



CORPORATE SUSTAINABILITY DUE DILIGENCE DIRECTIVE AND ESG

What European Lawyers Need to Know

7 November 2024

09:00-11:00 CET

Zoom Webinar



Co-funded by the European Union

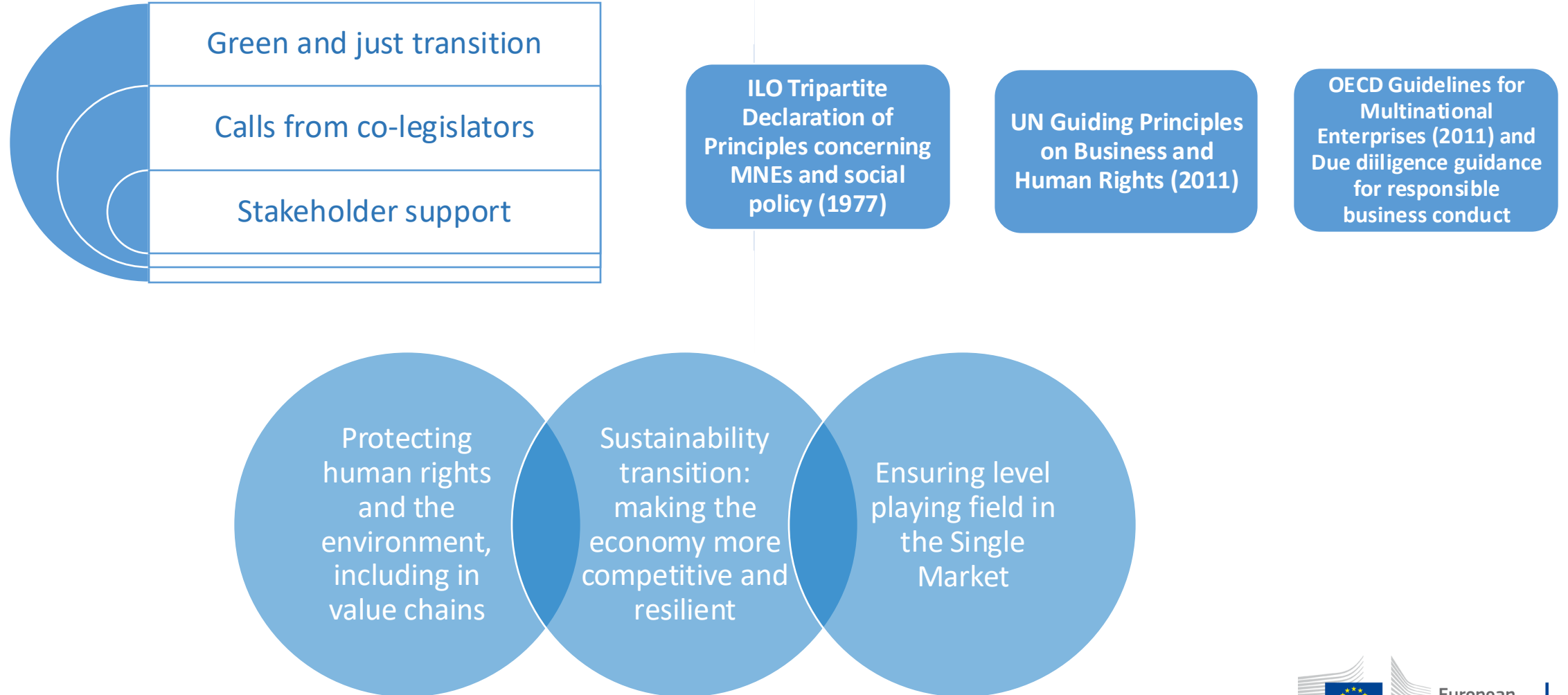


Directive on Corporate Sustainability Due Diligence (CSDDD)

WHAT?

Duty for companies in scope to **identify** and **address** potential and actual **adverse human rights and environmental impacts** in their **own operations**, those of their **subsidiaries** and, where related to their chain(s) of activities, those of their **business partners**

WHY?



PERSONAL SCOPE

PERSONAL SCOPE		"Anti-circumvention" / Level playing field
For each of the last two consecutive financial years	EU COMPANIES: LARGE LLCs & PARTNERSHIPS > 1 000 employees and > €450 million net worldwide turnover	1. Groups of companies <ul style="list-style-type: none"> ultimate parent company of group reaching the thresholds on consolidated basis 2. Franchising or licensing agreements <ul style="list-style-type: none"> royalties >€22.5 million, and net turnover >€80 million ww/in the EU (either alone or as ultimate parent company of a group)
	NON-EU COMPANIES: COMPARABLE FORM Duty to designate and notify representative empowered to cooperate with supervisory authorities > €450 million of net turnover in the EU (=link to the EU market)	

Companies outside scope (in particular SMEs): no duties, no public enforcement/sanctions and no liability under the Directive

MATERIAL SCOPE (I): ADVERSE IMPACTS

Human rights impacts

- **List of human rights** (recognised by listed 'global' international conventions) (Annex, Part I, Section 1)
- **Additional human rights** recognised by one of the 'global' international conventions, under certain conditions (Annex, Part I, Section 2)

Environmental impacts

- **List of prohibitions and obligations** set out in intl environmental instruments (Annex, Part II) – exhaustive
- **Environment-related human rights** (Annex, Part I, Section 1, points 15, 16)

MATERIAL SCOPE (II): CHAIN OF ACTIVITIES

UPSTREAM

- **Activities of a company's upstream business partners related to the production of goods or the provision of services** by that company
- Including design and development, sourcing (extraction, supply of raw materials, manufacture), transport and storage

DOWNSTREAM

- **Activities of a company's downstream business partners related to the distribution, transport and storage of a product** of that company
- Only where the business partner carries out those activities **“for the company or on behalf of the company”**
- **Not: financial services** (COM to evaluate within 2 years need for due diligence requirements tailored to financial sector)

WHICH DUTIES? (I)

CORPORATE DUE DILIGENCE

General principles:

- *Risk-based approach*
- *“Appropriate measures”: effective, reasonably available & proportionate, considering all circumstances (incl. level of involvement, ability to influence and risk factors)*
- **Integration of due diligence (DD) into company’s policies and risk management systems;** specific **DD policy** (including code of conduct)
- **Identification, assessment** and, where necessary, **prioritization** of actual or potential adverse impacts
 - **Broad mapping → in-depth assessment** – using appropriate resources (incl. independent reports); prioritization of information from business partners at the level of the chain of activities where adverse impacts are most likely to occur
 - **Prioritization** based on severity and likelihood of impacts (where not all can be addressed at the same time to their full extent)

WHICH DUTIES? (II)

CORPORATE DUE DILIGENCE

- **Appropriate measures to prevent/mitigate** potential impacts or **bring to an end/minimize the extent** of actual impacts
 - Prevention/corrective **action plan** (in complex cases), **contractual assurances** on fair & reasonable terms, (non-)financial **investments, modifications** to strategies/operations (incl. design, purchasing and distribution practices), **support** for SMEs (incl. capacity building, training, financial support), **collaboration** with other entities
 - In case of actual adverse impact that company (jointly) caused: also **remediation**
 - Only as a **last resort: temporary suspension** or **termination** of the business relationship (only in case of severe impacts); prior assessment if adverse impact of termination more severe than the adverse impact to be addressed
- **Meaningful stakeholder engagement** (only) at certain DD stages, **complaints procedure** (for affected persons, trade unions, envtl CSOs) and **notification mechanism** (incl. anonymously)
- **Monitoring the effectiveness** of due diligence and **public reporting** (CSRD)

