



A BDO Legal
Guide to the

Corporate Sustainability Due Diligence Directive:

European Council finally agrees





#Sustainability

Corporate Sustainability Due Diligence Directive

After the Council and the European Parliament reached a provisional agreement on the Corporate Sustainability Due Diligence Directive (“CSDDD”) in December 2023, the final agreement came under threat. Amendments to the agreed text were made and, after a period of last-minute uncertainty, the Council voted on the 24 May for the CSDDD. In this guide we address important elements of the approved text.

The final step will be publication in the Official Journal of the European Union, after which the CSDDD will finally enter into force.

This whitepaper fully replaces the previous one released last year, *The impact of the Corporate Sustainability Due Diligence Directive (CSDDD) on large companies and SMEs*, which has become irrelevant due to the different amendments.

The aim of the CSDDD

The aim of the CSDDD is to foster sustainable and responsible corporate behaviour and to anchor human rights and environmental considerations in companies' operations.

The obligations will – according to the European Commission – ensure that businesses address adverse impacts of their actions, including their chain of activities inside and outside Europe.

In order to achieve this, the CSDDD establishes a corporate due diligence duty. The core element of this duty is that in-scope companies should identify, prevent, mitigate, and account for how they address actual and potential impacts on human rights and environmental impacts in their operations and chain of activities. We will elaborate on this below.



SCOPE

Companies are subject to the CSDDD when they meet certain conditions, including turnover and – for EU companies - employment thresholds. As a result of the last-minute amendments, the scope of the CSDDD has been drastically limited so that fewer EU and non-EU companies are in scope of the CSDDD.

According to the final text companies in scope of the CSDDD are:

- EU companies or EU parent companies of a group with more than 1,000 employees on average and a net worldwide turnover exceeding EUR 450 million.
- Third-country companies or third-country parent companies of a group which generate a net turnover of at least EUR 450 million in the European Union.
- Companies providing franchising or licencing agreements who have a worldwide turnover over of at least EUR 80 million, a royalties amount of more than EUR 22.5 million, and who meet the criteria mentioned in the CSDDD.

The financial sector still seems to be in-scope but to a limited extent (see for instance below “chain of activities” with regards to financial undertakings).

The adjusted text includes an adoption scheme. This scheme applies from the moment the CSDDD enters into force and is as follows:

- EU Companies¹ with more than 5,000 employees and EUR 1.5 billion turnover and third-country companies with EUR 1.5 billion turnover in the EU will have 3 years to comply with the CSDDD (expected application from 2027).
- EU Companies with more than 3,000 employees and EUR 900 million turnover and third-country companies with EUR 1.5 billion turnover in the EU will have 4 years to comply with the CSDDD (expected application from 2028).
- EU Companies with more than 1,000 employees and EUR 450 million turnover and third-country companies with EUR 1.5 billion turnover in the EU will have 5 years to comply with the CSDDD (expected application from 2029).

The financial sector still seems to be in-scope, but to a limited extent.

¹ Please note that the CSDDD applies to companies which are formed in accordance with the legislation of an EU member state as well as companies which are formed in accordance with the legislation of a third country. For which legal forms per member state are in scope of the CSDDD, we refer to Annex I and II of the Accounting Directive.

OBLIGATION OF MEANS

Companies that are in scope of the CSDDD, have a so called “obligation of means”. A company should take appropriate measures to meet due diligence objectives as laid down in the CSDDD. In order to conduct appropriate human rights and environmental due diligence, the company should integrate due diligence into the company’s policies and risk management systems.

The aforementioned applies to the company’s operations, the operations of their subsidiaries and the operations of their business partners in the chain of activities. Part of the due diligence policy is also to include a code of conduct for the company, its subsidiaries and, where relevant, the company’s direct or indirect business partners.

DUE DILIGENCE PROCESS

The Due diligence process should cover at least the following six steps: (1) integrating due diligence into policies and management systems, (2) identifying and assessing adverse human rights and environmental impacts, (3) preventing, mitigating, ceasing or minimising actual and potential adverse human rights and environmental impacts, (4) monitoring and assessing the effectiveness of measures, (5) communication, and (6) providing remediations.

