



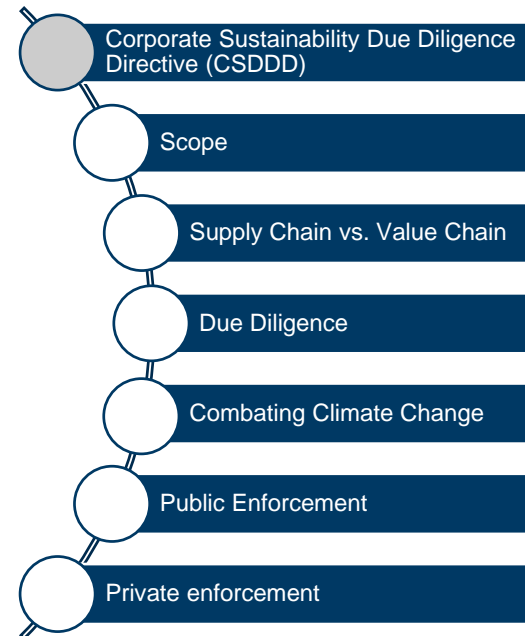
Corporate Sustainability Due Diligence Directive

An Introduction

Prof. Dr. Christian Kersting, LL.M. (Yale)

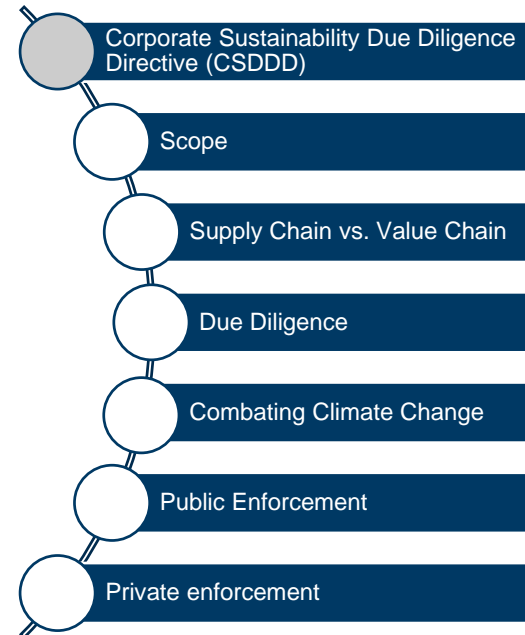
- **Human rights and environmental obligations**
 - measures to identify, prevent, and mitigate
 - any adverse impact on human rights or the environment
- **Combating climate change**
 - need to ensure that business model is compatible with the Paris Agreement objective
 - i.e.: limiting global warming to 1.5°C

See: <https://www.consilium.europa.eu/en/policies/corporate-sustainability/#due-diligence>



European Union – CSDDD

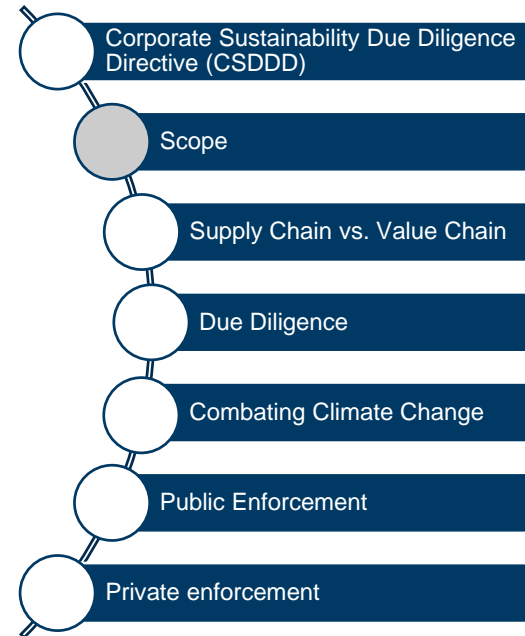
- 14 December 2023: Provisional deal on CSDDD
- 30 January 2024: Final Draft released
- EP has not voted, majority in Council not guaranteed (news article)
- 9 February 2024: Vote in Council postponed (news article)
- 14 February 2024: Vote in Council postponed (news article, German)
- ... more negotiations ... ?