WHICH DUTIES? (III)

CLIMATE CHANGE TRANSITION PLAN

Transition plan for climate change mitigation

- All companies, incl. financial sector
- To ensure **compatibility of business model/strategy with limiting global warming to 1.5°C in line with Paris Agreement / targets of European Climate Law** (incl. net zero by 2050)
- **Minimum content:** incl. time-bound targets (incl. absolute GHG reduction targets for Scope 3, where appropriate), decarbonization levers, key actions and financing
- **Duty to adopt, put into effect and update every 12 months;** implementation is obligation of means (“best efforts”)
- Adoption duty “deemed to” be fulfilled in case of compliance with CSRD
- **No liability** under the Directive

ENFORCEMENT

Administrative supervision

- **Independent supervisory authorities** with adequate **investigatory** powers (incl. inspections) and **enforcement** powers (incl. injunctions and penalties), acting based on **complaints** or **on their own motion**
- **European Network of Supervisory Authorities** to ensure EU-level **coordination** and **cooperation**
- **Proportionate and dissuasive penalties**, incl. in the form of fines (minimum cap $\geq 5\%$ of the company's net worldwide turnover)

Civil liability

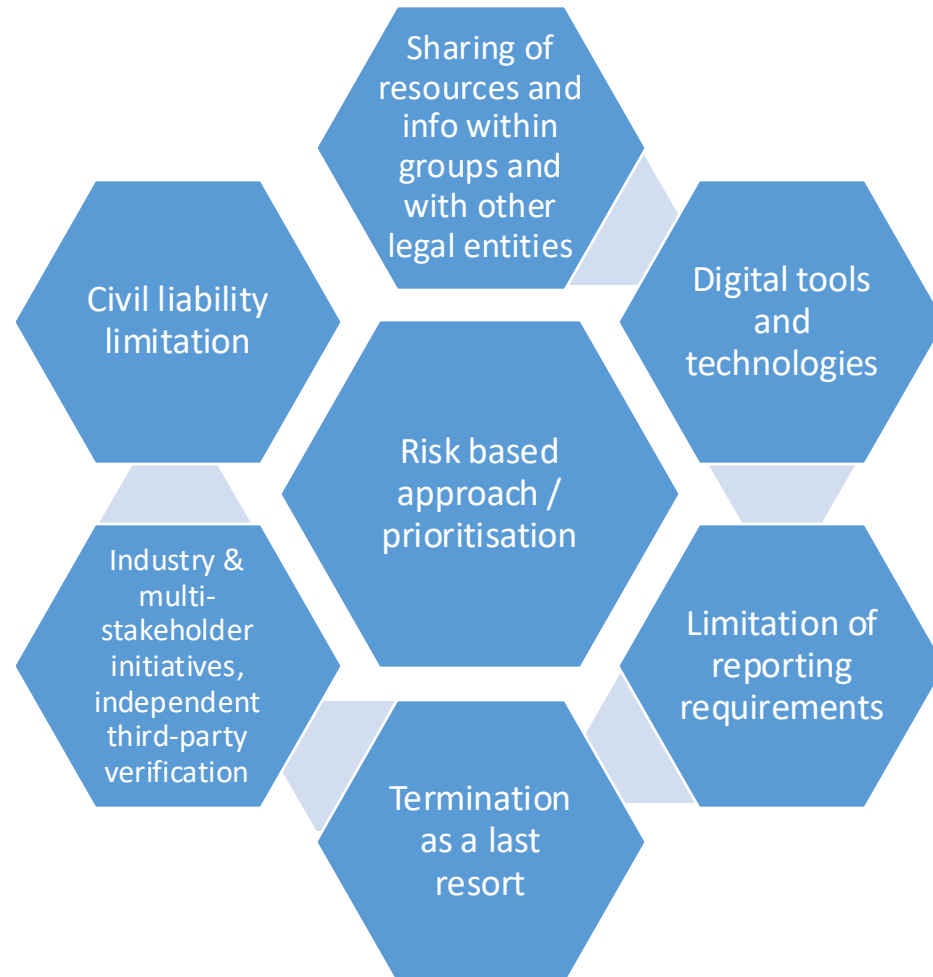
- Where harm to a person's **legal interests protected under national law** is caused by **intentional or negligent failure to comply with DD obligations** under **Arts 10, 11**
- Company **not liable** if the damage is caused only by business partner(s) in its chain of activities
- **Access to justice safeguards:** (i) limitation period of at least 5 years, (ii) representative action, (iii) power for courts to require disclosure of evidence, (iv) injunctive powers for courts, (v) no prohibitive costs

Impacts in a nutshell

- **Human rights protection**, including better working conditions, living wages and income
- **Protection of the environment** (as part of the protection of individuals & as a public good)
- **Empowerment** of local communities and other stakeholders (meaningful engagement with companies in scope)
- **Increased competitiveness** of companies (resource efficiency, access to finance, protection against risks, innovation, etc.) + support and capacity-building for companies in value chains
- Driving the **sustainability transition** (incl. climate change mitigation)

Helping companies comply

Burden limitation for companies in scope



Safeguards to limit trickle-down effect on SMEs

Risk-based approach, incl. for in-depth assessment

Requesting information directly from where impact is most likely to occur

Adaptation of purchasing practices

Investment duty

Targeted and proportionate support, incl. financial

Fair, reasonable and non-discriminatory contract terms

No passing-on of costs of verification, possibility to re-use reports

(Financial) support (MS, EU)

Information and capacity-building

SUPPORT (I)

Guidelines

How to conduct due diligence, in particular identification, prioritization, adaptation of purchasing practices, responsible disengagement, remediation, engagement with stakeholders

Climate transition plans

Sector-specific guidance

Assessment of **risk factors**, incl. those associated with conflict-affected and high-risk areas

