

CSDDD: a step change in ESG litigation

ESG Litigation Webinar Series
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CMS
law·tax·future

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Potential impact of CSDDD

Nicolò d'Elia



The CSDDD

CSDDD became effective on 25 July 2024

25 July 2024

2027

Establishes mandatory human rights & environmental obligation on EU and non-EU companies from 2027

- Identify & assess adverse impacts
- Prevent, mitigate & bring to an end such impacts
- Put in effect a climate transition plan

Who is affected by CSDDD

- EU companies with 1000+ employees & worldwide turnover of E450m+
- Non-EU companies with turnover in EU of E450m+



Trade Unions & NGOs will be able to bring claims on behalf of affected persons

The Due Diligence (art. 4 CSDDD)

Companies should carry out the following activities:

- integrating due diligence into their policies;
- identifying actual or potential adverse impacts;
- preventing and mitigating potential adverse impacts, and bringing actual adverse impacts to an end and minimising their extent;
- establishing and maintaining a complaints procedure;
- monitoring the effectiveness of their due diligence policy and measures ;
- publicly communicating on due diligence.

In case of breach of CSDDD obligations



Administrative liability:

Member States will designate an authority who may sanction companies that fail to comply with the directive by effective, proportionate and dissuasive penalties



Civil liability:

Member States will ensure that victims get compensation for damages resulting from an intentional or negligent failure to carry out due diligence

(in Italy) Criminal liability:
art. 603bis c.p. introduced
by d.lg. 138/2011 (so-called,
caporalato laws)



«Victims» persons affected by an adverse impact or who have reasonable grounds to believe they may be affected (art. 9 CSDDD)

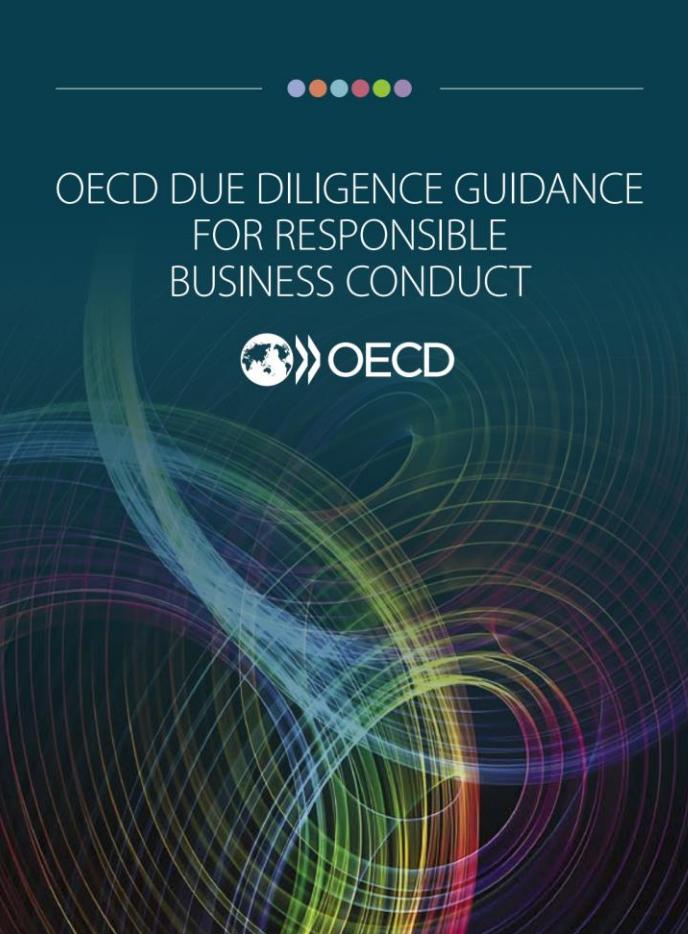
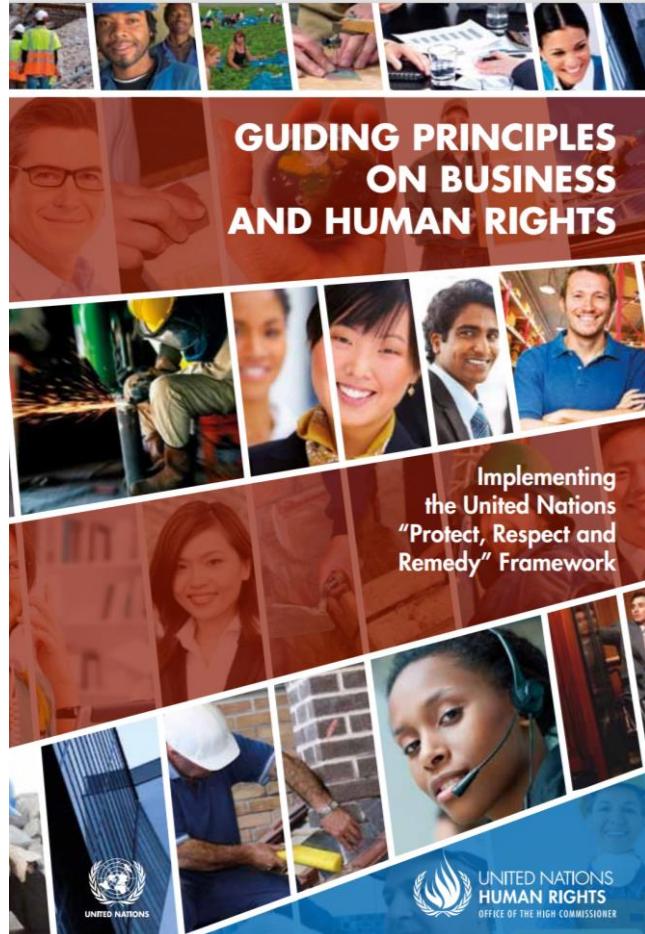
International standards on corporate sustainability due diligence