Scope

EU: Art. 2 CSDDD

- All sectors
 - Employees > 500
 - Worldwide turnover > 150 Mio. €
- High risk sectors (textiles, agriculture, construction etc):
 - Employees > 250
 - Turnover > 40 Mio. €, if at least 20 Mio. € generated in sector
- Application to
 - ultimate parent companies
 - both EU and third country companies (with relevant turnover in EU)

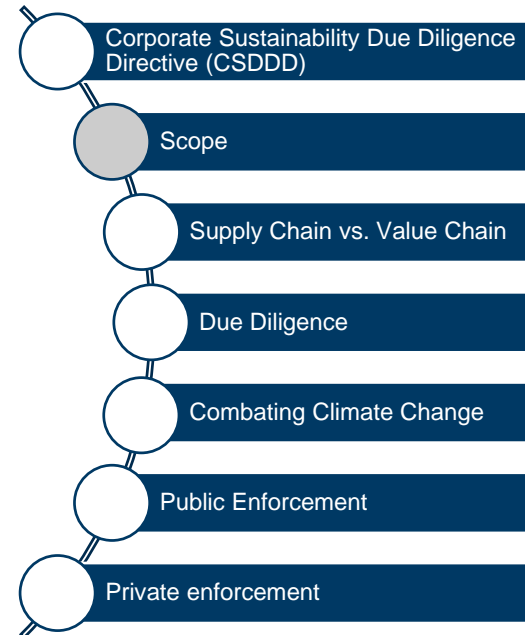


Step by step introduction

- 2027: employees > 1000 + 300 Mio. € turnover
- 2028: employees > 500
- 2029: employees > 250 in high risk sectors
- Non-EU companies: 3 years after entry into force

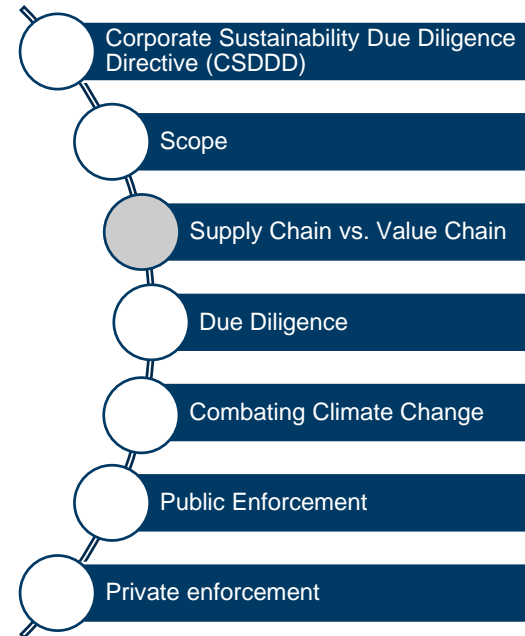
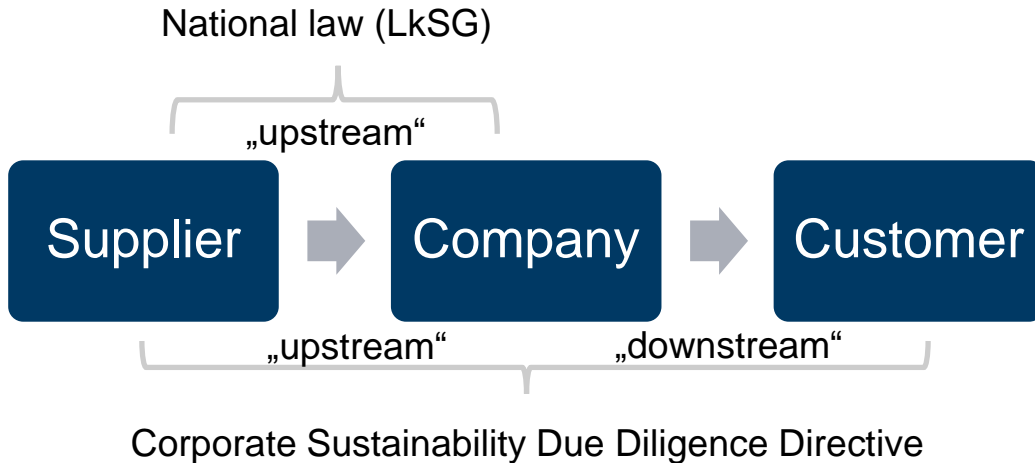
Assessment

