

2024 KLRI E.S.G. Global Symposium

“ *Global Perspectives on the Institutionalization
and Implementation of EU CS 3D:
Legal Framework and Future Directions* ”

September 20th (Fri), 2024

15:00 ~ 19:00 (KST) / 08:00 ~ 12:00 (CET)

2024 KLRI E.S.G. Global Symposium

Content

1. Co-Moderators

Dr. Yukyong Jung Yun Choe, Senior Research Fellow of KLRI (ROK)
Prof. Mauro Zamboni, Professor of Stockholm University (Sweden)

2. PART 1. Korean Perspectives

Keynote Speech

EU Sustainability - Should It Matter to Asia? EU ESG (and DDD) in Context

Mr. Walter VAN HATTUM, Minister Counsellor,
Head of Trade and Economic Section - EU Delegation to the Republic of Korea (Netherlands)

Presentations

An mHREDD Initiative from Asia: Challenges and Discontents

Dr. Pillkyu Hwang, Executive Director, Transnational Human Rights Institute,
GongGam Human Rights Law Foundation (ROK)

Reactive Policies Are not Enough: Examining Korea's BHR Policies and
Corporate Practices; The Case for mHREDD Legislation

Ms. Yujung Shin, Partner/Attorney at Law, Jihyang Law (ROK)

Challenges and Practical Difficulties Faced by Korean Companies

Mr. Changwan Han, Attorney at Law, BAE, KIM & LEE LLC (ROK)

3. PART 2. European Perspectives

Presentations

Safeguarding Biodiversity: Unveiling Corporate Governance's Silent Challenge

Prof. Dr. Marco Corradi, Professor, ESSEC Business School (France)
Prof. Dr. Silvia Grandi, Adjunct Professor, University of Bologna (Italy)

Transforming the CSDDD into National Law. (How) Can/Must
the German Lawmaker Modify the Scope of the LkSG?

Prof. Dr. Anne-Christin Mittwoch, Professor, Martin Luther University Halle Wittenberg (Germany)

EU Supply Chain Due Diligence - Questions on the Practical Implementation from
a German Point of View

Dr. Michael Burian & Dr. Marc Ruttloff, Partners, Gleiss Lutz (Germany)

Italian Corporate Law's Unreadiness to Implement EU CS3D (Despite Its Regulatory Lightness)

Prof. Carlo Amatucci, Professor, University of Naples Federico II (Italy)

4. PART 3. International Organization's + Asian Perspectives

Presentations

International Instruments on Responsible Business:
in the Context of Emerging Supply Chain Due Diligence Regulation

Ms. Kate Wilson, Project Manager-Asia, Center for Responsible Business Conduct (OECD)

ILO's Approach to Responsible Business Conduct and
the Labour Dimension of Human Rights Due Diligence

Ms. Emily Sims, Senior Specialist and Manager, ILO Helpdesk for Business (ILO)

Discussions

Prof. Dr. Florian Möslein, Professor, Philipps-Universität Marburg (Germany)

Dr. Hwa Ryung LEE, Director, Korea Fair Trade Commission (ROK)

Prof. Björn Lundqvist, Professor, Stockholm University (Sweden)

Dr. June Namgoong, Senior Research Fellow, Korea Labor Institute (ROK)

Ms. Hyunyoung Jee, Deputy Director, Attorney at Law, Institute of Green Transformation (ROK)

Ms. Youngah Park, Attorney at Law, GongGam Human Rights Law Foundation (ROK)

2024 KLRI E.S.G. Global Symposium

Global Perspectives on the Institutionalization and Implementation of EU CS 3D: Legal Framework and Future Directions

Co-Moderators : *Dr. Yukyong Jung Yun Choe*, Senior Research Fellow of KLRI (ROK)
Prof. Mauro Zamboni, Professor of Stockholm University (Sweden)

PART 1. Korean Perspectives

Opening & Welcoming Remarks

Dr. Yukyong Jung Yun Choe, Senior Research Fellow, KLRI (ROK)

Keynote Speech

EU Sustainability – Should It Matter to Asia? EU ESG (and DDD) in Context

Mr. Walter VAN HATTUM, Minister Counsellor, Head of Trade and Economic Section - EU Delegation to the Republic of Korea (Netherlands)

15:00~16:00
(60')

Presentations

An mHREDD Initiative from Asia: Challenges and Discontents

Dr. Pillkyu Hwang, Executive Director, Transnational Human Rights Institute, GongGam Human Rights Law Foundation (ROK)

Reactive Policies Are Not Enough: Examining Korea's BHR Policies and Corporate Practices;
The Case for mHREDD Legislation

Ms. Yujung Shin, Partner/Attorney at Law, Jihyang Law (ROK)

Challenges and Practical Difficulties Faced by Korean Companies

Mr. Changwan Han, Attorney at Law, BAE, KIM & LEE LLC (ROK)

PART 2. European Perspectives

Presentations

Safeguarding Biodiversity: Unveiling Corporate Governance's Silent Challenge

Prof. Dr. Marco Corradi, Professor, ESSEC Business School (France) & *Prof. Dr. Silvia Grandi*, Adjunct Professor, University of Bologna (Italy)

Transforming the CSDDD into National Law. (How) Can/Must the German Lawmaker Modify the Scope of the LkSG?