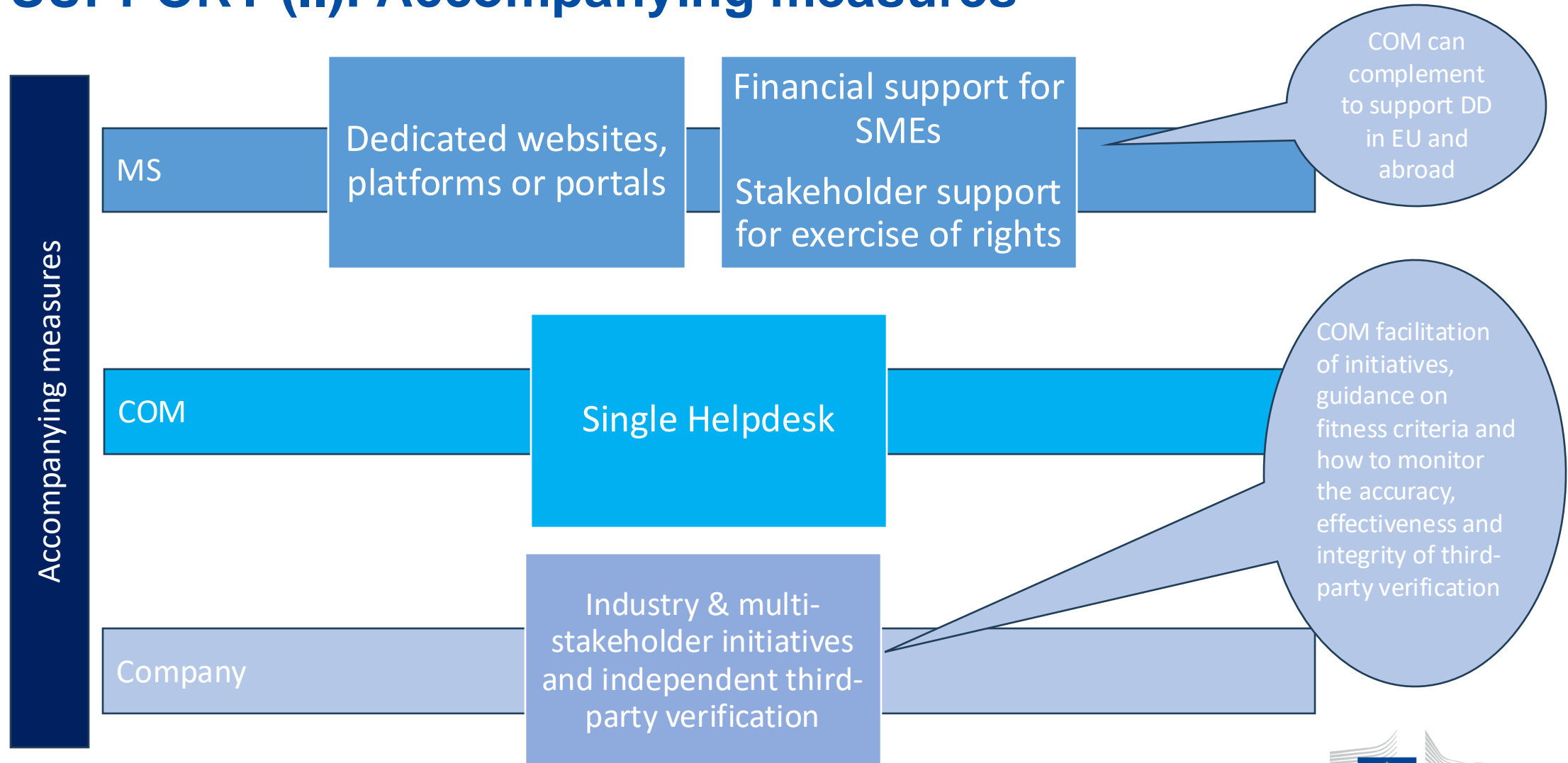
Data/information sources for carrying out DD duties, guidance about **digital tools** to facilitate and support compliance

Ways how to share resources and information

Information for stakeholders on **how to engage**

Model contract clauses

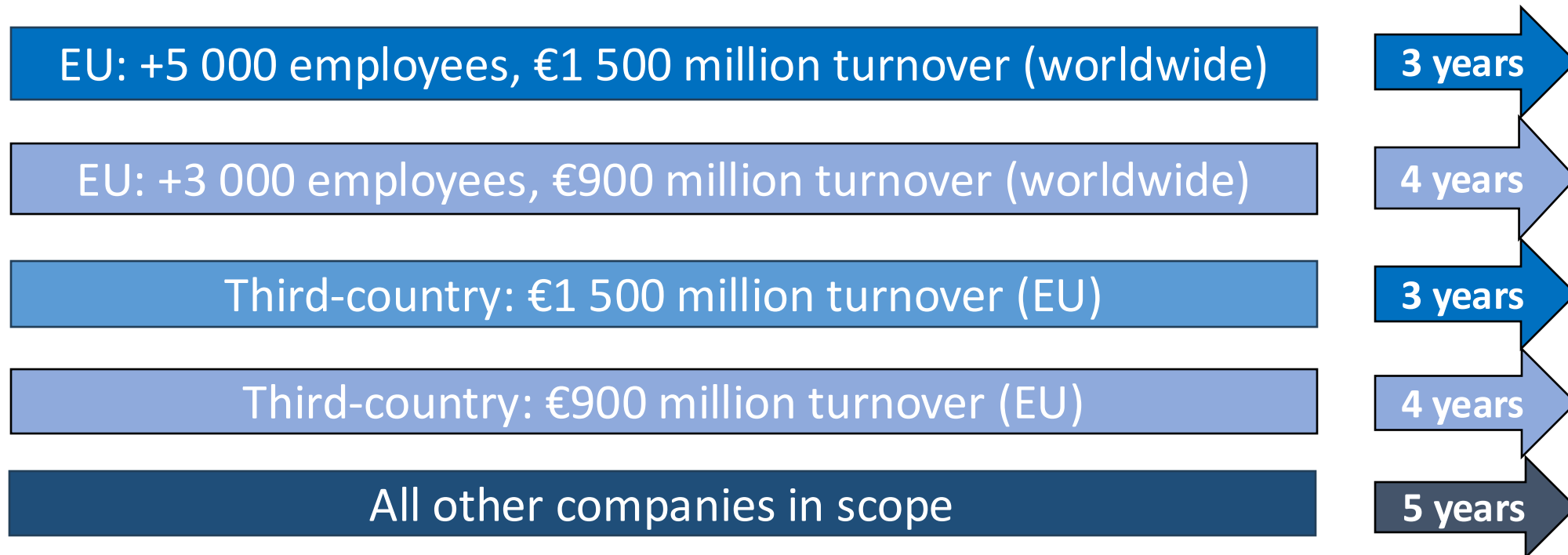
SUPPORT (II): Accompanying measures



Transposition/application periods (Article 37)

Entry into force (24 July 2024) and transposition into national law (26 July 2026)

Entry into application (x years after entry into force):



RESOURCES

Text of the Directive:

https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L_202401760

Frequently Asked Questions:

https://commission.europa.eu/document/download/7a3e9980-5fda-4760-8f25-bc5571806033_en?filename=240719_CSDD_FAQ_final.pdf



