

CSDDD Hangs in the Balance – What’s at Stake?

February 23, 2024

Despite political agreement on a revised version of the proposed Corporate Sustainability Due Diligence Directive (CSDDD)¹ being reached between the European Parliament and the European Council in December 2023, a confirmatory vote scheduled to be held in the Council on February 9 was postponed twice, the second time without a new date set, after the German liberal party (FDP) forced the country’s coalition government to announce that it would abstain from voting.

This article explores what is now at stake for the future of corporate sustainability due diligence in the EU. It notes a number of key areas where CSDDD goes beyond the requirements of the EU’s Corporate Sustainability Reporting Directive (CSRD) (which CSDDD was intended to complement), which took effect in January 2024 and requires companies to report on their sustainability due diligence processes. It asks whether, contrary to the FDP’s assertion, corporate interests may in fact be best served by the adoption on an EU harmonised regime on corporate sustainability due diligence.

Recent Developments

Under the rules of the European Council’s qualified majority voting procedure (which requires at least 15 countries representing at least 65% of the EU’s population to vote in favour of a measure), an abstention effectively represents a ‘no’ vote. Following Germany’s announcement, Italy and a number of other EU member states reportedly indicated that they, too, would abstain from voting, throwing into doubt whether the hard-won version of the text provisionally agreed with the Parliament in December 2023 will be approved by the Council.

The political agreement reached in December 2023 was seen as a significant milestone. While there had been some criticism² that it did not go far enough to improve human rights and environmental outcomes along global value chains, the deal was broadly welcomed as an important step forward, with the EU legislative and executive institutions having resolved the most contentious issues associated with the Directive (including as to

¹ Proposed EU Directive on Corporate Sustainability Due Diligence (2022/0051) (COD).

² *CSDDD political deal: A pivotal step but a missed opportunity to embrace transformative change*. [online] European Coalition for Corporate Justice. Available [here](#). [Accessed 22 Feb. 2024]

scope and provisions regarding corporate liability). However, the FDP has focused its objections on the perceived additional burdens that the Directive would impose on companies, including potential indirect impacts on SMEs, and its stance now threatens the future of the Directive.

With European elections looming in June, the legislative time to adopt CSDDD during this Parliamentary term is running out. Amid expectations that centre-left and green parties will lose seats in the elections, casting doubt on whether CSDDD could successfully be held over to the next term, there is increasing concern among interested parties that the Directive will fail at the penultimate hurdle, two years on from the Commission's original proposal³ (which itself was the product of years of effort by a range of stakeholders).

The Belgian Presidency of the Council now has, at most, until the first few days of March to find a sufficient majority among member states, and for a vote to take place in the Council, to ensure that the Parliament has enough time to approve the legislation prior to the elections.

To secure the vote, the Presidency will need either Germany or Italy to reverse their current positions and vote in favour of the Directive, which could require potentially significant compromises on key parts of the existing text and/or the promise of concessions on other legislative files.

Formally reopening negotiations at this stage between the Parliament and the Council would push the CSDDD file into the next term, where a newly constituted Parliament could be more politically hostile to a mandatory corporate sustainability due diligence regime.

An unsuccessful vote in the Council would effectively reset the clock on CSDDD, sending the legislative file back to the start of the process, and requiring a newly formed Commission to resurrect a proposal in the next term, which would very likely have to be significantly watered down.

As such, it seems increasingly likely that the Belgian Presidency will be forced to present a compromise version of the text that it hopes will be acceptable to enough member states in the Council, but without the opportunity to formally engage the Parliament in discussions on the revised content. The Belgian Presidency (and other interested parties) will also have to hope that any such amended version is still sufficiently acceptable to pass a parliamentary vote (which is expected but by no means assured).

What's at Stake?

The Opportunity to Make a Normative Shift

Although the proposed CSDDD is by no means the first legislation to mandate sustainability-related due diligence and disclosure at the EU level across industries and sectors,⁴ it represents a policy breakthrough at a scale not yet seen at a pan-EU level by virtue of the framework it would establish. Namely, binding legal obligations that would, in effect, codify much of the existing international framework defining responsible business conduct in relation to internationally recognised fundamental human rights, protections against exploitation, and environmental protection.

CSDDD seeks to transform existing soft law instruments into compulsory hard law requirements for certain EU and non-EU companies doing business in the EU (and would indirectly affect many additional companies by virtue of their position in covered companies' supply chains).

³ *Corporate sustainability due diligence*. [online] European Commission. Available [here](#).

⁴ In addition to the CSRD, *see e.g.*, the EU Sustainable Finance Disclosure Regulation, Batteries Regulation, Conflict Minerals Regulation, Deforestation Regulation, Digital Services Act and Timber Regulation.

Specifically, if adopted, CSDDD would require in-scope companies to conduct risk-based human rights and environmental due diligence, informed by the perspectives of affected stakeholders, and to identify, prevent and mitigate potential adverse impacts, and bring to an end or minimise actual adverse impacts where they are caused by or contributed to by the company, or where the company is directly linked to an adverse impact – thereby capturing both the company’s own operations (including subsidiaries and affiliates) and those of third-party entities in the company’s value chain (or “chain of activities”).