Prof. Dr. Anne-Christin Mittwoch, Professor, Martin Luther University Halle Wittenberg (Germany)

16:00~18:00
(120')

Break Time (20')

EU Supply Chain Due Diligence - Questions on the Practical Implementation from a German Point of View

Dr. Michael Burian & Dr. Marc Ruttloff, Partners, Gleiss Lutz (Germany)

Italian Corporate Law's Unreadiness to Implement EU CS3D (Despite Its Regulatory Lightness)

Prof. Carlo Amatucci, Professor, University of Naples Federico II (Italy)

PART 3. International Organization's + Asian Perspectives

Presentations

International Instruments on Responsible Business: in the Context of Emerging Supply Chain Due Diligence Regulation

Ms. Kate Wilson, Project Manager-Asia, Center for Responsible Business Conduct (OECD)

ILO's Approach to Responsible Business Conduct and the Labour Dimension of Human Rights Due Diligence

Ms. Emily Sims, Senior Specialist and Manager, ILO Helpdesk for Business (ILO)

18:00~19:00
(60')

Discussions

Prof. Dr. Florian Möslein, Professor, Philipps-Universität Marburg (Germany)

Dr. Hwa Ryung LEE, Director, Korea Fair Trade Commission (ROK)

Prof. Björn Lundqvist, Professor, Stockholm University (Sweden)

Dr. June Namgoong, Senior Research Fellow, Korea Labor Institute (ROK)

Ms. Hyunyoung Jee, Deputy Director, Attorney at Law, Institute of Green Transformation (ROK)

Ms. Youngah Park, Attorney at Law, GongGam Human Rights Law Foundation (ROK)

2024 KLRI E.S.G. Global Symposium

Co-Moderators



Dr. Yukyong Jung Yun Choe
Senior Research Fellow of KLRI (ROK)

Yukyong Jung Yun Choe is a Senior Research Fellow of the Korea Legislation Research Institute (KLRI). She received her LL.M. & JSD degrees from the UC Berkeley Law. Before she went to Berkeley, she got her Master in International Law and was a Ph.D. candidate at Seoul National University after getting her B.A. in Law from Ewha Womans University.

Yukyong has been leading the E.S.G. Legislative Team and the Research Group on E.S.G. under the National Research Council (NRC) since 2019 and her deepest interest encompasses judicial politics, legal reform and legal professional training system while her most recent works are more focused on Sustainability, E.S.G. Regulation & Artificial Intelligence Regulation.

Her most recent publication is "E.S.G. Legislative Basic Study (III): How to Improve Domestic Legislation to Ensure Alignment with Global Sustainability Disclosure (2023)" and "Research on AI Regulation for Enhancing Competitiveness in the Age of Artificial Intelligence (2024)." She is currently involved in diverse International projects including "Owning the Metrics: The Application of SDGs to Mondragon", "Korean Nature Futures", "Future Earth Korea" and "Democratic governance and non-majoritarian institutions"

2024 KLRI E.S.G. Global Symposium

Co-Moderators



Prof. Mauro Zamboni

Professor of Stockholm University (Sweden)

Mauro Zamboni is currently a professor at the Faculty of Law at Stockholm University since 2011. Additionally, he holds the position of Senior Associate Research Fellow at the Institute of Advanced Legal Studies at the University of London (2015-). Zamboni has been a Research Fellow at the Korea Legislation Research Institute (Seoul) since 2012 and a member of the Executive Committee of the International Association for Social and Legal Philosophy (I.V.R.) since 2015. Moreover, he assumed the role of President of the International Association for Legislation in 2021. Throughout his academic career, Mauro Zamboni has contributed as a visiting scholar and visiting professor at various institutions, including Harvard Law School, the Institute of Advanced Legal Studies at the University of London, Stanford University, and Kobe University. His main academic interests revolve around exploring the intricate relationships between law and politics, particularly from the perspective of legislative studies. Zamboni has an extensive list of publications, including notable works such as "Law and Politics: A Dilemma for Contemporary Legal Theory" (Springer), "The Policy of Law: A Legal Theoretical Framework" (Hart Publishing), "Constitutional Courts' Activism and the Relation Between Law and Politics: A Legal Theoretical Contribution" (Cambridge Law Review), and "The Positioning of the Supreme Courts in Sweden - A Democratic Oddity?" (European Constitutional Law Review).

