is unclear whether Member States will ensure this.

Second, by *coupling* substantive obligations with sanctions and liability, the Directive may entrench adversarial dynamics between firms and stakeholders. Better results, however, can follow from engagement. To foster such engagement, though, there must be an incentive for companies, who must see it as a way to limit the risk of liability, and civil society organizations, who must decline the more newsworthy confrontation in favor of the more discrete engagement.

Third, although the CSDDD presents due diligence as part of risk management, read in conjunction with other texts, like the CSRD, the EU legislator “nudges” due diligence and sustainability into corporate strategy. This requires shifting the CSDDD’s incentive structure and narrative away from mere cost internalization toward innovation and long-term value creation. Exploring how firms can leverage greater supply chain knowledge to improve efficiency requires engaging businesses, allowing them to prioritize, and being honest about the trade-offs.

None of this will be easy. Yet the alternative – a massive source of red tape prompting firms to withdraw from certain jurisdictions – would be considerably more detrimental.