CSDDD is heavily influenced by and specifically recognises the approaches to due diligence set out in the UN Guiding Principles on Business and Human Rights (UNGP) and the OECD Guidelines for Multinational Enterprises (OECD Guidelines), including the six steps outlined in the OECD Due Diligence Guidance for Responsible Business Conduct relating to due diligence and supporting measures.

By directly incorporating these international frameworks for responsible business conduct, and defining harms by reference to the abuse of and/or the protection of human rights enshrined in international instruments and adverse environmental impacts resulting from the violation of prohibitions and obligations pursuant to international environmental conventions, CSDDD would impose a high standard of conduct on in-scope companies which, for many industries, would go significantly beyond current business practices.

By imposing such obligations on companies, CSDDD identifies the private sector as a central actor, alongside government, in achieving better outcomes where human rights, environmental and climate change-related goals are concerned.

The expectation for CSDDD to deliver a significant normative shift in responsible business conduct has been described by its supporters as a decisive moment that will both assist in addressing corporate governance gaps with respect to sustainability and human rights issues, and also send a forceful message that companies active in Europe must take long-term business issues relating to human rights and environmental sustainability seriously. Several industry associations and companies have expressed and maintained their support for the Directive.

The normative shift in EU policy represented by CSDDD is perhaps best demonstrated by contrasting the framework that CSDDD would establish with the framework CSRD has already established. Whereas CSRD itself represents a significant shift in the breadth and depth of corporate sustainability reporting in the EU (and the volume and granularity of sustainability information that must be cumulatively reported under CSRD goes significantly beyond any current mandatory sustainability reporting regime globally⁵), its principle requirements are disclosure-based, rather than focusing specifically on prevention or mitigation of harm, even as they reinforce the need for due diligence (to fulfill disclosure requirements).

The current draft text of CSDDD, in addition to imposing comprehensive due diligence requirements on companies, also requires them to develop climate transition plans that aim to align with the temperature goals of the Paris Agreement, with time-bound targets to reduce Scope 1, 2, and 3 GHG emissions.

In addition, companies that intentionally fail to comply with or are negligent in complying with their due diligence or remediation obligations may be subject to supervision and enforcement actions by member states, administrative penalties, and civil liability actions brought by individuals, trade unions or NGOs to enforce the rights of victims of harm caused by companies. This includes injunctive measures or damages, which, where relevant, can be applied on a joint and several basis with business partners that are jointly responsible for harm.

5 Simpson Thacher & Bartlett (2023). *EU Corporate Sustainability Reporting Directive (CSRD): 5 Key Considerations for U.S. Companies* [online] Available [here](#).

At present, theoretically any of the above aspects of CSDDD are at risk of being negotiated out of the CSDDD framework, which given the extensive global reach of supply chains servicing the EU market, would have impacts extending beyond the EU's borders.

More generally, there could be adverse effects to the CSRD framework caused by any delay to or abandonment of CSDDD. Although EU member states have until July 6, 2024 to implement CSRD into national law (with the first group of companies required to report in 2025 for their 2024 financial years), the Swedish government has already put forward a proposal to delay the first reporting cycle for Swedish companies to the 2025 financial period, and a successful pushback against CSDDD could potentially embolden other member states to delay their own implementation, or even to try to unwind some of CSRD's requirements.

EU Harmonisation and Legal Certainty

Another key policy aspect of CSDDD is the need to harmonise corporate sustainability due diligence obligations at an EU level to create a level playing field for the EU's internal market, including from the perspective of companies already implementing due diligence in line with existing international standards.

A number of EU member states have already introduced or are preparing to introduce national due diligence laws. Although member states would be largely free to introduce stricter requirements, creating harmonised EU due diligence standards should prevent a patchwork of requirements from proliferating across the EU and potentially act as a barrier to trade within the internal market.

While it seems unlikely that the failure to adopt CSDDD at an EU level will result in 27 different due diligence laws that do not reference interoperability, even if a small number of large EU economies adopted different standards this could be challenging for companies to comply with, particularly if they have significant operations or business partners in multiple member states.

More generally, many companies already engage with the UNGP and OECD Guidelines and have reviewed or are in the process of reviewing their existing due diligence processes and business practices to better align with them—some engaging in preemptive compliance with CSDDD based on available drafts.

CSDDD's explicit recognition of existing methodologies (including the OECD's six steps for due diligence) and its permissive approach to the use of existing business tools provide companies with greater certainty that they can continue to invest in these areas. Loss of that certainty exposes early movers not only to the risk of potentially fracturing European standards, but also to potential international exposure if the recognition afforded by CSDDD to companies' methodologies and tools is lost, resulting in a different 'gold standard' emerging in other key global markets.

Conclusion

Currently, CSDDD's challenging gestation period seems no closer to a final resolution, and there is significant uncertainty as to if, and in what form, the Directive will be adopted. The most immediate hurdle is a vote in the European Council, which must occur by the first few days of March if the Directive is to have time to pass through the Parliamentary process before the European elections. The degree of compromise that may be needed to procure a 'yes' vote from Germany and/or Italy (plus probably at least one other member state) remains unknown.

A compromised Directive could undermine the normative shift that CSDDD seeks to achieve with respect to responsible business conduct, but the ramifications could yet be felt more broadly if trust in the EU's institutions is undermined by this last-minute drama.

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