2024 KLRI E.S.G. Global Symposium

PART 1. Korean Perspectives

Keynote Speech

EU Sustainability - Should It Matter to Asia? EU ESG (and DDD) in Context



Mr. Walter VAN HATTUM

Minister Counsellor,

Head of Trade and Economic Section - EU Delegation to the Republic of Korea (Netherlands)

Following my studies in political economy, development and business administration, I worked on trade, industry and development policies, among others for the International Labour Organisation in Nigeria; as a career diplomat for the Dutch Foreign Service; Oxfam Novib; and the European Union.

For the EU, I helped establish a joint undertaking in Barcelona for nuclear fusion development. I worked on humanitarian aid and health policies and more recently on EU trade policy.

I was posted in Thailand, Indonesia, the Philippines and Hong Kong where I served as head of the trade section of the EU Delegation, engaging government, business and stakeholders on free trade agreements, sustainability and market access.

In August 2024, I was appointed head of the trade and economic section of the EU Delegation to the Republic of Korea, also covering digital, science & technology; and partnership.

2024 KLRI E.S.G. Global Symposium

PART 1. Korean Perspectives

An mHREDD Initiative from Asia: Challenges and Discontents



Dr. Pillkyu Hwang

Executive Director, Transnational Human Rights Institute,
GongGam Human Rights Law Foundation (ROK)

Pillkyu Hwang is Executive Director of the Transnational Human Rights Institute at Gonggam Human Rights Law Foundation and a former adjunct professor at Seoul National University Law School and Ewha Law School. He is the vice-chair of the LAWASIA Human Rights Committee, the vice-chair of the Human Rights Law Society of South Korea, the chair of the Committee on Disaster and Human Rights of the Korean Bar Association and has served as an advisory board member of the Fortify Rights since 2015 and an editorial team member of the Business and Human Rights Journal since 2019.



An mHREDD Initiative from Asia: Challenges & Discontents

Pillkyu Hwang
Executive Director
The Transnational Human Rights Institute
GongGam Human Rights Law Foundation

EU CSDDD? KSS? MHREDD LEGISLATION?

“EU 'Corporate Supply Chain Due Diligence' D-3 Years...Will It Hurt Korea, 'A Human Rights and Environmental Backward Country'?” (Hankyoreh, 19 Aug. 2024)

“CaIPERS, NBIM, and other international investors demand stronger disclosure standards than KSSB draft” (ESG Economy, 5 Sept. 2024)

경제 경제일반

EU '기업 공급망 실사' D-3년... '인권·환경 후진국' 한국 탈 없을까?

HERI 이슈 | EU CSDDD 7월25일 발효

2027년 7월부터 EU와 거래 대기업
협력사 인권·환경 위험 실사 의무화
위반 땀 세계 매출액 5% 이상 벌금
인권·환경지표 열악...준비 초보단계

기자 편집소

수정 2024-08-19 07:43
등록 2024-08-19 05:00

ESG경제
지속가능경제 | 환경·사회 | 기업 거버넌스 | 공시·평

홈 > 지속가능경제 > 정책·제도

**캘퍼스·NBIM 등 해외 투자자,
KSSB 초안보다 강화된 공시기
준 요구**

이신형 기자 | 입력 2024.09.05 15:00

가 가

국민연금 포함 국내외 256개 기관이 초안에 대한
의견 제시
미 캘퍼스 등 기후공시뿐 아니라 일반사항 공시 의
무화 요구
신속한 공시 이행과 이를 위한 명확한 일정 제시 바
람적 의견
노르웨이 국부펀드, 스코프 3 배출량과 산업기반
공시 요구



EU CSDDD? KSS? MHREDD LEGISLATION?

Understanding & Implementing of
HUMAN RIGHTS
ENVIRONMENTAL
DUE DILIGENCE

v.