Why was there a need for CSDDD?

Rafał Morek



International standards on corporate sustainability due diligence



The concept of due diligence to “*identify, prevent, mitigate and account for*” adverse corporate impacts on human rights and the environment:

2011 UN Guiding Principles on Business and Human Rights (“UNGPs”).

Updated draft UN legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises (2023).

OECD Guidelines for Multinational Enterprises (“OECD Guidelines”, last updated in 2023) and the related OECD Due Diligence Guidance on Responsible Business Conduct and sectoral guidance specify and further develop this concept of due diligence and specifically extend this to environmental matters.

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Background

Paragraph 25, literals (f), (g) and (i), of the report on the eighth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (A/HRC/52/41) stated:

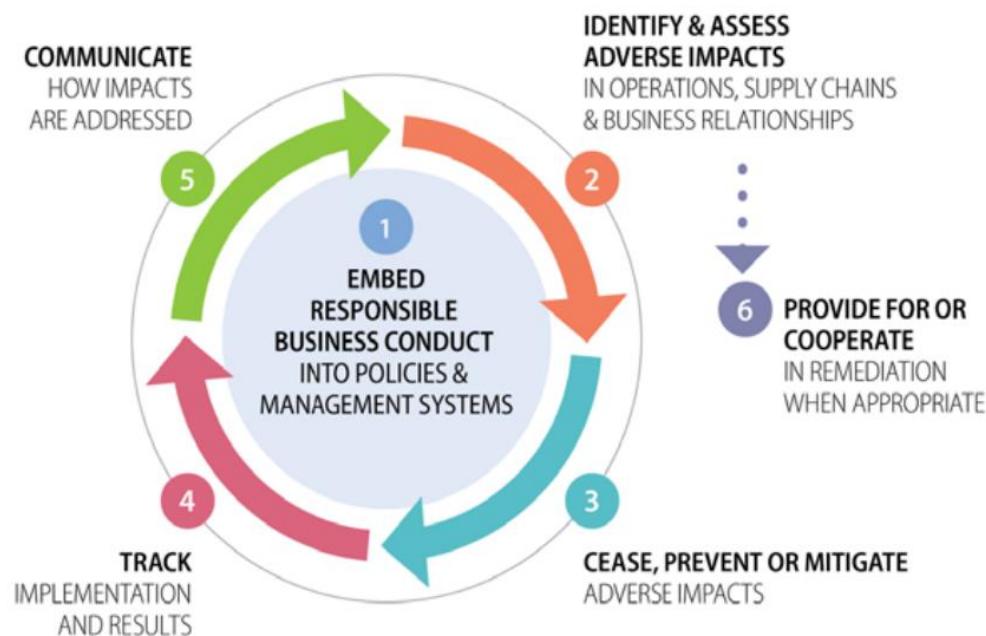
*“25. Following the discussions held during the eighth session, and acknowledging the comments and concrete textual suggestions expressed therein on the third revised **draft legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises**, and also acknowledging the comments and concrete textual suggestions on the informal suggested Chair proposals for select articles of the legally binding instrument, the Chair-Rapporteur makes the following recommendations:*