CORPORATE SUSTAINABILITY DUE DILIGENCE DIRECTIVE AND ESG

What European Lawyers Need to Know

Jean-Marc Gollier

CSDDD – lawyers' practice and ESG advice

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Looking at the profession

CSDDD and the legal profession,
introductory thoughts

CSDDD could be directly applicable to law firms but



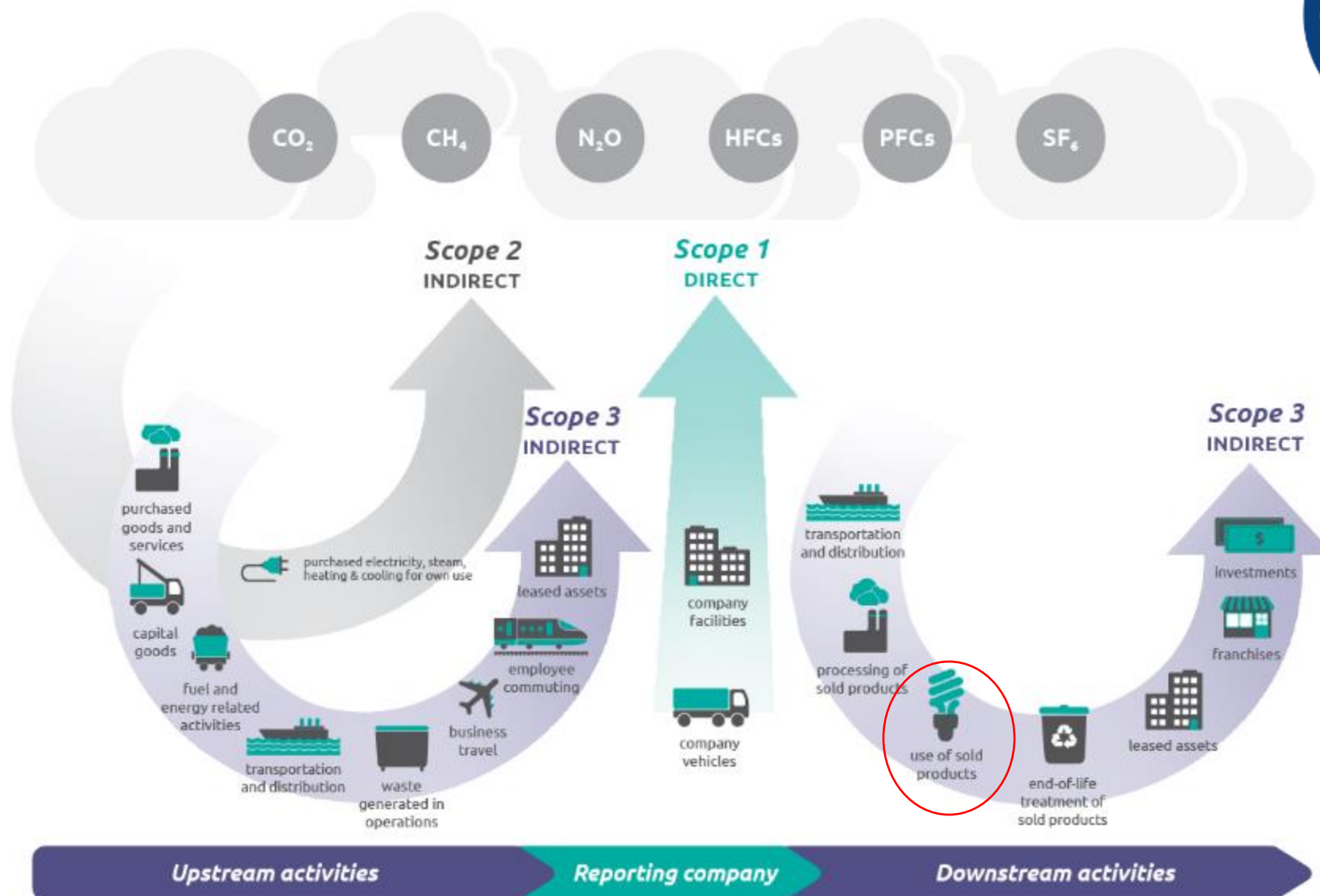
- CSDDD could only be directly applicable (if any) to the *chain of activities* of (very big) law firms (companies/?partnerships?), but not to their *value chain* as a whole.
- It is not directly applicable to (small and medium) law firms with
 - less than 1 000 'employees' (enlarged definition) or
 - less than 450 mln€ turnover!
- It is not directly applicable to individual lawyers.

Value chain / Chain of activities (ESRS Glossary DR 2023/2772)



Supply chain (ndlr: most of the ‘chain of activities’ corresponds to the ‘supply chain’)	<p>The full range of activities or processes carried out by entities upstream from the undertaking, which provide products or services that are used in the development and production of the undertaking’s own products or services. This includes upstream entities with which the undertaking has a direct relationship (often referred to as a first-tier supplier) and entities with which the undertaking has an indirect business relationship.</p>
Value chain (ndlr: concept used by the UNGP and the OECD MNE principles)	<p>The full range of activities, resources and relationships related to the undertaking’s business model and the external environment in which it operates.</p> <p>A value chain encompasses the activities, resources and relationships the undertaking uses and relies on to create its products or services from conception to delivery, consumption and end-of- life. Relevant activities, resources and relationships include:</p> <ol style="list-style-type: none">those in the undertaking’s own operations, such as human resources;those along its supply, marketing and distribution channels, such as materials and service sourcing and product and service sale and delivery; andthe financing, geographical, geopolitical and regulatory environments in which the undertaking operates. <p>Value chain includes actors upstream and downstream from the undertaking. Actors upstream from the undertaking (e.g., suppliers) provide products or services that are used in the development of the undertaking’s products or services. Entities downstream from the undertaking (e.g., distributors, customers) receive products or services from the undertaking. ESRS use the term “value chain” in the singular, although it is recognised that undertakings may have multiple value chains.</p>

Figure [1.1] Overview of GHG Protocol scopes and emissions across the value chain



Source: Greenhouse Gas Protocol, *Corporate Value Chain (Scope 3) Accounting and Reporting Standard* (September 2011)

CSDDD and the legal profession



- Lawyers and financial intermediaries are in a comparable position:
 - ✓ “**financed** emissions”, “financed polluting activity”, “financed impacts on human rights”
 - ✓ “**advised** emissions”, “advised polluting activity”, “advised impacts human rights”
- But the lawyer is not an ordinary service provider, he/she is
 - Sometimes described as an “officer of the court” or a “**minister of justice**” (*CCBE Charter of Core Principles of the European Legal Profession* – special thanks to Jonathan Goldsmith for his help to connect with this source),
 - In case of conflict between the interests of the client and the public interest, “*in the last analysis the lawyer can only successfully represent his or her client if the lawyer can be **relied on by the courts and by third parties** as a trusted intermediary and as a **participant in the fair administration of justice**” (*ibidem*).*

CSDDD could be indirectly applicable to lawyers and law firms



- CSDDD could be indirectly applicable to lawyers and law firms as far as they are a ‘business partner’ in the chain of activities of a company falling in the scope of CSDDD
- Recital 43 CSDDD:
 - *“This Directive should be without prejudice to the rules on **professional secrecy applicable to lawyers** or to other certified professionals who are authorised to represent their clients in judicial proceedings, in accordance with Union and national law”*

Is a lawyer a ‘business partner’ of his client?