Minimizing of
Adapting to Inevitable Regulation
& Establishing Avoidable Regulation
i.e.
DISGUISED DENIAL OF
HUMAN RIGHTS AND
ENVIRONMENT

THE FRIST STATEMENT FROM A STATE INSTITUTION, 2022

Special Inquiry Commission on Social Disasters

Recommendation : **Enactment of an 'mHREDD law'**

- The Minister of Justice(MOJ), the Minister of Health and Welfare(MOHW), and the Minister of Environment(MOE) should enact the "mHREDD" to require companies to voluntarily implement and publicize supply chain safety management in order to strengthen the safety management capabilities and responsibilities of companies.
- The mHREDD establishes guidelines for supply chain due diligence **for companies of different sizes**, and stipulates the **applicable targets, international standards, actual items, scope of due diligence, obligations, and legal sanctions for violations.**

THE FRIST STATEMENT FROM A STATE INSTITUTION, 2022

Special Inquiry Commission on Social Disasters

Recommendation : **Enactment of an 'mHREDD law'**

- The Minister of Justice(MOJ), the Minister of Health and Welfare(MOHW), and the Minister of Environment(MOE) should enact the "mHREDD" to require companies to voluntarily implement and publicize supply chain safety management in order to strengthen the safety management capabilities and responsibilities of companies.
- The mHREDD establishes guidelines for supply chain due diligence **for companies of different sizes**, and stipulates the **applicable targets, international standards, actual items, scope of due diligence, obligations, and legal sanctions for violations.**

THE FRIST RESPONSE FROM THE MINISTRIES, 2023

[MOJ]- Considering ways to support companies to voluntarily examine their human rights impacts and take appropriate measures in line with **Korean business realities**

[Ministry of Employment and Labor(MOEL) Occupational Safety and Health Policy Division]- Regulations and punishment-centered approaches that impose supply chain due diligence and disclosure obligations on all companies need to be carefully reviewed in light of **the contraction of business activities.**

[MOE] **Social consensus through sufficient discussion** with related ministries, stakeholders, and the National Assembly on the enactment of the law are necessary.

UN HR BODY RECOMMENDATIONS, 2023

UN Human Rights Committee Concluding Observations:

The State party should:

- (a) **Enhance the effectiveness of existing mechanisms** to ensure that all business enterprises subject to its jurisdiction respect human rights standards, including when operating abroad;
- (b) **Consider adopting binding legislation to require human rights due diligence** by business enterprises, including a system for disclosure of related information;
- (c) **Consider establishing an independent mechanism with the power to investigate human rights abuses** committed both domestically and abroad by business enterprises subject to its jurisdiction;
- (d) **Take additional steps to ensure access to judicial and non-judicial remedies** for victims of human rights violations caused by the activities of business enterprises subject to its jurisdiction, including those operating abroad.

GOVERNMENT HUMAN RIGHTS POLICY (NAP), 2024

- **Conducting research on how to utilize the “Guidebook for Business and Human Rights”** published by the Ministry of Justice and conducted policy research on business and human rights
- **Participating in discussions on the 'Basic Bill on Human Rights Policy'**, which includes the responsibility of companies to respect human rights and the efforts of the state and local governments to prevent corporate human rights violations
- **Establishing K-ESG guidelines** for each industry
- **Preventing human rights violations** of local workers in overseas companies **by provide information and holding meetings** with related organizations **to share labor management support** results and plans for companies

Human Rights Policy WITHOUT HUMAN RIGHTS?

National Action Plan WITHOUT ACTION PLAN?

2021 BASIC BILL ON HUMAN RIGHTS POLICY (DEAD)

Article 17 (Corporate Responsibility to Respect Human Rights) ①
A corporation shall not violate the human rights of others through its business activities at home or abroad, **or engage in** activities that cause third parties to violate the human rights of others.

② In the event of human rights violations caused by business activities, companies **shall prepare procedures** in advance for victims to seek redress **and endeavor to provide** appropriate remedies.

Article 18 (Efforts by the State and Local Governments to Prevent Human Rights Violations by Business Enterprises, etc.) ① **The State and local governments shall prepare necessary laws and policies** to prevent human rights violations caused by business enterprises and provide relief to victims of such violations.

The bill died in 2024

WITHOUT ANY DELIBERATION FOR 3 YEARS.

COUNTER-ARGUMENTS TO 2023 MHREDD BILL (DEAD)

- National Assembly Expert: burdens (difficult to identify all supply chain human rights and environmental risks; **SMEs are also affected**); international trends (no examples of legislation in Asia)
- Ministry of Economy and Finance(MOEF): **Double burden on companies, excessive burden on industry as a whole**; concern of conflict with existing human rights and environmental laws; pre-emptive **legislation in the context of very few similar laws, disadvantageous for industrial strategy**
- Ministry of Trade, Industry and Energy(MOTIE): Sanctions, greater burden on companies; ESG management based on corporate autonomy, need of considering support rather than regulation
- Ministry of SMEs and Startups(MSS): Impossible application of the law if supply chains of SMEs are included, concern over increased burden

COUNTER-ARGUMENTS TO 2023 MHREDD BILL (DEAD)

