

BEWARE
The Liability Trap by introducing CSRD before CSDDD

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Companies should be aware that reporting on risks of material impacts in the value chain may soon lead to increased risks of liability for such impacts.

By reporting on risks of material impacts in your value chain, confer the EU Corporate Sustainability Reporting Directive (CSRD), ESRS S2, you may make your company vulnerable to civil liability under the coming EU Corporate Sustainability Due Diligence Directive (CSDDD). Hence, think twice and stop presuming risks of impacts in your value chains. If you choose to report on risks in your value chains, make sure that you can address them. If not, you create an open invitation to lawsuits when CSDDD is transposed into national law.

The Corporate Sustainability Due Diligence Directive (CSDDD) has been agreed between the EU Commission, Council and Parliament; and we are eager to see the final text.

GLOBAL CSR is pleased, that the EU acts on its duty as defined by the UNGPs pillar I but is sceptical to the extension of the corporate responsibility to respect human rights by the February draft CSDDD, introducing that companies may be held responsible to provide access to remedy to impacted persons, when the company is merely 'linked to' the impacts.

The scenario is as follows. Impacted stakeholders anywhere in the value chain read from a present or past Sustainability Statement of a company, that the company identified the risk of impacts, that the impacted stakeholders experience. The impacted stakeholders use the CSDDD seeking to hold the company liable for the impacts. The court can read from the company's annual report, that the company had identified the risk. It is likely that the court will find, that the company did not do enough (i.e., did not display adequate sustainability due diligence) to prevent or mitigate the identified risks of impacts; they did occur. Hence, the impacted stakeholders have improved their chances for holding the company liable.

When we questioned the EU draftspersons on the expediency of such expansion of the corporate responsibility, compared to the globally agreed definitions in the UNGPs, we were told, that we had to accept that the EU wanted to go further than the UNGPs.

It appears, that the final version of the CSDDD will contain the same or similar provisions. Companies can be held liable (civil liability; i.e. torts, etc.) for adverse impacts occurring in the value chain of the company, provided that the company did not implement (adequate) sustainability due diligence. This was the main argument from the financial sector to seek exemption from the scope of the CSDDD.

GLOBAL CSR would have liked to see the CSDDD in force before the increased annual reporting requirements under the EU CSRD. The CSRD presumes implementation of sustainability due diligence as the foundation for reporting.

Next to a host of legal challenges created by EU's wish to deviate from the UNGPs definitions in the CSDDD, this risk springs to mind, when comparing with the reporting requirements. We must expect that many companies feel encouraged, enticed, or even obligated to report on risks of material impacts in the value chain. ESRS S2 is dedicated for reporting on risks in the value chain.

Our best advice: Do not report on *risks* of material impacts in your value chain. Report on *actual* material impacts in your value chain, if you can demonstrate that your company concretely has used or build leverage to make the impacts stop and not re-occur.