**UNITED NATIONS FORUM
ON BUSINESS AND HUMAN RIGHTS**
GENEVA, 25 - 27 NOVEMBER 2024

July 2023

OECD Due Diligence Guidance for Responsible Business Conduct

DUE DILIGENCE PROCESS & SUPPORTING MEASURES



Due diligence aims to address adverse impacts related to the following chapters of the OECD Guidelines for Multinational Enterprises:



Human Rights



Environment



Employment and Industrial Relations



Combating Bribery,
Bribe Solicitation
and Extortion



Consumer
Interests



Disclosure

OECD Due Diligence Guidance for Responsible Business Conduct

Sector due diligence guidance

This Guidance complements existing resources developed by the OECD to help enterprises carry out due diligence for responsible business conduct in specific sectors and supply chains including in the agriculture, minerals & extractive, garment & footwear and financial sectors :



Tripartite Declaration of Principles
concerning Multinational Enterprises and Social Policy
(MNE Declaration)

► A self-assessment tool
for enterprises



**The ILO Tripartite Declaration of Principles
concerning Multinational Enterprises and Social
Policy (“MNE Declaration”)**
(most recently amended in 2022)

The self-assessment tool for enterprises developed by the ILO, together with the International Organisation of Employers (IOE), to support enterprises that seek to benchmark their corporate social policies and practices against the guidance provided in the MNE Declaration.

International regulatory framework

- **National laws** (examples):
 - UK and Australian Modern Slavery Acts
 - the French Duty of Vigilance Law (*Loi de Vigilance*)
 - the Netherlands Child Labour Due Diligence Law (*Wet Zorgplicht Kinderarbeid*)
 - UK and New Zealand climate-related financial disclosure regulations,
 - the German Act on Corporate Due Diligence Obligations in Supply Chains (*Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten*)
- **Model ESG clauses** are available, including, for example, the clauses developed by:
 - The Chancery Lane Project and
 - the American Bar Association.
- While the **existing voluntary frameworks at international level (UN, OECD)** have been helpful in familiarising companies with corporate sustainability due diligence, research shows that companies were not sufficiently integrating sustainability aspects into their operations.
- **Unclear and fragmented legal landscape across the Single Market**, with several Member States having adopted their own due diligence laws while others having considered doing so.
- Around 70% of companies participating in the 2021 Open public consultation therefore agreed that a **harmonized EU legal framework on due diligence for human rights and environmental impacts** was needed.
- CSDDD sets out an obligation for large companies to adopt and put into effect a transition plan for climate change mitigation which aims to ensure, through best efforts, that the business model and strategy of the company 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**.
 - a legally binding international treaty on climate change
 - adopted by 196 Parties at the UN Climate Change Conference (COP21) in Paris, on 12 December 2015.
 - entered into force on 4 November 2016.