- Federation of Korean Industries(FKI): Need to establish a basic supply chain due diligence system; broad scope increases burden on companies; concerns about duplication of human rights and environmental due diligence across multiple contractors
- Korea Federation of SMEs(KBIZ): Excessive burden of expanding responsibilities to small and medium-sized enterprises that cooperate with large and medium-sized enterprises
- Korea Chamber of Commerce and Industry(KCCI): Excessive burden on companies; need for voluntary diffusion through incentives, not mandates



SUPPORT FOR COMPANIES ON HREDD (2023 BILL)

The 2023 Bill specified **the government's support for companies' hredd by establishing various standards and introducing support programs.**

- Preparation and dissemination of guidelines on corporate hredd
- Establishment of standards for disclosure of information related to hredd of companies
- Establishment of evaluation criteria and evaluation indicators for corporate hredd
- Provide consulting, education, training, and support for the establishment of relevant information systems for the implementation of hredd by companies
- Support tailored to the obligations and needs of SMEs



CONTENTS OF MHREDD: AVOIDING & MITIGATING RISKS (2023 BILL)

It is a process of risk identification, countermeasure formulation and implementation, evaluation, and feedback throughout the entire process of a company's (including its supply chains) business activities.

- ← Key terms excessively broad, vague, and may have adverse effects such as abuse of information disclosure requests, grievance procedures, and hredd appeals;
- ← Possibility of identifying actual hre risks is negative;
- ← Burdensome, including forced termination of contractual relationships with SME suppliers;
- ← Inability to influence top suppliers on indirect suppliers' issues or infringement on management rights
(National Assembly Expert)



SCOPE: EXCLUSION OF SMES (2023 BILL)

Application without exception

- Obligation to identify war crimes and crimes against humanity, genocide, child labor, and hre risks in conflict-affected and high-risk areas, and to develop and implement countermeasures
- ← Undue burden on SMEs (National Assembly Expert)

Exclusion of application

- SMEs under Article 2 of the Basic Act on SMEs
- Companies employing less than 500 workers at any given time and with sales of less than 200 billion won in the previous business year
- ← 500 is an excessively low threshold (National Assembly Expert)

The scope of the Act can be expanded in stages by presidential decree

- ← Scope of application is a matter of law (National Assembly Expert)



HREDD IMPLEMENTATION SYSTEM & STAKEHOLDER COMMUNICATION

Establishment of relevant organizations and procedures & involvement of the board of directors to ensure the effectiveness of corporate hredd

← Excessive burden on companies, supervisory responsibilities and joint liability of management (National Assembly Expert, MOEF, KCCI)

Obligation to communicate & cooperate with stakeholders throughout the entire process of hredd, as well as stakeholders' right to request information & appeal

← Concerns about over-expansion of advocacy organizations (National Assembly expert)

← Vagueness of information required to be disclosed, concern about excessive infringement of corporate secrets (National Assembly expert, MOEF)



HRE CORPORATE COMMISSION, DISPUTE RESOLUTION & REMEDIES AND PENALTIES

Establishment of an authoritative body responsible for overall hredd, & consider organizational structure to enable practical hredd

← Need to clarify whether it is an administrative or advisory committee (National Assembly expert)

← Possibility to utilize similar committees such as the NHRC and the Environmental Dispute Mediation Committee (Ministry of the Interior and Safety(MOIS), Office for Government Policy Coordination of Prime Minister's Secretariat(OPM))

Right of stakeholders to appeal & correction recommendations and orders of the HRE Corporate Commission/ the relevant ministries

← Overly broad investigative powers (National Assembly Expert)

Provision of damages and penalties for effective implementation of obligations and practical relief of victims

← Concerns about excessive expansion of liability for damages, shifting burden of proof to corporations, and liability without reasonable limits; penalties violating the principle of clarity, and excessive prison sentences (National Assembly Expert)



-
- Discussion, finalization, and application of narrowly tailored **local sustainability disclosure standards** including mandatory disclosure of “climate-related risks and opportunities that are reasonably expected to affect the company's prospects”
 - Reintroducing and discussing **the Corporate Human Rights and Environmental Due Diligence Bill**
 - Interpretation and application of the **European Union's 'Corporate Sustainability Supply Chain Due Diligence Directive'**, discussion of the process of enacting and applying domestic laws, and application of other individual domestic laws
 - Investigation and assessment of hre risks in **overseas supply chains** of Korean companies
 - Discussion and evaluation of corporate activities in **conflict and high-risk areas**

2024 KLRI E.S.G. Global Symposium

PART 1. Korean Perspectives

Reactive Policies Are not Enough: Examining Korea's BHR Policies and Corporate Practices; The Case for mHREDD Legislation



Ms. Yujung Shin

Partner/Attorney at Law, Jihyang Law (ROK)

Yujung Shin is a legal expert specializing in corporate responsibility and human rights. She previously served in the Korean government, focusing on the domestic implementation of international human rights laws, including the UNGPs, and contributing to the establishment of the National Action Plan for Human Rights. As a lawyer, her practice focuses on advising corporations and public institutions on ESG strategies. She also participated in drafting and advocating for the mHREDD bill proposed in Korea in 2023.

