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The enforcement of the *Corporate Sustainability Due Diligence Directive (CSDDD)*: what are the new scenarios about directors' liability?

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1. The CSDDD and its contents

During 2024, the *Corporate Sustainability Due Diligence Directive* ('**CSDDD**'), presented by the European Commission on 23 February 2022, is expected to come into force.

As already mentioned in our [focus](#) on the contents of the proposal formulated by the European Commission, the CSDDD aims to regulate companies' due diligence obligations in relation to their partners along the so-called 'value chain', in order to duly monitor and manage the impacts of the chain itself in the relevant areas of environment, social impact and corporate governance ('**ESG**').

In practical terms, upon the enforcement of the CSDDD, European companies- and companies based in non-EU states, but operating within the European Union- will have to comply with the CSDDD provisions adopted by the competent jurisdictions and namely:

1. adopt a series of checks and controls to ensure that operators along the supply chain are carrying out their activities in a sustainable manner and to identify potential risk areas of unsustainable conduct;
2. fulfil reporting and communication obligations to *stakeholders in* relation to the impact of its value chain.

Lastly, the CSDDD provides for companies to take the necessary steps to reduce gas emissions from their activities in line with the goals of the Paris Agreements.

2. The provisional agreement of Parliament, Council and European Commission

On 1 June 2023, the European Parliament voted on the Commission's draft CSDDD, partially amending its contents.

In mid-December, however, the European Parliament and the Council reached a [provisional agreement](#) enshrining the essential points of the CSDDD, which must now also be approved by the European Commission for its formal adoption.

a. *Scope of application*

- According to the provisional agreement achieved, the companies obliged to take the necessary steps to perform due diligence in connection with their value chains will be those companies based in the European Union that employed more than 500 employees and generated a worldwide net turnover of more than Euro 150,000,000 in the last reporting year.
- As of the third year after the enforcement of the CSDDD, companies based in non-EU states that generated a net turnover of more than EUR 150,000,000 within the European Union in the last financial year.
- It is envisaged that the Commission will periodically publish a list of companies established in third countries that are subject to the obligations of the CSDDD.
- Companies operating in the financial sector are temporarily excluded from the scope of the CSDDD.

b. *The Value Chain*

The European Parliament, in its comments to the draft CSDDD, confirmed that due diligence obligations must be performed along the entire 'value chain', i.e. with regard to both business flows of the obliged companies: customers and suppliers.

This implies that, with effect from the date of enforcement of the CSDDD, due diligence and monitoring of potential risks and negative consequences on the impact areas will have to be carried out not only with regard to supply chain partners, but also with regard to their own customers, by means of- by way of example- the acceptance by the latter of the provisions of the sustainability models of companies falling within the scope of the CSDDD.

c. *Implementation into national law and sanctions*

The implementation of the CSDDD into national legislations should take place by the end of 2025 at the latest.

With regard to the implementing provisions, the CSDDD stipulates that they shall be adopted by the Member States within four years after the enforcement of the CSDDD.

The enforcement of CSDDD shall be carried out by national regulatory authorities, which may impose fines of up to 5 per cent of the global turnover of the liable company, as well as possible administrative and/or reputational sanctions such as, for example, exclusion from public tenders, withdrawal of products from the market and/or sanctions relating to *naming and shaming*.

d. *Civil liability*

The provisional agreement finally provides:

- (i) a five-year limitation period for interested parties (including through trade unions and representative organisations) to submit claims against the effects of negative impacts due to violations of the provisions of the CSDDD;
- (ii) an extension of rights and protections for plaintiffs (limitation of disclosure of evidence and costs of action);
- (iii) the duty of companies to terminate business relationships with partners that cause negative impacts on the environment and human rights.

3. The role of directors in the light of the CSDDD provisions

The CSDDD, as partially amended by Parliament during the 2023 vote, assumed a crucial role in outlining the directors' liability regime in relation to the monitoring of impact areas and initiatives to reduce the negative effects of business activity on them.

Article 25 of the CSDDD, in that formulation, provided that member states should incorporate into their legal systems provisions aimed at introducing the obligation for directors of companies- based in the European Union and falling within the scope of the CSDDD- to *"take into consideration, in fulfilling their duty, to act in the best interests of company, the consequences in terms of sustainability, in the short, medium and long term, of the decisions they take, including, where appropriate, the consequences for human rights, climate change and the environment"*. In this perspective, the laws, regulations and administrative provisions relating to breaches by directors of their obligations would also apply to cases of breach of obligations under the CSDDD itself, thus broadening the basis for possible liability actions against members of the administrative bodies.