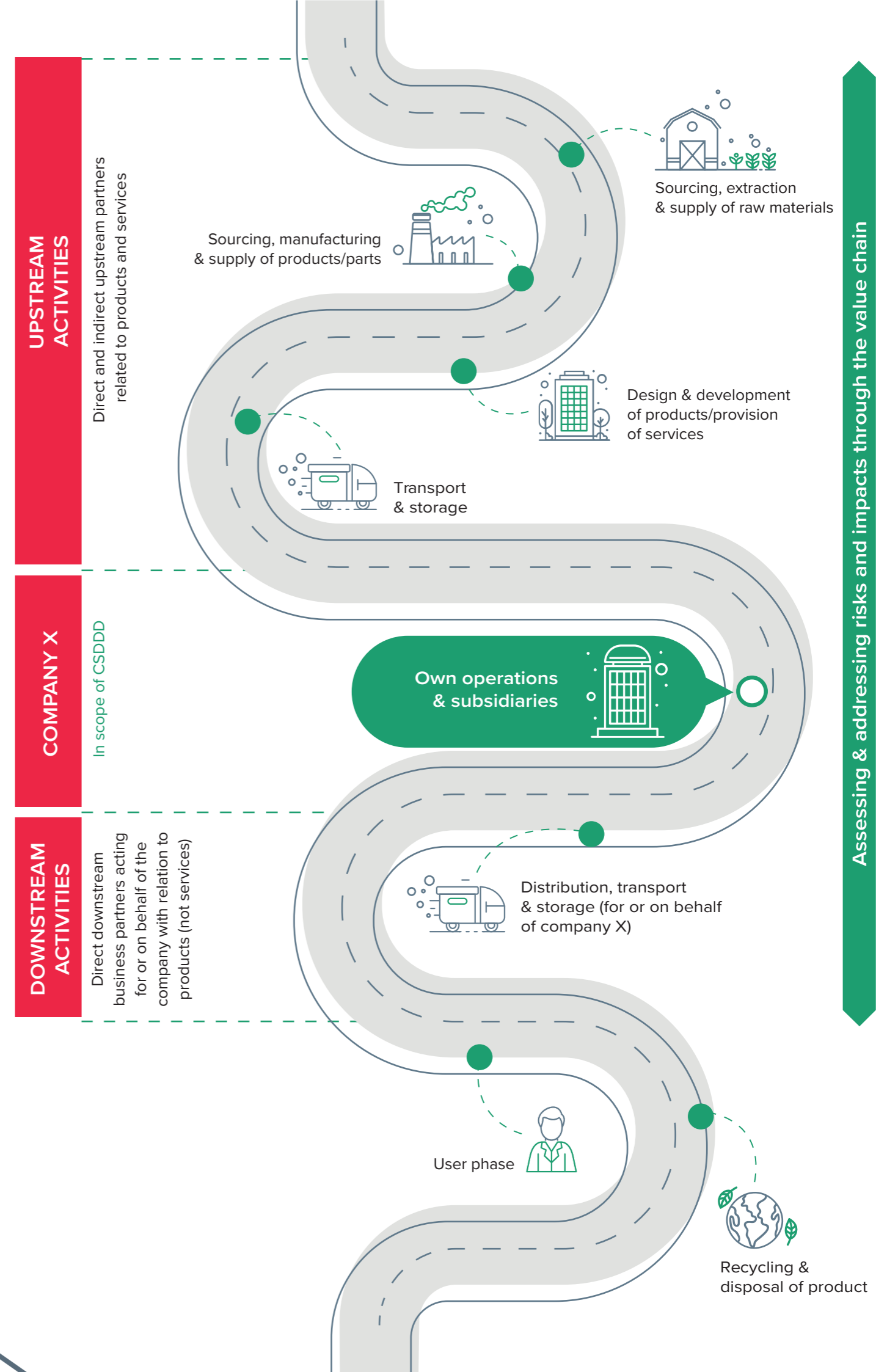
In order to ensure appropriate measures for the prevention and mitigation of adverse impacts are effective, companies should prioritise engagement with business partners in their chain of activities. Only as a last resort, after attempting to bring actual adverse impacts to an end or to minimise their extent with success, the company should avoid from entering into new or extending existing contractual relationships.

In order to ensure appropriate measures for the prevention and mitigation of adverse impacts are effective, companies should prioritise engagement with business partners in their chain of activities.

CHAIN OF ACTIVITIES ►

Due diligence obligations apply to the so-called “chain of activity”: the activities of a company’s upstream business partners related to the production of goods or the provision of services by the company and the company’s downstream business partners related to the distribution, transport and storage of product of that company where the business partners carry out those activities for the company or on behalf of the company.