Reactive Policies Are not Enough: Examining Korea's BHR Policies and Corporate Practices; The Case for mHREDD Legislation

Yujung Shin / Attorney at Law / Jihyang Law

Desirable Government Action on Business and Human Rights

Aligning with International Standards

The UNGPs require states to set clear expectations for businesses to respect human rights, enforce laws and policies, and provide effective guidance on how to do so.

Clear Compliance Mechanism

According to UN WGBHR reports clear compliance monitoring and enforcement structures, as well as accessible remedy mechanisms, are necessary.

Inclusive Stakeholder Engagement

According to UN WGBHR reports, meaningful and inclusive stakeholder consultations are crucial for developing effective national BHR laws and policies.

Current Policies and Practices

Existing Policies

Korean Government has published some guidelines with regards to supply chain due diligence and introduced policies to assist domestic exporters 'respond' to human rights due diligence by foreign importers. The policies are mostly passive/reactive, and do not set a clear expectation towards domestic companies to respect human rights.

Corporate Practices

While some Korean companies have started to 'audit' or 'check' human rights risks in their supply chain, the overall level of alignment with UNGPs remains low. Many companies lack comprehensive policies and processes to identify, prevent, and mitigate negative impacts in their supply chains, and the gap is more significant in SMEs.

Stalled Implementation of UNGPs (around 2021)

Guideline on HRDD ends up to be a dead letter

In 2021, the Ministry of Justice published a guideline on human rights due diligence in supply chains, "A Guide to Business and Human Rights". However as of 2024, the government has no policy to promote the implementation of the Guide, and the Guide is not widely recognized nor effective.

Related bill was introduced, but was abandoned

The government submitted "Framework Act on Human Rights Policy" to the National Assembly, attempting to enact a law that would require the state to establish policies for corporate responsibility to respect human rights. The bill was abandoned due to the expiration of the National Assembly's term, and the Korean government is not pursuing its reintroduction.

Latest National Action Plan on Human Rights includes only passive policy tasks

The government recently released the 4th National Action Plan on Human Rights (NAP), which outlines its human rights policy goals through 2027. While it includes a chapter on corporate responsibility to respect human rights, the policy tasks are only passive, such as "conducting policy research" and "organizing conferences and forums".

Reactive Actions to Foreign mHREDD Legislation

Government action plan on HRDD: aims to respond to trade pressures

In May 2023, the Korean government released the 'Plan to Support Companies in Responding to Supply Chain Due Diligence'. This action plan aims to provide support to domestic exporters in responding to the regulatory risks posed by foreign mHREDD legislations(EU CSDDD).

With this plan in place, Policies are being designed from the perspective of considering foreign mHREDD legislations, such as EU CSDDD, as trade pressures on exporters and thus protecting business opportunities for domestic companies.

DD Guidance: geared towards meeting the minimum standards requested by business partners

In December 2022, the MOTIE published the "K-ESG Guidelines" to help Korean companies respond to supply chain due diligence requirements. Industry-specific guidelines were also released in 2023.

However, the Guidance does not require companies to identify and address adverse human rights impacts. Instead, it provides checklists based on ESG initiatives like the RBA or EcoVadis, rather than international human rights standards, so that companies do not receive 'failing grades' in certain items that are considered important by their foreign clients, buyers or investors.

Corporate Practices on HRDD: Large Corporations

Most major conglomerates claim to manage ESG risks in their business partners' activities as part of their 'ESG management'. A 2022 survey by the Korea Enterprises Federation found that 76% of Korean conglomerates reported overseeing their partners' 'ESG management'.



Supplier Codes of Conduct

Many large enterprises report having established supplier codes of conduct that include human rights, demonstrating their commitment to managing ESG risks in their supply chains.



ESG Checklists

Large Korean companies commonly distribute ESG checklists to business partners to assess ESG risks, including human rights, as part of their 'ESG management' efforts.



Third-Party Audits

Large companies increasingly join industry-specific sustainability initiatives and have third parties audit their business partners, ensuring compliance with human rights standards.

Gaps in 'ESG audits' and International Standards



Superficial ESG audits

While many large companies perform 'ESG checks' or 'ESG audits' on their business partners, these often consist merely of requiring partners to submit documentation, without thoroughly verifying the accuracy of the information or conducting proper due diligence. For example, on-site audits to validate the actual operations of these partners are generally limited in scope.