- European CSDDD very broad
- Significant impact on third country companies as well
- Scope is one point that could be critical for adoption / further negotiations

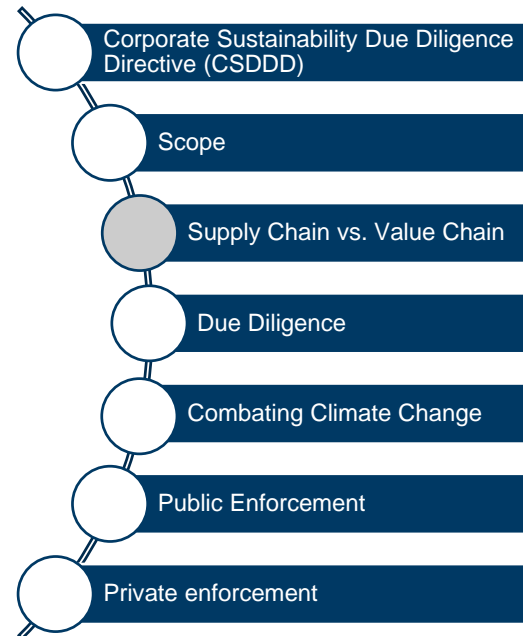


Supply Chain vs. Value Chain

Supply Chain vs. Value Chain



Supply Chain vs. Value Chain



New wording: “**Chain of Activities**”

- Covering direct and indirect business partners
- Upstream: production of goods & provision of services
- Downstream:
 - Only related to product, not services
 - Excluding disposal by consumers
 - Regulated financial undertakings only upstream (recital 19)

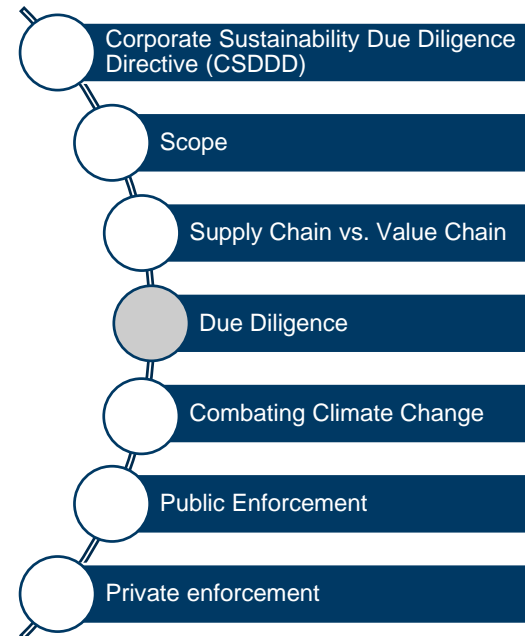
Human Rights & Environmental

Due Diligence

Art. 4(1) CSDDD

Member States shall ensure that companies conduct risk-based human rights and environmental **due diligence** as laid down in Articles 5 to 11 ('due diligence') by carrying out the following actions: [...]