Interplay of CSDDD with other EU sustainability instruments

- CSDDD complements other recent EU initiatives aimed at protecting human rights and the environment, such as:
 - EU Regulation 2021/1119 of 30 June 2021 establishing the framework for achieving climate neutrality (**European Climate Law**);
 - EU Regulation 2023/1115 on **Deforestation Free Products (EUDR)** that will start to apply on 30 December 2024;
 - European Parliament legislative resolution of 23 April 2024 on the proposal for a regulation of the European Parliament and of the Council on **prohibiting products made with forced labour** on the Union market.
- CSDDD establishes a **general horizontal framework** (*lex generalis*) for sustainability due diligence for very large EU and non-EU companies.
- **Sectoral laws** pursuing the same objectives but providing for more extensive or more specific obligations (*lex specialis*) **supersede** the Directive's general requirements in case of conflict.
- An example of *lex specialis* is Regulation 2023/1115 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation, which provides a sectoral framework for deforestation and includes more specific rules regarding due diligence for certain products.
- CSDDD makes **cross-reference to existing legislation** for certain duties.
 - For instance, as regards **public communication on due diligence**, the Directive relies on the reporting under the **Corporate Sustainability Reporting Directive (CSRD)**, thereby avoiding duplication for companies in the scope of both sets of rules.
 - For the small number of companies that are not already covered under the CSRD, it complements the existing rules by providing a simplified and aligned reporting framework.

Key litigation risks

Aukje Haan



Key Litigation risks

CSDDD in the Netherlands also known as “Anti Look Away Act”

Important articles:

- Article 10, 11, 12 (prevention, termination, recovery of negative effects)
- Article 22 (climate transition plan)
- Article 27 (rules on sanctions/penalties)
- Article 29 (liability and full compensation)

How will the civil liability regime under CSDDD work?

- When companies intentionally or negligently fail to comply with their duty to prevent, mitigate, bring to an end, minimise adverse impacts, and this failure causes or contributes to damage, they can be held **liable for the damage suffered** (Article 29(1)).
- In case the company is liable, it will have to provide **full compensation** to the victim for the damage suffered. However, this shall not lead to overcompensation, for instance through punitive damages (Article 29(2)).
- Injured parties may authorise a trade union, a non-governmental human rights or environmental organisation or other non-governmental organisation based in a Member State to bring **actions on their behalf**, under the conditions set out in national law (Article 29(3)(d)).

How will the civil liability regime under CSDDD work?

“DISCOVERY” (PRODUCTION OF DOCUMENTS):

When a claim is brought, and a claimant presents a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of their claim for damages and has indicated that additional evidence lies in the control of the company, **courts are able to order that such evidence be disclosed by the company** in accordance with national procedural law (Article 29(3)(e)).

- The civil liability of a company for damages arising shall be without prejudice to the civil liability of its subsidiaries or of any direct and indirect business partners in the chain of activities of the company.
- Jointly caused damages **> jointly and severally liable.** (Article 29(5)).
- Stricter national laws on liability go above the liability rules in the CSDDD (Article 29(6))

How will the civil liability regime under CSDDD work?

LIMITATION PERIODS:

- the limitation period for bringing actions for damages under CSDDD shall be **at least five years** and, in any case, **not shorter than the limitation period laid down under national general civil liability regimes**;
- **Limitation periods shall not begin to run before the infringement has ceased and the claimant knows, or can reasonably be expected to know:**
 - of the **behaviour and the fact that it constitutes an infringement**;
 - of the fact that the infringement **caused harm** to them; and
 - the **identity of the infringer**.

INJUNCTIVE MEASURES:

- Claimants able to seek injunctive measures, including through summary proceedings; such injunctive measures shall be in the form of a **definitive or provisional measure to cease infringements** of the provisions of national law adopted pursuant to CSDDD by performing an action or ceasing conduct.