- Definition (article 3,1 (f) CSDDD)
- “ *‘business partner’ means an entity:*
 - i. *with which the company has a commercial agreement related to the operations, products or services of the company or to which the company provides services pursuant to point (g) (‘direct business partner’); or*
 - ii. *which is not a direct business partner but which performs business operations related to the operations, products or services of the company (‘indirect business partner’). ”*

↳ When advising a client or defending a client before the court, is a lawyer a ‘business partner’ of his client? Yes, to the extent the legal profession is a (special) kind of ‘business’

Risks resulting from the possible application of CSDDD to lawyers (1)



- When conducting a due diligence, a company will
 - ↳ send questionnaires to their significant suppliers and service providers to the extend such supplier or service provider qualifies as “business partner” in the meaning of CSDDD and could have an environmental or human rights impact as result of his relation with the company (risk based approach),
 - ↳ the company will request such supplier or service provider to confirm his compliance with the ‘code of conduct’ (article 7.2 (b) CSDDD)

Risks resulting from the possible application of CSDDD to lawyers (2)



- Law firms and lawyers cannot be subordinated to their client:
 - ↳ Answering to a questionnaire is possible as long as it does not infringe the professional secrecy and independence of the lawyer
 - ↳ no disclosure outside the limits of the provision of the legal service:
 - ↳ diversity in the firm,
 - ↳ carbon footprint of the firm,
 - ↳ efforts to limit emissions,
 - ↳ ...
 - ↳ Accepting principles of a client's 'code of conduct' would generally contradict basic principles governing the legal profession
 - ↳ e.g.
 - ↳ independence,
 - ↳ respect for the rule of law and the fair administration of justice.
- External auditors will have no entry into the premises of a lawyer for due diligence



Looking at the professional practice

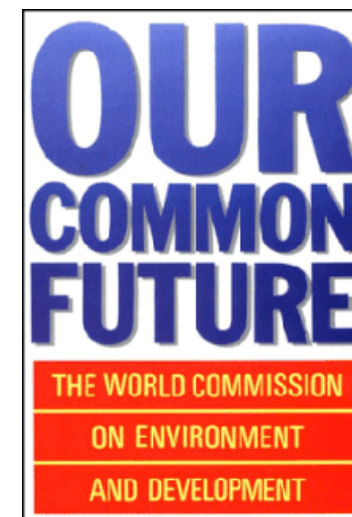
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Is CSDDD a bridge too far?



Special Report Europe's Climate Leaders
EU business regulation
Companies count the cost of compliance with green regulation
Is the EU recklessly piling on costs for companies? Or simply codifying best practice?

Source: Financial Times May 16
2024

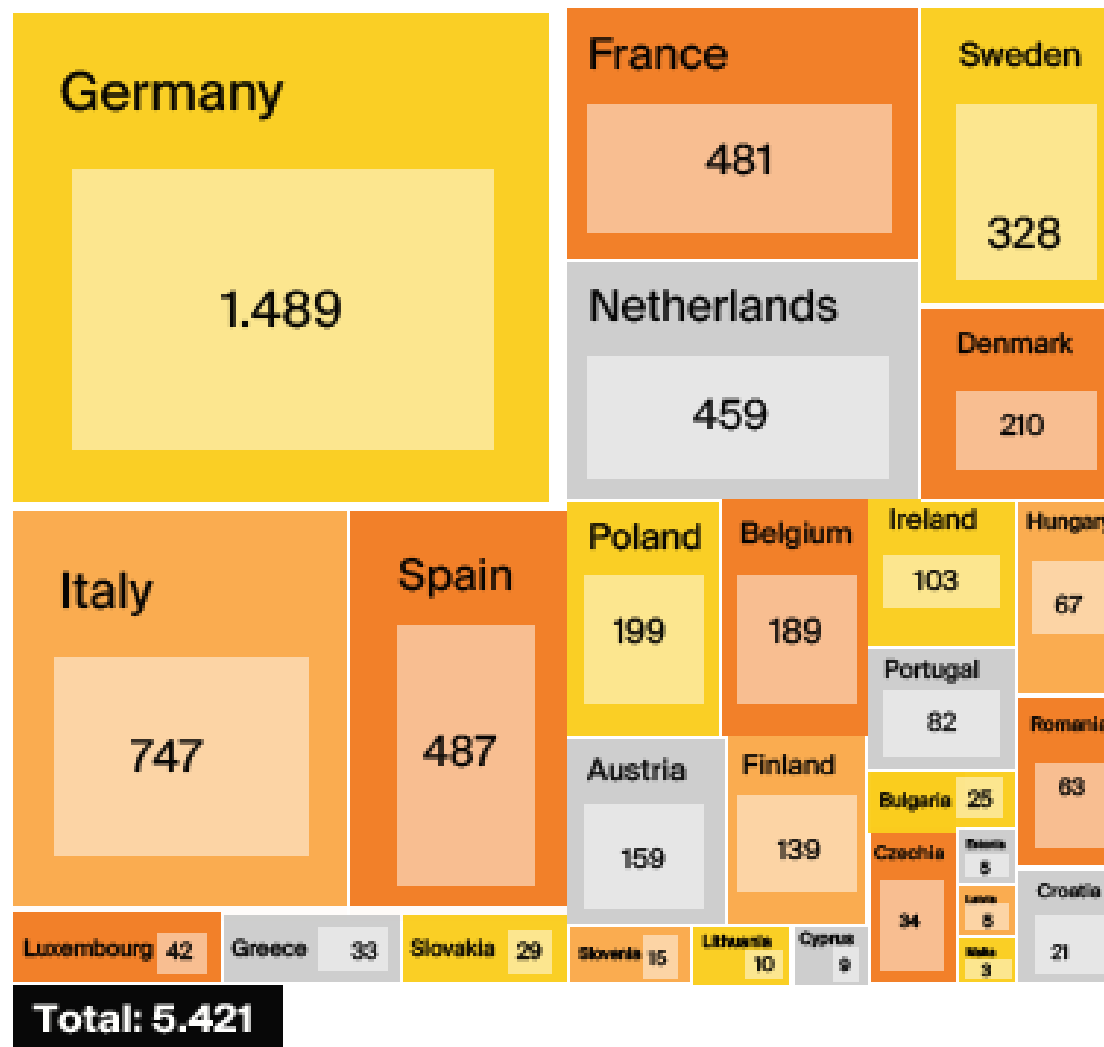


1972

UN
Brundtland
report
1987

UN
"SDG
2030 Agenda"
2015

Answer to the question: No, our economies are on an unsustainable path (Brundtland (1987), IPCC (AR6 2023), IPBES (2019))



Source: European Coalition for Corporate Justice (May 2024), *Overview of the Corporate Sustainability Due Diligence Directive*

Is a Rana Plaza collapse acceptable?



Child Labour (UK, 19th century)



Deforestation (in Mexico)

Source: Wikipedia



Pollution (in the Niger Delta)



Rana Plaza, 2013 (death toll of 1,134. Approximately 2,500 injured people)

Role of the lawyer in complying with the due diligence obligations?



- Building a Robust Due Diligence Framework to address supply chain risks and ensure compliance, is driven by:
 - Active engagement with diverse stakeholders (e.g., farm workers, suppliers, customers)
 - Responding to changing customer demands & expectations
 - Adapting to evolving EU regulatory requirements & national laws
- Continuous Cycle of identifying, preventing, and addressing supply chain risks

Source: OECD Due diligence guidance for responsible business conduct (2018)