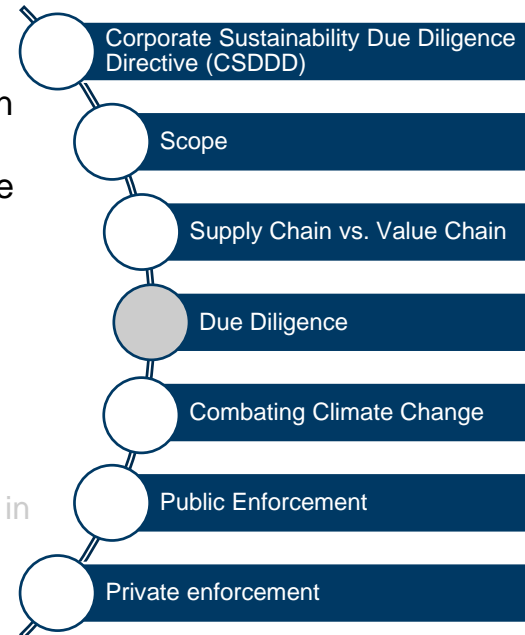
- Central provision
 - regarding human rights and environmental due diligence
 - combating climate change dealt with in art. 15 (different regulatory regime)
- Road map – pointing to more detailed articles
- Due diligence is much more than just knowing what you are doing (very different from M&A due diligence) – next slide



Art. 4(1) CSDDD

Member States shall ensure that companies conduct risk-based human rights and environmental due diligence as laid down in Articles 5 to 11 ('due diligence') by carrying out the following actions:

- (a) **integrating** due diligence into their policies and risk management systems in accordance with Article 5;
- (b) **identifying** and assessing actual or potential adverse impacts in accordance with Article 6 and, where necessary, prioritizing [...];
- (c) **preventing and mitigating** potential adverse impacts, and bringing actual adverse impacts to an end and **minimising** their extent in accordance with Articles 7 and 8;
- (cb) providing remediation to actual adverse impacts in accordance with Article 8c;
- (cc) carrying out meaningful engagement with stakeholders in accordance with Article 8d;
- (d) establishing and maintaining a notification mechanism and **complaints procedure** in accordance with Article 9;
- (e) **monitoring** the effectiveness of their due diligence policy and measures in accordance with Article 10;
- (f) **publicly communicating** on due diligence in accordance with Article 11



Adverse Impacts: **What?** Whose? How?

What is an adverse impact?

- ‘**adverse impact**’ means adverse environmental impact and adverse human rights impact
- ‘adverse **environmental** impact’ means an adverse impact on the environment resulting from the breach of prohibitions and obligations ... [Environmental and climate conventions and EU legislation]
- ‘adverse **human rights** impact’ means an impact on persons resulting from an abuse of human rights [list in annex]

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Whose adverse impact is to be dealt with?

- Own adverse impact
- Subsidiaries’ adverse impact
- Business partners’ adverse impact: upstream and downstream

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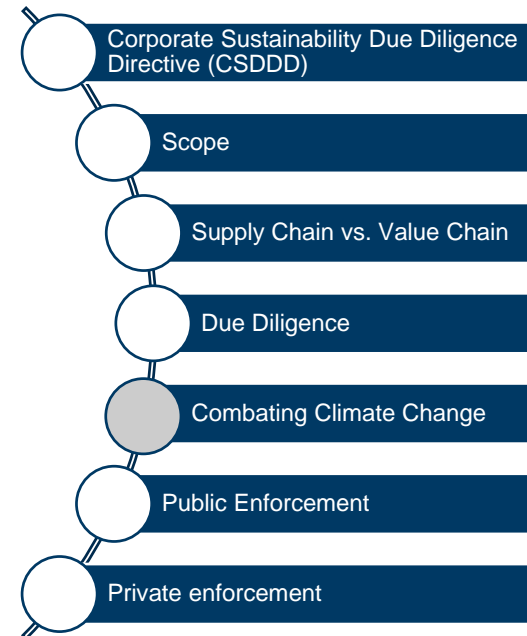
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How to deal with adverse impacts?