The CSDDD in its original version also introduced a requirement for Member States to adopt provisions setting the directors' duty to take all necessary steps to implement (i) the value chain due diligence process, (ii) the monitoring activities of the value chain, and (iii) the alignment of the company's strategy, codes of conduct and procedures with the due diligence requirements.

The European Parliament, by the proposed amendments, has provided for the deletion of this provision, thus, should the CSDDD come into force as formulated by the European Parliament, it would introduce a liability regime for directors limited to the more general obligation to conform their activities to the mitigation of the negative effects of the company's activities on relevant ESG impact areas.

Lastly, the CSDDD introduced a requirement that variable remuneration of directors be conditional on the achievement of climate mitigation targets.

The provisional agreement between the European Parliament and the European Council did not expressly intervene on the aforementioned points, and therefore it will be necessary to wait for the formal approval of the final text in order to assess possible amendments.

4. Directors' responsibility in the ESG area

The provisions introduced by the CSDDD in Articles 25 and 26 mentioned above are in addition to the list of obligations and responsibilities imposed on directors by the ESG legislation that has been in place over the last decade, and in particular:

- the directors' obligation of benefit companies, provided for by Italian Law n° 208/2015, to complete the company's financial statements with a specific report concerning the state of the art of the activities implemented by the company to achieve the common benefit envisaged by the corporate purpose and the positive impact generated by the company itself.

Law 208/2015 does not provide for specific sanctions, but specifies that failure to comply with this obligation constitutes a prerequisite for the directors' liability actions provided for in the Civil Code;

- the directors' obligation already introduced by the EU Directive 34/2013 ("**NFRD**"). The NFRD, transposed by Italian Legislative Decree n° 254/2016 in fact provides that directors of public interest entities- which have had, on average, during the financial year more than five hundred employees and, on the balance sheet date, had a balance sheet of more than Euro 20.000,000 or net revenues from sales and services of more than Euro 40,000,000- draw up for each financial year a non-financial statement concerning the company's impacts in relation to environmental, social and human rights issues and anti-corruption.

The Legislative Decree 254/2016 provides that, in the event of violation of these provisions, directors shall be subject to an administrative fine ranging from Euro 20,000 to Euro 100,000;

- the directors' obligation under EU Directive 2022/2464 ("**CSRD**", which we have discussed [here](#)), which extends the annual sustainability reporting burden under the NFRD to directors as well:
 - a) as from 2025, with reference to the financial year 2024, of companies and large groups that are not of public interest and that have an average of 500 employees, i.e. companies issuing securities admitted to trading on regulated markets in Italy and the European Union, banks, insurance companies and reinsurance companies, that exceed at least the threshold of Euro 20,000,000 in balance sheet and the threshold of Euro 40,000,000 in net revenue;
 - b) as from 2026, with reference to the financial year 2025, of companies that exceed at least two of the following thresholds: (i) a balance sheet total value of more than Euro 20,000,000; (ii) a net revenue value of more than Euro 40,000,000; (iii) an average number of 250 employees during the financial year;
 - c) as from 2027, with reference to the financial year 2026:
 - of small and medium-sized listed companies (with the exception of micro-enterprises), i.e. companies that exceed two of the following three criteria on the balance sheet date: (a) a balance sheet total value of more than Euro 350,000; (b) net revenues from sales and services of more than Euro 700,000; (c) an average number of 10 employees during the financial year;
 - small and non-complex entities as defined in Article 4(1)(145) of Regulation (EU) 575/2013 or small and medium-sized listed entities;
 - of *captive* insurance and reinsurance companies that are either large or small and medium-sized listed companies;
 - companies based in non-EU countries with net sales and service revenues exceeding Euro 150,000,000 in the EU, if they have at least one subsidiary or branch in the EU that exceeds certain thresholds.

Each Member State will have to transpose the CSRD by 6 July 2024, therefore, following the issuance of the implementing provisions, it will be possible to spell out more precisely any obligations and formalities for companies covered by the CSRD.

- Completing an increasingly composite picture regarding directors' responsibilities in ESG-relevant areas, there is the most recent orientation of the Inter-Regional Committee of the Italian Notary Councils of the *Tre Venezie*, according to which social benefit purposes may be set forth under the clauses of the bylaws regulating corporate purposes, as these would not be incompatible with the objective of maximising profits, typical of business activity. In this perspective, it is therefore accepted that any company, regardless of its company name, may also include in its object the pursuit of socially useful purposes and, consequently, there is the possibility that the liability regime already provided for only benefit companies is extended by analogy also to the directors of the latter.

In light of the increasing focus by European and national legislators on the role and responsibilities of directors in relation to the pursuit of ESG principles, careful monitoring of regulatory developments on these issues will be necessary.



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