Key Litigation risks

- CSDDD brings broadly formulated due diligence obligations
- Not always clear how these due diligence obligations are to be fulfilled
- e.g. what is specifically and minimally expected with regard to a climate transition plan?
 - Claims e.g. based on:
 - **Injunction actions** (e.g. Shell)
 - **Tort**
 - ✓ Greenwashing
 - ✓ Unfair trading practices > check (local) guidelines for sustainability claims
 - ✓ Complaint to the advertising code commission may be a stepping stone to further proceedings.
 - **External directors liability** based on breach of improper performance of duties? Might be possible but for now not seen as an easy route because of causality and culpability. According to Dutch law personal serious fault required. (Specific obligations for directors removed from directive but local law rules on liability obviously still apply).

Mitigating Risks

Aukje Haan





Mitigating risks

- Map the company's chain of activities
- Review and test the climate transition plan annually
- Implement comprehensive due diligence systems to monitor and address human rights and environmental risks across the entire value chain (HREDD policy (Human Rights and environmental due diligence))
- Ensure ESG knowledge and expertise within the board and the supervisory board
- Appoint a contact person whom suppliers can contact regarding sustainability, environmental and human rights issues and mention this in contracts
- Make an appendix to agreements in which you highlight your key responsibilities in relation to the chain of activities



Mitigating risks

- Include discovery / disclosure clauses (including audit rights) in your contracts on which basis you can lawfully enforce such obligations by judicial intervention
- Have or update your internal code of conduct regarding (internal HRE policy)
- Try to be transparent: ensure clear, accurate and timely reporting on sustainability efforts, demonstrating compliance and proactive risk management.
- Be transparent about challenges and steps taken to address the above to build trust with regulators and stakeholders
- Integrate compliance clauses into contracts with suppliers, ensuring they adhere to human rights and environmental standards. Conduct regular audits and impose penalties for non-compliance within the supply chain
- Implement a grievance mechanism



Mitigating risks

Taking the disclosure of evidence into account:

- Confidentially – what is confidential and or needs to be kept confidential e.g.
- trade secrets: how are they dealt with
- lawyer's privilege
- does the in-house counsel have privilege? check the local (bar) rules
- who is the client when issuing a potential (research) assignment and to whom
- Carefully consider and assess retention policies

And

- Check already existing CSR policies of your company: are they in line with the CSDDD or do they even go beyond what is necessary based on the CSDDD > a company may have created its own standard of care
- Join and/or consult with industry organisations.



Mitigating risks

In case of issues:

- be proactive
- work on a (strengthened) action plan
- don't cover things up

Last but not least:

Keep a close eye on the to be published guidelines with best practices on *how* to fulfil due diligence obligations



Report on use of ESG contractual obligations and related disputes

ESG Subcommittee of the
IBA Arbitration Committee

CSDDD does not specifically provide for arbitration or mediation, however:

Arbitration is likely to play a role in business-to-business disputes in relation to ESG obligations where arbitration clauses are included in contracts.

ESG obligations are included in investment treaties between states and because such treaties typically include arbitration as a means of dispute resolution, we are likely to see ESG concerns addressed through arbitration.

Initiatives to cater specifically for the resolution of ESG disputes (examples):

- the CEDR Business and Human Rights Mediation Initiative
- the Hague Rules on Business and Human Rights Arbitration.

