

New European mandatory human rights and environmental due diligence obligations - CSDDD

On 14 December 2023, the Council of the EU and European Parliament reached a provisional agreement on the Corporate Sustainability Due Diligence Directive ("CSDDD"). This directive will mandate comprehensive due diligence from large EU and non-EU companies, targeting actual and potential adverse impacts on human rights and the environment of their business operations, including those of subsidiaries and business partners. Significantly, the CSDDD is expected to impact non-EU companies, both directly and indirectly. Therefore, it is crucial for all relevant stakeholders to actively monitor the directive's implementation process, from early stages on.

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The provisional agreement reached between the EU institutions is yet to be reflected in a final text of the CSDDD. The publication of this final text is expected for early 2024. Meanwhile, recent statements from EU co-legislators already provide insight into the key aspects of this new human rights due diligence framework.

Scope of the CSDDD

The CSDDD will capture:

1. **Large EU companies** with more than 500 employees and a net worldwide turnover over EUR 150 million (on a consolidated basis);
2. **EU companies from high-impact sectors** with 250 or more employees and a net worldwide turnover over EUR 40 million, of which at least half generated in a high-risk sector (eg, textiles, footwear, agriculture, food manufacturing, extraction or trade of mineral resources, construction).

Importantly, the CSDDD will also capture **companies headquartered outside of the EU**, provided they generate a turnover of more than EUR 150 million in the EU (calculated on a consolidated basis). These companies will have a three-year transitional period before the directive becomes applicable to them. Similarly, non-EU companies from high-impact sectors, whose EU turnover reaches the relevant thresholds, are also expected to fall under the scope of the CSDDD.

The EU Commission estimates that approximately 13,000 EU companies and around 4,000 non-EU companies will be subject to the CSDDD's scope of application.

Obligations under the CSDDD

The CSDDD will, in a nutshell, establish two main requirements:

1. **Due diligence obligations:** In-scope companies will have to identify, assess, prevent, mitigate and, as the case may be, cease and remedy the negative impacts of their business chain of activities on human rights and the environment. This due diligence effort focuses on upstream business partners and only partially includes downstream activities, such as distribution or recycling; and
2. **Climate transition plan obligations:** Additionally, in-scope companies will be required to adopt and put into effect transition plans for climate change mitigation, in line with the Paris Agreement's objective to limit global warming to 1.5 °C.

Partial inclusion of the financial sector under the CSDDD

The Council and Parliament agreed to only partly subject the financial sector to the CSDDD. Climate transition plan obligations will apply fully to regulated financial institutions, provided the relevant size thresholds are met. The financial sector will, however, be excluded from due diligence obligations related to downstream activities (such as making investments or granting loans). Due diligence efforts will be limited to an institution's own operations and upstream supply chain.

This partial exclusion might, however, be temporary, as the CSDDD will include a clause allowing for a review of the situation after a few years.

The CSDDD represents a major extension over Swiss law in human rights and environmental due diligence, with significant direct and indirect effects anticipated for Swiss companies.

Enforcement and civil liability

The consequences in case of non-compliance with the CSDDD could be severe and involve considerable administrative enforcement and/or civil liability risks:

1. **Fines:** The CSDDD notably mandates each EU Member State to designate a supervisory authority tasked with the supervision of compliance with the directive. Such supervisory authority will have the power to order fines of up to 5% of a non-compliant company's net global turnover;
2. **Civil liability:** The CSDDD will mandate EU Member States to open civil liability avenues, allowing those concerned by adverse impacts (including trade unions or civil society organisations) to file civil claims against companies that fail to meet their due diligence obligations and seek compensation for resulting damages.

Outlook for non-EU companies

The Council of the EU and the European Parliament have yet to formally endorse and adopt the final text of the CSDDD that they have provisionally agreed upon. This is expected to occur in the beginning of 2024. Thereafter, EU Member States will have two years to transpose the provisions of the CSDDD into national law.

A thorough analysis of the CSDDD's final text, once available, will be essential to fully understand its implications for both EU and non-EU companies. However, it is already today evident that alignment and compliance with the CSDDD will necessitate significant preparation and adjustments to business practices and processes, even for non-EU entities like Swiss companies.

The expected impact on Swiss companies will be twofold:

1. **Directly:** Swiss companies with a net EU turnover exceeding EUR 150 million on a consolidated basis (or exceeding the relevant thresholds for high-impact sectors) will be directly subject to the CSDDD (and the respective national implementations of the CSDDD); and
2. **Indirectly:** Irrespective of whether they are captured by the CSDDD or not, Swiss companies can be expected to be indirectly impacted by the new regime in significant ways. For instance, Swiss companies that are in business relationships with EU entities subject to the CSDDD will be required to provide comprehensive contractual assurances to their EU business partners and allow verifications to confirm adherence to the directive. Furthermore, compliance with CSDDD standards could potentially become a factor in determining eligibility for public contracts and concessions in the EU.

The CSDDD goes far beyond what is currently provided for under Swiss law in terms of human

rights and environmental due diligence. Both its direct and indirect impacts on Swiss companies are expected to be considerable. A study commissioned by the Swiss Government concludes that the CSDDD would directly capture between 160 to 260 Swiss companies, but that the number of Swiss companies indirectly impacted, notably those who are suppliers to EU companies, could reach 50'000 (including a considerable number of SMEs). Recognizing the extensive impact of the CSDDD, the Swiss Federal Council, on 22 December 2023, decided to further reassess the matter following the publication of the CSDDD's final text and to closely follow its implementation by EU Member States. The crucial issue that needs to be ultimately addressed is whether it would be advantageous for Switzerland to align its legislation with that of the EU with a view to reducing duplications, minimizing potential competitive distortions and promoting a level playing field.

Please do not hesitate to contact us if you have any further questions on this subject.

Legal Note: The information contained in this Smart Insight newsletter is of general nature and does not constitute legal advice.

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