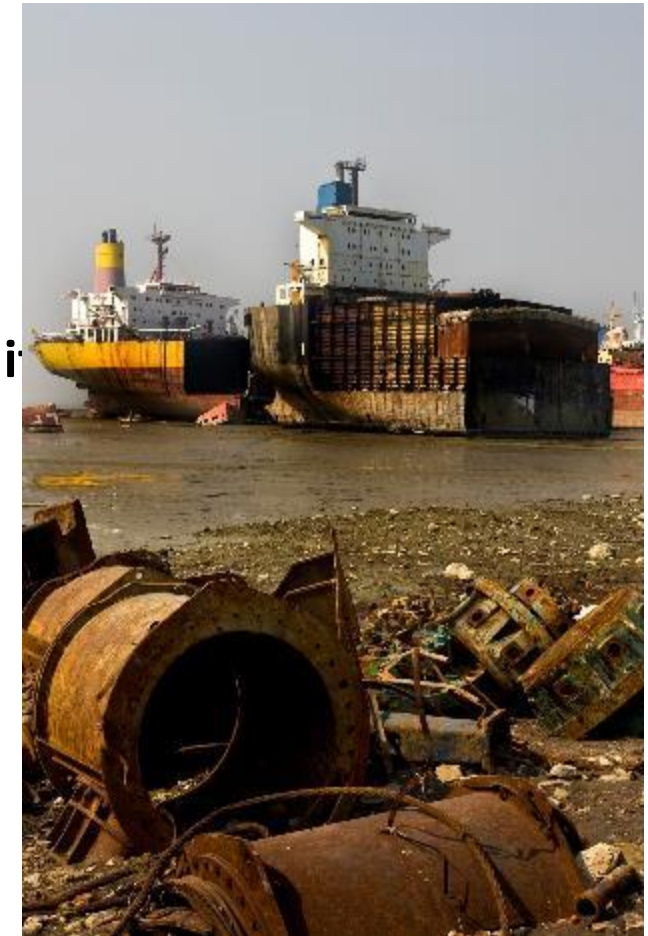
CSDDD source of liability (precedents)



- Case law (“duty of care”):
 - Vedanta v/ Lungowe (UK, Supreme Court, 2019)
 - Maran v/ Begum (UK, Appeal Court E&W, 2021)
 - Shell v/ Oguru (NL, Gerechtshof Den Hague, 2021)

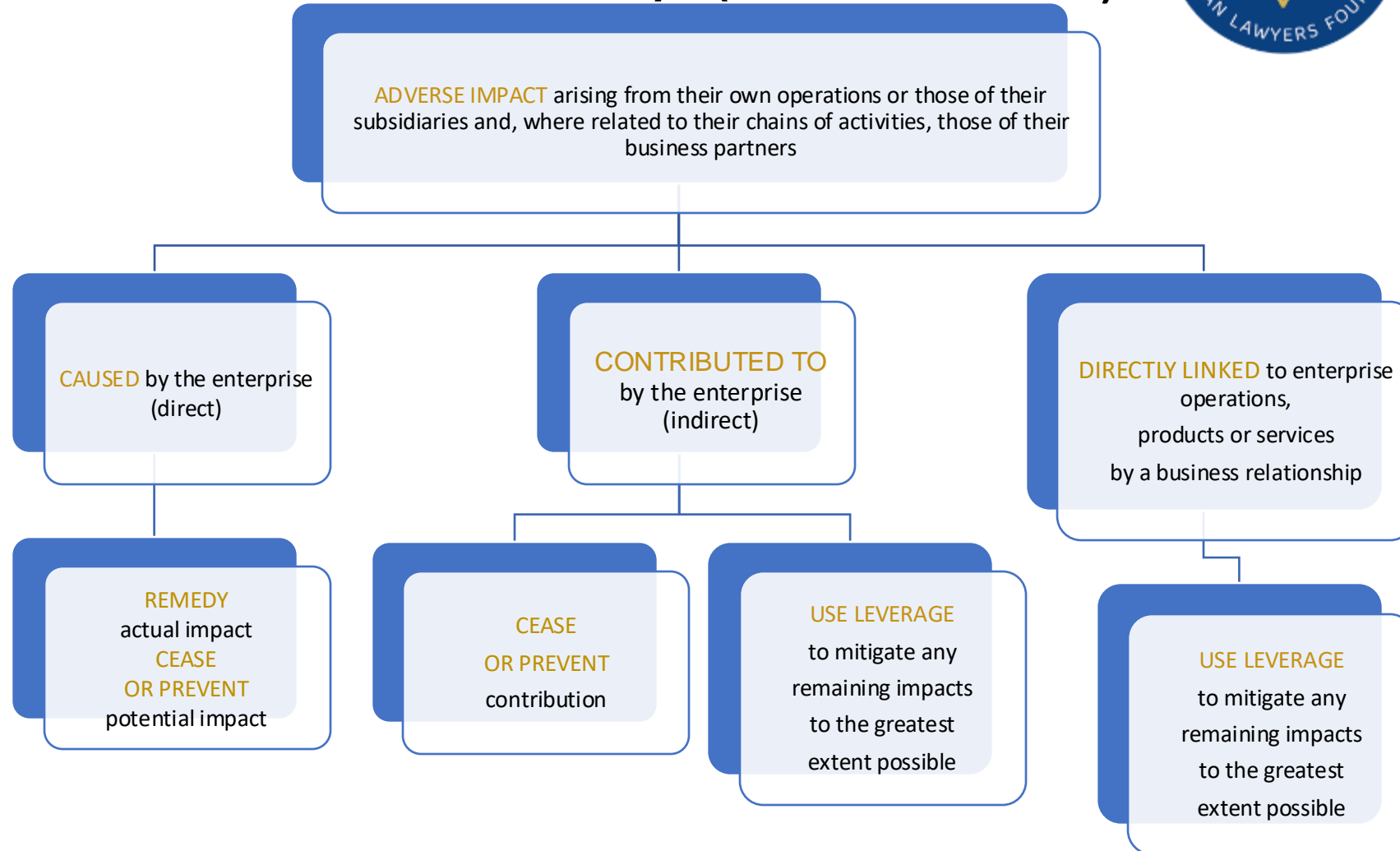
↪ **CSDDD does not replace liability system but supplements it**

- French “devoir de vigilance” (Act of 27 March 2017)
 - TotalEnergie (EACOP project): 28 February 2023 – inadmissible
 - La Poste: 5 December 2023: injunction to complement the “plan de vigilance”
 - [Around 20 pending cases]
- Other experiences:
 - **UK** ‘modern slavery Act’ (2015),
 - **NL** ‘Wet Zorgplicht Kinderarbeid’ (2019),
 - **Deutschland** ‘Lieferkettensorgfaltspflichtengesetz’ (2021),
 - **USA** ‘Uyghur Forced Labor Prevention Act’ (2021),
 - **Norvège** ‘Åpenhetsloven’ (2022).



Source: Wikipedia, Naquib Hossain from Ottawa, Philadelphia, Dhaka - CTG. Ship Breaking 02Uploaded by jklamo, CC BY-SA 2.0, <https://commons.wikimedia.org/w/index.php?curid=15561441>

CSDDD source of liability (article 29)



Source: OECD Due diligence guidance for responsible business conduct (2018)

Supervisory authorities (article 24)



- Competence:
 - As regards a EU based company: the Member State in which the company has its registered office.
 - As regards a non-EU company: the Member State in which the company has a branch (if no branch or different branches > highest turnover).
- Powers: investigation, injunction, administrative penalties
- ↳ But during the initial implementation period, they will mainly provide (exemple of the German authorities under the LkSG)
 - Assistance to to companies in scope and to SME's ,
 - Issue Guidelines for implementation (article 19),
- Network of EU supervisors (headed by EU Commission – article 28)
- Filing of “substantiated concerns” by any natural or legal person (article 26) (role of the NCP under the OECD Principles for MNE)