Exemplary Cases

Rafał Morek



Exemplary cases: Jurisdiction in tort claims

Courts in several European countries have been willing to **assume jurisdiction** over cases where human rights and/or environmental harms have occurred **outside the home state** by **subsidiaries of the defendant parent company**:

- the Netherlands:
 - *Akpan v Royal Dutch Shell PLC*, C/09/337050/HA ZA 09-1580
 - Nigerian farmers and Friends of the Earth filed cases against Royal Dutch Shell (Shell) and its Nigerian subsidiaries in a Dutch court seeking compensation for damage claimed to have been caused by leaking oil pipelines and an oil well in Nigeria.
- Sweden:
 - *Arica Victims KB v. Boliden Mineral AB*
 - Nearly 800 people in Chile sued the Swedish mining company Boliden for damages after the company exported a pile of toxic waste to Chile.
- the UK:
 - *Vedanta Resources PLC and another v Lungowe and others*, [2019] UKSC 20
 - A group tort claim concerning toxic emissions from the Nchanga Copper Mine in Zambia.
 - The claimants (1,826 Zambian citizens) were poor members of rural farming communities who were reliant on open bodies of water for drinking and irrigation for their crops. They alleged that their health and farming activities have been damaged by the discharge of toxic matter from the Mine into those waterways.

Exemplary cases: Criminal law proceedings

Criminal law proceedings filed in various EU Member States against a parent company or its managers for **being complicit in human rights abuses**:

- France
 - LCS/Syria
 - In November 2016, 11 former Syrian employees and two NGOs (Sherpa and the European Center for Constitutional and Human Rights' (ECCHR)) filed a criminal complaint before French courts against the cement company, Lafarge, for alleged abuses committed in Syria by its subsidiary Lafarge Cement Syria (LCS). Alleged abuses included buying raw material from diverse jihadists groups to maintain its business activities in Syria in the midst of the Syrian Civil War and compensating these groups for safe passage of workers and products. LCS was charged with complicity in war crimes, crimes against humanity, financing of a terrorist enterprise, and forced labour.
- Germany
 - SIFORCO/DR Congo
 - On 2 May 2011, the village of Bongulu in northern Democratic Republic of Congo (DRC) was allegedly attacked by Congolese police and military. During the attack several human rights abuses took place, such as rape and arbitrary arrests of villagers. Senior staff of Danzer Group, a Swiss and German timber manufacturer, allegedly aided and abetted these abuses by failing to prevent these crimes from being committed. NGOs filed complaints against Danzer's former subsidiary SIFORCO in the DRC, alleging that SIFORCO aided and abetted human rights abuses. In 2019, a military court sanctioned officers and imposed a fine on the government but found the company not guilty. NGOs filed a criminal complaint against a senior manager of Danzer Group in Germany.
- the Netherlands
 - Guus Kouwenhoven/Liberia case
 - “Dutch court makes legal history by sentencing timber baron Guus Kouwenhoven to 19 years for war crimes and arms smuggling during Liberian civil war”.

Exemplary cases: Supply Chain Liability

Germany

- Jabir and Others v KiK Textilien und Non-Food GmbH, LG Dortmund, Urteil vom 10.01.2019 - 7 O 95/15
- The case concerned claims for personal injury and death brought by four Pakistani nationals against a German retailer in relation to a fire in the Karachi factory (supplying jeans) of its supplier Ali Enterprises. It was the first time that damages claims based on the liability of a transnational company for human rights violations abroad have been pursued before German courts.
- The German court **accepted jurisdiction and granted legal aid to the Pakistani claimants** to cover the legal fees, but dismissed the claims based on the statute of limitations.
- The court found that the claims are **time-barred under Pakistani law**, which was applicable to the case pursuant to the Rome II Regulation. The court concluded that the two-year limitation period under Pakistani law had expired before the claims were filed and that the statute of limitations had neither been waived nor suspended.
- Compensation already paid by the retailer was merely a voluntary “ex gratia” payment that did not amount to a written acknowledgement of liability, which could have extended the applicable limitation period.
- Parties’ settlement negotiations before the claims were filed did not amount to an agreement on the applicability of German law in accordance with Article 14(1) lit. a Rome II Regulation, which could have subjected the claims to the longer three-year limitation period under German law.