Selective Stakeholder Engagement

Some large companies claim to engage with stakeholders, but they tend to only selectively engage with experts who are 'not too aggressive', while excluding actual rights-holders from the engagement process. Meaningful consultation with trade unions and impacted communities is often lacking.



Limited Scope of ESG Audits

Many companies' ESG audits are limited to a subset of their tier 1 suppliers, mainly those with high purchase volumes rather than those at high risk for human rights abuses, and seldom extend globally. A 2024 survey by the Korea Chamber of Commerce and Industry found that 67.9% of Korean exporters were not prepared to conduct due diligence on overseas business partners.



Incentives Leading to the Gaps

Cost-Effective Decisions?

Large corporations may find it "cost-effective" to pass on business operations with human rights or environmental risks to sub-contractors in foreign nations with insufficient governance, rather than conducting legitimate due diligence.

Burdensome Choices?

Many C-level executives comment that human rights due diligence may be a "burdensome" and "costly" undertaking and show preference to maintain an "industry average" stance rather than proactively preventing human rights abuses.

Lack of Penalties?

The absence of institutional penalties for neglecting human rights due diligence causes many corporations to focus on merely meeting the "minimum" requirements set by foreign investors or clients.

SMEs' Status on HRDD

Lack of Awareness

Many SMEs do not map or identify human rights risks to prevent or mitigate them. According to a March 2024 survey by the KCCI, 81.4% of Korean exporters do not conduct sustainability due diligence and have no plans to do so. Awareness of due diligence is also very low; the same survey found that SMEs scored only 41 out of 100 in understanding due diligence requirements under the EU CSDDD, indicating a poor grasp of the concept.

Low Sustainability Policies

SMEs generally have low levels of sustainability policies, raising concerns about potential human rights violations. In 2024, the KCCI analyzed the sustainability policies of 1,278 SMEs, scoring them from 0 to 5: listed companies scored 4.84, externally audited companies scored 3.96, and other small companies scored 2.85, indicating significant variation based on company size. Many SMEs report lacking the resources for dedicated sustainability teams or strategies.

Need for clear standards

On a practical level, there is criticism that the burden of supply chain audits conducted by large companies is often shifted onto small businesses. Some argue that large companies demand excessive documentation and information from their SME partners, highlighting the need for standardized requirements.

Need for mHREDD



From Reactive to Proactive

The Korean government and companies have adopted HRDD policies only in response to foreign regulations or client requests, rather than out of a genuine commitment to human rights. This reactive approach must be replaced with proactive measures to protect human rights.



Changing Profit-Driven Approach

Korean companies have adopted HRDD policies primarily to protect corporate profits, rather than to address human rights abuses. This has led to a focus on material risks to the exporter's financials, rather than on the high-impact risks to right-holders. The focus needs to be shifted with institutional measures.



Bridging the Gaps

While ESG audits are being conducted by large companies, they are not aligned with the UNGPs and their effectiveness is questionable. Clear standards and accountability mechanisms are needed to bridge the gap between practice and international human rights law.

2024 KLRI E.S.G. Global Symposium

PART 1. Korean Perspectives

Challenges and Practical Difficulties Faced by Korean Companies



Mr. Changwan Han

Attorney at Law, BAE, KIM & LEE LLC (ROK)

Changwan Han is a partner at Bae, Kim & Lee LLC, one of the largest law firms in Korea. He provides a range of legal services in the fields of international regulations, including ESG, trade, and international disputes. Before joining the firm in 2023, he served as the directors of the International Legal Affairs Division and the International Dispute Settlement Division at the Ministry of Justice in Korea. He was admitted to the Illinois Bar in 2017 and the Korean Bar in 2006. He also holds a Ph.D. in International Law.



2024 KLRI E.S.G. Global Symposium

Challenges and practical difficulties faced by Korean companies

20 September 2024

Changwan HAN, Bae, Kim and Lee LLC

Korean companies' reliance on trade and global supply chains



- South Korea's trade-to-GDP ratio was approximately 88% in 2023, reflecting a substantial reliance on international trade. For comparison, the ratios for the United States, Japan and China were 27% in 2022, 47% in 2022, and 37% in 2023, respectively.* This underscores the significant integration of the Korean economy into global trade networks, with an inherent dependency on participation in complex global supply chains.

* Source: World Bank DataBank

- Many Korean enterprises, particularly those in key sectors such as electronics, automotive, textiles, and shipbuilding, operate within intricate, multi-layered global supply chains. However, these companies face considerable challenges in ensuring full traceability of subcontractors and lower-tier suppliers, especially in regions with constrained visibility or weak regulatory frameworks.
- While certain Korean companies have proactively addressed these challenges and are relatively well-prepared, others lag behind in meeting the requisite compliance and due diligence standards.