Conclusions

- CSDDD is a game changer for business conduct in Europe
- It will impact the legal profession
 - Insofar as service providers could be subject to sustainability questionnaires
 - The filing of 'sustainability claims' (violation of human rights, ILO principles or environmental claims) is facilitated and prevented
 - Prevention of due diligence failures through adequate contractual clauses and monitoring of their respect is important for the business itself
- The creation of a regulatory framework facilitates fair competition and encourages partnerships
- Cooperation between EU-lawyers and local lawyers could be decisive to facilitate the acceptance of the EU-rules in the local communities



CORPORATE SUSTAINABILITY DUE DILIGENCE DIRECTIVE AND ESG

What European Lawyers Need to Know

Dr. Alix Frank-Thomasser

**What kind of lawyers does the CSR-ESG agenda
need and why lawyers should involve?**

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Business lawyers are deeply involved in corporate responsibility – but they could do more



To start, what people *think* lawyers do:

- **Lawyers protect their clients' legal interests** by negotiating for them, preparing documents, providing advice, and representing them in legal proceedings.
- **Lawyers are advocates**—advocates for individuals, groups and organizations who need assistance in interpreting the law or who are in conflict with other individuals or groups. Lawyers are also interpreters of laws and regulations.
- **Lawyers think** - In terms of process, they negotiate, litigate, advise clients.... In terms of product, they draft contracts, write briefs, compose letters, and so on. But behind both process and product, what lawyers most fundamentally do, is think...
- **Lawyers work creatively**....[A] big part of what lawyers do is exploit ambiguity and vagueness in ways that further their client's interests.

Scene: Gage Whitney Pace attorneys, Midtown Manhattan

Female Lawyer: The ships will be registered in Libya and Panama, so they won't be subject to the OPA, which wouldn't allow an American company to keep a tanker like this in service very long.

Sam [also a lawyer with Gage Whitney Pace]: Actually. I have a thing. I have a thing I was going to mention, just a proposal to throw out there...Instead of buying these ships? Don't buy these ships. Buy other ships. Better ships. That's my idea.

Mr. Cameron: But Sam, we want these ships. This is as little as we've ever paid for a fleet.

Sam: Well, there's a reason why they don't cost a lot of money. They're 20-year old single hulled VLCCs that nobody wants. When they hit things, they will break. And they will hit things, because they don't have state of the art navigation systems...

Mr. Loch: Sam, I thought you told us that you covered our liability.

Sam: I did. Strictly speaking, I did. But there's a broader liability to think about. People drove past Exxon Stations after the Valdez.

Mr. Cameron: We've got PR firms for PR problems.

Sam: I think I have an obligation...Maybe they want to buy safer boats, but we never gave them the option.

Mr Gage: Are you trying to get fired?



The evolution of CSR



- Brundtland Report 1987
- EU strategy 2011-14 for Corporate Social Responsibility - CSR as “the responsibility of enterprises for their impacts on society”
- UN Guiding Principles on Business and Human Rights (UNGPR) 2011 “Protect, Respect and Remedy”
- OECD Due Diligence Guidance for Responsible Business Conduct 2018
- MNE Declaration
- The Sustainable Development Goals (SDGs)
- ESG policies and ESG reporting
- Taxonomy Regulation

Recent legal initiatives in CSR



August 2023: ESRS (“European Sustainability Reporting Standards”) adopted by Commission on 31 July 2023.

July 2024: CSDDD

Other regulations:

- European Climate Law (EC) No 401/2009 and (EU) 2018/1999
- Deforestation and forest degradation and repealing Regulation (EU) No 995/2010
- Green Claims Directive
- Nature Restoration Law
- Net Zero Industry Act
- Revision of the Ambient Air Quality Directives
- Environmental Crime Directive

Six strong Reasons for considering the implications of the CSR Agenda for the legal profession



REASON 1

The legal dimensions of corporate responsibility – including litigation with reputational impacts – already implicate the legal profession.

Six strong Reasons for considering the implications of the CSR Agenda for the legal profession



REASON 2

The corporate responsibility agenda raises fundamental questions about the balance between lawyers' ethical responsibilities to individual clients, and their broader responsibilities to serve the interests of justice. Corporate responsibility invites a fresh perspective on the central questions 'what do lawyers do and how can it be justified'?

Six strong Reasons for considering the implications of the CSR Agenda for the legal profession



REASON 3

There are indications that campaign groups who help to drive forward the corporate responsibility agenda are expanding into new focal areas – such as the international development implications of tax avoidance or foreign investment contracts – where lawyers, through their role in negotiating and drafting legal agreements – have a key role in defining the positive and negative impacts of business activities.

Six strong Reasons for considering the implications of the CSR Agenda for the legal profession



REASON 4

In-house business lawyers are already deeply involved in the development of corporate responsibility initiatives and management systems within their employers' businesses. And traditionally it is in-house lawyers within large businesses who lead development and supervise implementation of compliance programs reflecting the business's core values or operating principles.

Six strong Reasons for considering the implications of the CSR Agenda for the legal profession



REASON 5

Corporate responsibility has implications for the way in which business lawyers offer advice and meet their professional responsibilities to clients.

Six strong Reasons for considering the implications of the CSR Agenda for the legal profession



REASON 6

Private 'for-profit' law firms are themselves businesses, and are therefore directly addressed by the corporate responsibility agenda. Many of the business models and reputational and risk management considerations that drive some business responses to the corporate responsibility agenda more widely are equally applicable to professional law firms.

‘[W]hat we ‘do’ is a function of what we ‘are’...
It's important to keep our many hats
in mind because doing so allows us to step
outside of our habitual contextualization
of our job as purely customer service. True,
we spend the overwhelming majority of
our time doing things for clients.. and clients
keep the lights on, but we also owe
allegiance to our courts and the public in
general...



Thomas G. Pirmantgen, J.D., University of Missouri-Columbia (2000), quoted in "Dialogue on Justice: What do Lawyers do?" at <http://www.mobar.org/journal/2002/novdec/prezpage.htm>

‘Ethical lawyers for an unpredictable world:

The relationship you have with your lawyers is based on trust. But could you trust lawyers who are willing to offer advice that’s based on what you want to hear rather than what you should be hearing? We think the answer is no. That’s why Eversheds is guided by strict ethical guidelines. We won’t work for inappropriate clients. We have the ability to say ‘no’ when necessary. And we provide objectivity in all the advice we give. You can trust Eversheds’.



Quote of a one page advertisement of EVERSHEDES in the December 2002/January 2003 issue of the European Lawyer magazine

Law is the codification of basic human values.
The goal of CSR is to implement these values
in corporations, thus CSR develops and
functions in a legal framework.

There is no other professional who both has
such ready access to EU boardrooms and
enjoys legal privilege. As a result, advising on
CSR issues should become an everyday
matter for corporate lawyers



2003 edition of the CCBE Guide for European Lawyers Advising on Corporate Social Responsibility

CSR – A Business CASE



Being a 'responsible' business can make commercial sense:

- ❖ Reputation and Branding Drivers
- ❖ Supply chain pressures
- ❖ Campaign pressure
- ❖ Regulation
- ❖ Gaining and Retaining excellent Work Force
- ❖ Core Business Impacts
- ❖ Social Investment
- ❖ Public Policy Role

Does Your Law Firm Have a Corporate Social Responsibility Program? - <https://www.jaffepr.com/blog/does-your-law-firm-have-corporate-social-responsibility-program>



How will CSR programs benefit law firms?