Recent Italian Cases

Nicolò d'Elia



Alviero Martini commissioned

Factual background

Since September 2023, the police inspected eight factories of the company and identified 197 workers, 37 of whom were employed illegally, it was found that processing was taking place under exploitative conditions, in presence of serious violations of safety in the workplace, as well as housing the workforce in dormitories built illegally and in unethical sanitary conditions



Allegations

- no verification of the entrepreneurial capacity of the contractors
- no inspections to assess the conditions of workers and working environments.

Dior and Armani

Factual background

- Prosecutors in Milan uncovered workshops where underpaid workers, often immigrants who were in the country illegally, produced leather bags then sold to Armani and Dior for a tiny fraction of their retail price.
- Investigations were carried out by the Italian antitrust authority for misleading conduct of the companies in violation of the Italian Consumer Code



Allegations

- no verification of conditions of workers and working environments.
- exploitation of labour with very low production prices

Esselunga 48 million fine to the Revenue Agency

Factual background

The company employed workers in the group's logistics who in fact worked for the large company, but they were employees of cooperatives, consortia and other companies, the so-called 'labour pools', which were born and died in a short time, leaving debts.



Allegations

- fraud on the 'illicit supply of labour' in the logistics sector of the group

Press coverage and comments on CSDDD

Rafał Morek

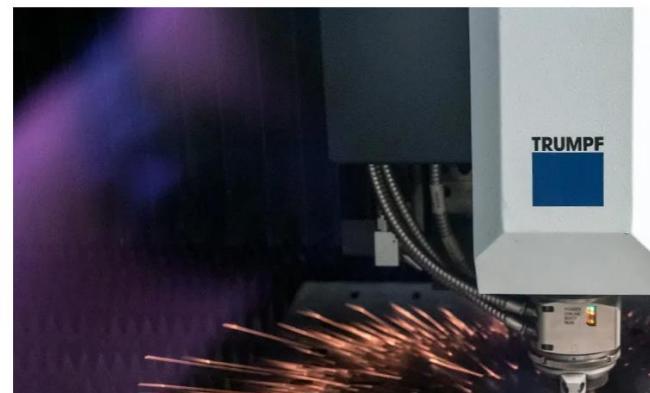


Could CSDDD Signal A Tipping Point For Corporate Accountability?

Felicia Jackson Contributor
I write about innovation, finance, energy, climate and sustainability.

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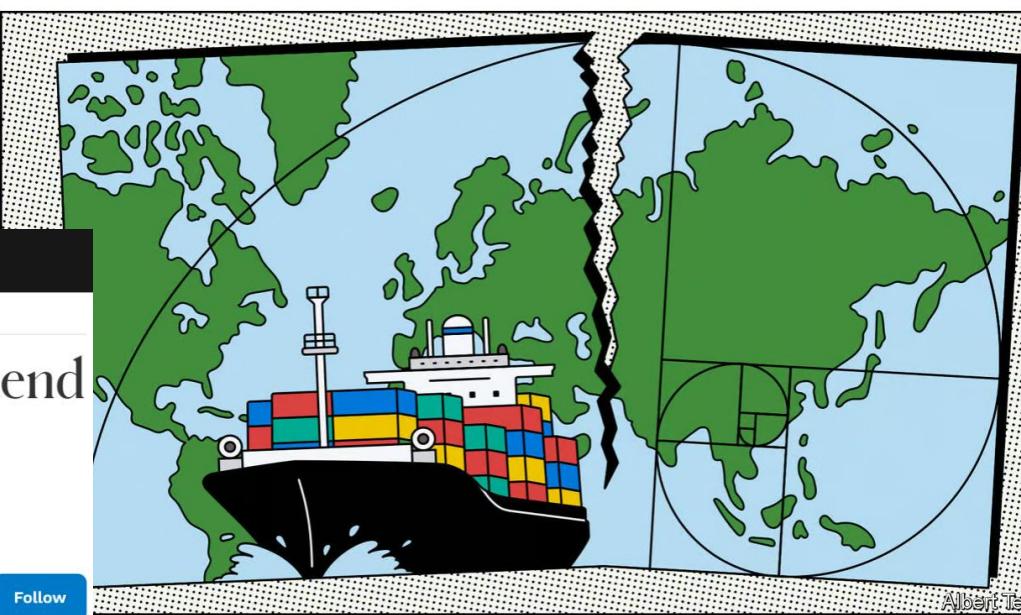


Time to get to know your supply chain: EU adopts Corporate Sustainability Due Diligence Directive



The structure of the world's supply chains is changing

The pandemic and war in Ukraine have speeded up the transformation



The EU Tries To Extend Its ESG Regulatory Reach To The U.S.

