

Demystifying the CSDDD: practical approach for businesses.

By Stéphane Brabant, Paris Bar - Senior Partner at Trinity International AARPi and Eugénie Denat, Doctor of Law.

After many twists and turns, the vote by the European Parliament on the “Corporate Sustainability Due Diligence Directive” (CSDDD) will take place on April 24, 2024.

There appear to be many expectations and the companies concerned are discovering new obligations which, if not explained, can seem complex to implement. It therefore appears necessary, in simple terms, to demystify some of the most essential provisions in order to reassure businesses about the application of the directive and its content.

1- The CSDDD will gradually apply from 2027 will finally apply to all EU companies with more than 1,000 employees (and) with a turnover of more than 450 million euros from 2029. It will also apply to foreign companies which have a turnover of 450 million euros in the EU.

The CSDDD (i) thus responds to the “fragmentation” of regulations, which is always complex for companies that have activities in several countries, (ii) ensures, through fairly high precision and its more global application, better legal certainty for companies and (iii) allows as much as possible competition on an equal footing not only on a European level but also on a global level (level playing field).

2- The CSDDD is based, including for its possible interpretation, on the 2011 United Nations Guiding Principles (UNDP) and those of the OECD on multinationals, so-called soft law principles, moreover, often already largely voluntarily endorsed by the companies, particularly French ones, which have made this “their hard law” through self-regulation. The CSDDD is also influenced by French law on the duty of vigilance of 2017 - also largely influenced by the UNDP.

3- Companies must, and especially in conjunction with stakeholders (populations, workers, etc.), demonstrate vigilance - the basic obligation of the CSDDD - on all possible risks of negative impacts that their activities and those of their business relationships (subsidiaries, subcontractors, suppliers) may have on human rights and the environment (lists attached to the Directive), draw up a “mapping” of them and evaluate them in particular in terms of seriousness.

4- As part of this logic above all of prevention, they must and on a continuous basis, take all “appropriate” (or “reasonable”) measures to, as a priority, do their best to prevent or at least limit the impacts whose realization appears to them to be the most probable and which would have the most severe consequences on the fundamental rights of human beings and the environment, and assess their effectiveness. This is indeed an obligation of means which must also take into account, on a case-by-case basis, the context (geographic, sector, etc.).

5- Among these measures, companies will notably put in place general policies, but also codes of conduct and contractual provisions in their relations with their subcontractors or direct suppliers (tier 1), most often SMEs. They will work with these SMEs to ensure real sharing of responsibility and will provide them, as far as possible, with financial support, training and others to help

them take into account these new rules imposed not by the CSDDD (thresholds too high to include them).) but by the companies that make them work (the trickle-down theory).

6- Companies must also, and still with the aim of prevention, put in place “complaints” mechanisms through which stakeholders and/or their representatives can report to them (i) not only proven violations of human rights or to the environment in order to immediately repair them, (ii) but also for cases where they simply have good reason to think that they could be affected.

7- Concerning (non-judicial) remediations, companies are only required to do so in cases where it clearly appears that they are, alone or jointly, the direct cause of the damage. Theoretically, they are not required to do so in other cases, i.e. negative impacts which would be the result of the indirect actions of subcontractors or suppliers of their own subcontractors or suppliers (rank 2 and subsequent).

8- In the event of non-respect of these human rights and the environment in their chains of activities, companies will ensure that they do everything possible to put an end to these violations and will not be able to terminate the commercial relationship with sub-contractors, tier 1 contractors or suppliers only if, despite their efforts to convince people to change (which will be taken into account by the courts), these violations, particularly the most serious, persist. Also, companies should not necessarily end their commercial relationships to the extent that the planned termination could have even more severe negative consequences on human rights than if they maintained them (we think, for example, and under the conditions provided for by the ILO Conventions, on the issue of child labor).

9- To help them, companies will be able to appoint external auditors to assist them as best as possible in complying with their vigilance obligations. This will not be a factor exonerating liability, but probably and under certain conditions, a means of mitigating it. To be credible, they must be recognized experts in human rights and the environment. Details of their profiles should be provided by the Commission (including the criteria for possible involvement of professional organizations).

10- The CSDDD provides for the establishment by each Member State of a national supervisory authority with (i) power of investigation on their own initiative or at the request of stakeholders, (ii) the possibility of setting up a complaints management mechanism in competition with the voluntary one of companies and (iii) the right to impose penalties which cannot, however, exceed 5% of global turnover (we find it difficult to think that such very "punitive" penalties » - while the CSDDD excludes punitive legal sentences - will be decided).

11- The civil liability of companies towards both natural and legal victims, on the other hand, falls to each Member State (including the question of causality) but, specifies the CSDDD, it can only be decided if the company “intentionally or negligently” failed in its obligations to prevent, mitigate or put an end to negative impacts, and that damage resulted. This is undoubtedly the case if the company is the direct cause of the damage, but there remains uncertainty, if not textual at least doctrinal, in cases of co-responsibility of subcontractors or suppliers. In the absence of civil liability, the company still has to use its influence - which takes multiple forms depending on the

context - to stop the negative impacts. In addition, to assess whether the company has taken appropriate measures to prevent or mitigate the damage, the court will have to assess the way in which the company “prioritized” the risks, a determining step in the duty of vigilance. In addition, and regarding the implementation of civil liability, the representatives of victims will only be able to act on behalf of the latter and not for themselves, and according to the procedures decided by each Member State.

12- Concerning climate change, companies will have to do their best (obligations of means) to put in place transition plans in accordance with the Paris agreements, and without penalty, as is also the case for managers whose liability is no longer considered.

The CSDDD is therefore, for companies, a legal tool for sustainable profitability.

By Stéphane Brabant, Paris Bar - Senior Partner at Trinity International AARPi
and Eugénie Denat, Doctor of Law.