The CSDDD does not cover the disposal of the product, nor the activities of the downstream business partners related to the services provided by that company. Therefore, for financial undertakings only the upstream but not the downstream part of their chains of activities are covered by the CSDDD.



The obligation to adopt a climate transition plan also applies to the financial sector.

CONTRACTUAL ASSURANCES

The CSDDD explicitly provides that - in support of their efforts to prevent and/or bring to an end adverse human rights and environmental impacts - **companies might be required to seek contractual assurances from a direct business partner that it will ensure compliance with that company's code of conduct and prevention action plan.**

These contractual assurances should be accompanied by **appropriate measures to verify compliance.** Such verifications can be performed by independent third-parties. When the business partner is an SME the terms used should be fair, reasonable and non-discriminatory, and be accompanied by appropriate supporting measures (see further). The commission is to provide a voluntary model of contractual clauses within 30 months after entry into force.

Companies' implementation of such contractual assurances will however not limit their civil liability (see below).

CLIMATE TRANSITION PLAN

In order to ensure that the CSDDD contributes to combating climate change, companies are obliged to adopt and put into effect a transition plan for climate change mitigation.

This plan should aim 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 and the objective of achieving climate neutrality as established in the European Climate Law (EU 2021/1119), including its intermediate and 2050 climate neutrality targets.**

The obligation to adopt a climate transition plan also applies to the financial sector.

DUE DILIGENCE SUPPORT

To make due diligence more effective and release the burden, companies are – under certain circumstances – entitled to share resources and information within their respective groups of companies and with other legal entities (industry or multi-stakeholder initiatives).

Parent companies falling under the scope of this Directive are also allowed to fulfil some of the due diligence obligations also on behalf of their subsidiaries that fall under the scope of the CSDDD, **if this ensures effective compliance.** However, this is without prejudice to the subsidiaries being subject to civil liability under the CSDDD (see below). For companies that fall within the scope of the CSDDD and are part of a group, it may be interesting to verify whether and under what conditions they can make use of the aforementioned.

SUPPORT IN GENERAL / SUPPORT SMES

The Commission will provide further guidelines (general or sector-specific) and establish a single helpdesk through which companies may seek information, guidance and support. Member states will set up dedicated websites, platforms and portals and/or even provide financial support to SME's (within the legal limits).

On top of the aforementioned, the CSDDD stipulates that **companies in-scope of the CSDDD provide targeted and proportionate support of small and medium-sized enterprises (SME) which are a business partner of the company.** This, when necessary, in the light of resources knowledge and constraints of the SME. It includes, amongst others, providing or enabling access to capacity-building, training or upgrading management systems and can even go as far as providing targeted and proportionate financial support.

CONSEQUENCES OF BREACHES

The CSDDD includes a penalty regime that can be imposed by national supervisory authorities of the member states. These authorities can impose fines of at least up to 5% of the company's worldwide net turnover. The penalties also include a public statement indicating the company responsible for and the nature of the infringement, if the company fails to comply with a decision imposing a pecuniary penalty within the applicable timeframe.

In addition, member states have to ensure that any decisions of the supervisory authorities concerning penalties related to the infringement remain publicly available for at least five years ("naming and shaming").

An in-scope company can – under certain circumstances - also be held civilly liable for damages caused to a natural or legal person, provided that the in-scope company intentionally or negligently failed to comply with the obligations to prevent and bring to an end adverse human rights and environmental impacts, and as a result of such failure to comply, damages to the natural or legal person's legal interest protected under national law was caused. An in-scope company cannot be held liable if the damage was caused only by its business partners in the chain of activities.

NEXT STEPS

The CSDDD shall enter into force on the twentieth day following its publication in the Official Journal of the European Union. Member states have 2 years from the entry into force to implement the CSDDD in national law.

MORE INFORMATION

After a long and last-minute uncertain journey, it seems that the CSDDD will finally enter into force. Although it will take some time before the CSDDD will be implemented into national law, companies should already consider the requirements of the CSDDD and see to what extent a revision of compliance and risk management systems is necessary.

This also includes a revision of existing or new contractual documents, such as the code of conduct.

These authorities can impose fines of at least up to 5% of the company's worldwide net turnover.



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