- Art. 5–11: obligation of means, not result
- Obligation to take “appropriate measures” → what is “appropriate”?
 - EU: causation, proximity to company, level of influence.
 - Detailed list of measures e.g. in Art. 7, 8

Combating Climate Change

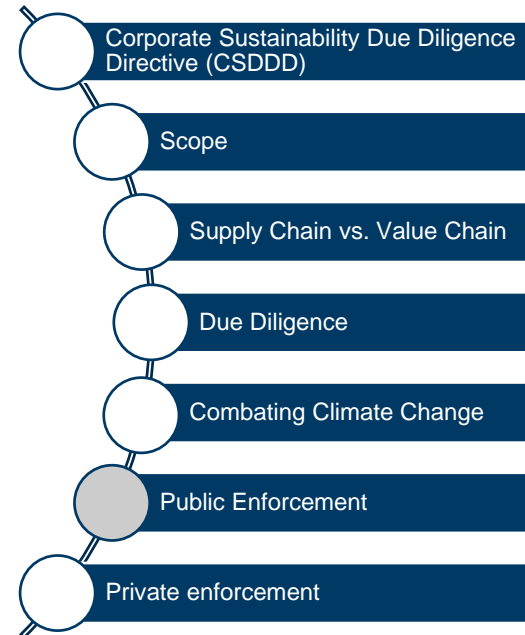
- Art. 15 requires the development and implementation of a transition plan for climate change mitigation
- Objective of transition plan: business model and strategy to be aligned with
 - Transition to a sustainable economy
 - Limiting global warming to 1.5 °C (Paris Agreement)
 - Achieving climate neutrality ([Regulation 2021/1119/EU](#), European Climate Law)
- Again: obligation of means, not obligation of result: “through best efforts” (see as well recital 50)
- No overlap with environmental due diligence



Public & Private Enforcement

Supervisory authorities in each member state

- Monitor and investigate whether companies comply with obligations (Art. 17, 18)
- Exchange at EU level within European Network of Supervisory Authorities (Art. 21)
- Penalties (Art. 20) include
 - “naming and shaming”
 - Fines up to 5% of the company’s net worldwide turnover (consolidated turnover for ultimate parent companies)

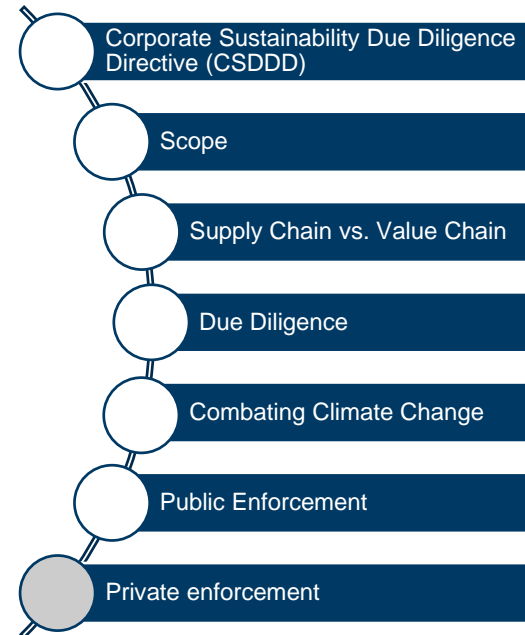


Art. 22 Civil liability of companies and a right to full compensation

Companies can be held liable for a damage caused to a natural or legal person, provided that:

- a) the company **intentionally or negligently** failed to comply with the obligations laid down in Articles 7 and 8, when the right, prohibition or obligation listed in Annex I is **aimed to protect** the natural or legal person and
- b) as a result of a failure as referred to in point (a), a damage to the natural or legal person's legal interest **protected under national law** was caused

- Fault requirement
- Limited to Art. 7, 8 (not: the entire CSDDD, esp. not Art. 15)
- Possible far-reaching limitation: protected interest requirement



Conclusion

- Companies responsible for their chain of activities
- Obligation of means, but still extensive compliance measures necessary
- Companies are not obliged to bring actual adverse impacts to an end at all cost
- Public and private enforcement
- Uncertainty as to civil liability – still one of the most contentious issues in the legislative process
- Currently: adoption of directive is uncertain; at least more negotiations to be expected