- ❖ **Image:** A positive brand image increases the likelihood that a consumer will use the firm's "product."
- ❖ **Media coverage:** Getting the word out about donations, employee volunteer programs or other CSR initiatives is a powerful branding tool that can generate positive publicity for a firm and its attorneys.
- ❖ **Recruiting and retention:** One of the greatest benefits of CSR programs is the workplace environment that they foster.
- ❖ **Corporate partnerships:** Another impact a CSR program has on law firms is the opportunity for corporate partnerships. These partnerships not only help the communities served but also build relationships, trust and loyalty among the partnering groups.

THANK YOU for your attention!

A special THANK YOU to the members of the CCBE CSR Committee who - over the past years - contributed to many thoughts raised in my words today.

A further special THANK YOU to Halina Ward, who has - as an independent corporate responsibility analyst – started a very important discussion about Corporate Responsibility and the Business of Law together with the GLOBALT ANSVAR in 2005 and inspired my words of today.



Dr. Alix Frank-Thomasser



CORPORATE SUSTAINABILITY DUE DILIGENCE DIRECTIVE AND ESG

What European Lawyers Need to Know

Andrew Walker KC

Ethical Implications of ESG Obligations for Lawyers and Clients

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The rule of law context

- 1) Duties to clients.
- 2) Duties to the rule of law and the interests of justice.



“In a society founded on respect for the rule of law the lawyer fulfils a special role. The lawyer’s duties do not begin and end with the faithful performance of what he or she is instructed to do so far as the law permits. A lawyer must serve the interests of justice as well as those whose rights and liberties he or she is trusted to assert and defend and it is the lawyer’s duty not only to plead the client’s cause but to be the client’s adviser. Respect for the lawyer’s professional function is an essential condition for the rule of law and democracy in society.”

CCBE Code of Conduct for European Lawyers, Art.1.1



“The lawyer’s role, whether retained by an individual, a corporation or the state, is as the client’s trusted adviser and representative, as a professional respected by third parties, and as an indispensable participant in the fair administration of justice. By embodying all these elements, the lawyer, who faithfully serves his or her own client’s interests and protects the client’s rights, also fulfils the functions of the lawyer in society - which are to forestall and prevent conflicts, to ensure that conflicts are resolved in accordance with recognised principles of civil, public or criminal law and with due account of rights and interests, to further the development of the law, and to defend liberty, justice and the rule of law.”

Commentary on CCBE Core Principles, para.6



CCBE Core Principles [and commentary] (beyond the interests of clients):

a) the independence of the lawyer ...;

[“The lawyer must ... remain independent of his or her own client if the lawyer is to enjoy the trust of third parties and the courts.”]

d) the dignity and honour of the legal profession, and the integrity and good repute of the individual lawyer;

[“To be trusted by clients, third parties, the courts and the state, the lawyer must be shown to be worthy of that trust.”]

i) respect for the rule of law and the fair administration of justice;

[“... the lawyer can be relied on by the courts and by third parties as a trusted intermediary and as a participant in the fair administration of justice.”]



Commentary on Core Principles – hierarchy of duties

e) loyalty to the client

“Some of the most delicate problems of professional conduct arise from the interaction between the principle of loyalty to the client and principles which set out the lawyer’s wider duties – principle (d) (dignity and honour), principle (h) (respect towards professional colleagues) and in particular principle (i) (respect for the rule of law and the fair administration of justice). In dealing with such issues the lawyer must make it clear to the client that the lawyer cannot compromise his or her duties to the court and to the administration of justice in order to put forward a dishonest case on behalf of the client.”

(my emphasis)



Commentary on Core Principles – hierarchy of duties

i) respect for the rule of law and the fair administration of justice

“A lawyer must never knowingly give false or misleading information to the court, nor should a lawyer ever lie to third parties in the course of his or her professional activities. These prohibitions frequently run counter to the immediate interests of the lawyer’s client, and the handling of this apparent conflict between the interests of the client and the interests of justice presents delicate problems that the lawyer is professionally trained to solve.”

(my emphasis)



Some suggestions

1. Law and public policy in areas of reasonable debate should be determined by the institutions with constitutional responsibility for this (democratic parliaments; the judiciary applying constitutions and laws), not by lawyers.
2. The demands or expectations of some sections of society may not be the same as the public interest in any relevant respect.
3. There is a public interest in lawyers performing their role in applying the law and participating in the fair administration of justice.

Might our duties of integrity, independence and to the rule of law prevent us from assisting lawful behaviour by clients? If so, when?



Ethical decision-making in the face of client ESG challenges:

1. Are you willing to accept a client's instruction?
2. Are you permitted to accept the instruction?
3. Can you comply with a prospective client's ESG demands?
4. Your relationship with your client, if you act.



1. Are you willing to accept a client's instruction?

- Same factors as apply to all clients, e.g. competence and conflicts with existing clients (Core Principles (g) and (c)).
- Conflict with your published external ESG commitments?
- Conflict with internal ESG policies?
- Tensions among partners and staff?
- Tensions with existing clients?
- Conflict with ESG assurances to existing clients?
- The rule of law/interests of justice?



2. Are you permitted to accept that instruction?

- Same factors as apply to other clients, including whether what the client is asking you to do, to assist with, is illegal.
- Would the client be asking you to assist in something that would undermine the rule of law / fair administration of justice?
- More complex where there is an international dimension?
- Do you have due diligence obligations?
- Is additional due diligence needed?



3. Can you comply with a prospective client's ESG demands?

Due diligence

- Can you respond to client ESG due diligence requests?
- To what extent? (Client confidentiality – Core Principle (d))

ESG Code of Conduct

- Might the client's Code of Conduct interfere with your professional obligations as a lawyer?
- Can you be confident that there is no problem? How?
- Conflicts between ESG commitments to different clients?
- What about future clients?



4. Your relationship with your client, if you act.

- No option to refuse to act based on personal views: now too late.
- The same obligations as you owe to any client.
- The same higher duties as exist when acting for any client.

Scope of your client relationship

- Must give the legal advice which is relevant to your task.
- Are you obliged to go further?
- Can you go further?
- What might be the legal and ethical consequences of going further?
- Can and should set clear limits on scope of advice at the outset?



Selected further reading:

Some European perspectives:

- **‘Corporate Social Responsibility and the Legal Profession: Key Considerations for Bars and Lawyers’** (CCBE).
- **‘Be careful what you wish for: a European perspective on the limits of CSR in the legal profession’** (Prof Dr B. Speisshofer; September 2021)

Recent academic and professional discussion in England & Wales:

- **‘What does it mean for lawyers to uphold the rule of law? A report for the Legal Service Board’** (Prof. R. Moorhead, Prof. S. Vaughan, K. Tsuda; February 2023)
- **‘The impact of climate change on solicitors’** (Law Society of England & Wales; April 2023)
- **‘Legal Services Regulation – the Meaning of “the Public Interest” ’** (Second Supplementary Report of the Independent Review of Legal Services Regulation; Prof. S. Mayson; September 2024)

Just one current US perspective:

- **‘Cancelling Lawyers: Case Studies of Accountability, Toleration and Regret’** (Prof. W. B. Rendel; 2024)