David Blackmon Senior Contributor
David Blackmon is a Texas-based public policy analyst/consultant.

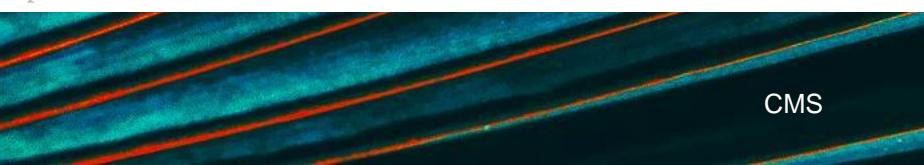
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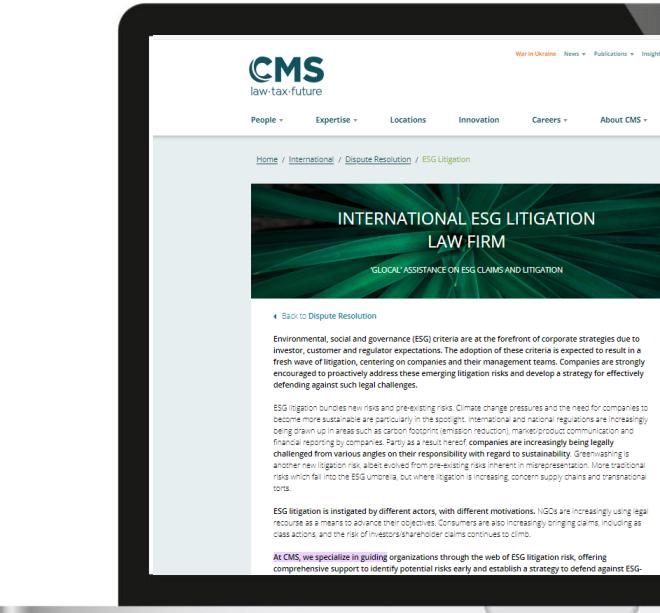
EU's CSDDD will drive demand for specialist sustainability skills

Phased introduction gives companies time, but hard-to-abate sectors and those with complex supply chains need to get started now.



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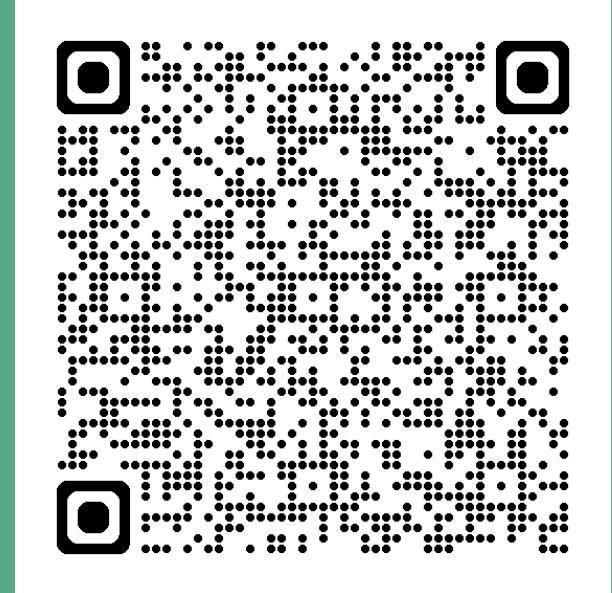
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