Potentially divergent domestic implementation



- The CSDDD does not, in itself, impose direct obligations on any company. Its provisions must first be transposed into the national laws of EU member states. Only the rules adopted through such national legislation will have legal applicability.
- Under Article 4 of the CSDDD, EU member states are permitted to implement more stringent obligations on companies, potentially leading to variations in the standards applied at the national level across different jurisdictions.
- Several Korean businesses remain uncertain about how these potentially divergent domestic implementations across EU member states will affect them in the future. Different member states may have varying levels of stringency in their national regulations, adding complexity for Korean companies that operate in multiple EU markets.

Privileged & Confidential

>

3

What does “in the Union” mean?



- Many Korean companies are questioning whether the CSDDD applies to them directly, irrespective of indirect effects on their operations as supply chain partners. A significant point of ambiguity is the interpretation of the term “in the Union”.* The CSDDD provides no clear guidance.
* Korean companies generating a net turnover of more than EUR 450 million *in the Union* will be directly subject to the CSDDD.
- If a Korean entity, which does not itself have significant operations, such as branches, within the European Union, sells its products to EU-based companies but delivers them within Korea, would this Korean entity fall directly under the scope of the CSDDD? Does this situation pertain to competitive dynamics with EU-based entities?
- Consider another scenario: A Korean entity has a subsidiary located within the EU, but the subsidiary does not engage in any significant operational activities within the EU. Instead, it enters into franchising or licensing agreements with entities outside the EU. Would the subsidiary and the parent Korean entity be subject to the CSDDD as a result of these royalty agreements?
- Could the geographic allocation of turnover under EU competition law be considered relevant in this context?

Privileged & Confidential

>

4

Small-medium sized Korean companies

bkl

- Certain Korean small and medium-sized enterprises (SMEs) have expressed concerns that non-compliance with the ESG standards required by the CSDDD may lead to significant loss of business opportunities. The inability to meet these sustainability requirements could result in exclusion from the supply chains of various EU-based and non-EU entities.
- On the positive side, Korean SMEs that proactively align with the CSDDD requirements may gain a distinct competitive advantage. As EU-based corporations may increasingly seek to partner with entities that adhere to ESG standards, compliant SMEs could position themselves as preferred suppliers, thereby opening new business opportunities.
- However, a considerable number of Korean SMEs that provide goods or services to EU-affiliated companies have encountered difficulties and confusion regarding how to adequately prepare for the potential impact of the CSDDD on their operations. Some of these SMEs have yet to take any steps to address this issue.

Privileged & Confidential

>

5

Support to SMEs or threats?

bkl

- Companies subject to the CSDDD are required to provide targeted and proportionate support to SMEs that are their business partner (Article 11.3(f)). Such support may include engaging with business partners regarding the company's expectations or enabling access to capacity-building, guidance, administrative and financial support (Article 11.4). Additionally, companies may seek contractual assurances from indirect business partners, complemented by appropriate measures to verify compliance (Article 11.5, 11.6).
- In practice, however, these measures—even those characterized as "support"—can impose significant burdens on SMEs working with companies subject to the CSDDD. Moreover, Larger companies may be required to refrain from entering into new business relations or extending existing ones, and in some cases, may need to terminate the relationship altogether (Article 11.7).
- SMEs often lack the leverage to decline requests from larger companies, and if they refuse to comply with the guidance or requests of larger entities, they risk losing their business relationships. In light of the power dynamics and corporate culture in Korea, SMEs may be disproportionately burdened. How can we address this issue in practice?

Privileged & Confidential

>

6

The climate transition plan



- The climate transition plan obligations under the CSDD and CSRD require companies to adopt plans that demonstrate how they will transition to climate-neutral operations in line with the Paris Agreement and EU targets for net-zero emissions.
- Korean SMEs may be required to make significant investments in data collection and sustainability expertise. Non-compliance with the climate transition obligations could lead to reputational damage, loss of business opportunities, or losing access to the EU market.
- However, unlike those in the EU, many Korean SMEs are not familiar with stringent climate disclosure and sustainability practices. They may need to reduce reliance on fossil fuels, shift to renewable energy sources, and improve energy efficiency in their operations. For this, they may need to develop internal expertise, build technical knowledge, or partner with external consultants. They often lack the resources to implement these changes without external support.

Privileged & Confidential

>

7

The importance of the EU Commission's guidelines



- The EU Commission shall issue general and sector-specific guidelines to support companies in fulfilling their due diligence obligations under the CSDDD.* In my opinion, these guidelines will, and should, play a critical role in mitigating uncertainties and addressing practice challenges encountered by Korean companies in complying with the directive.
 - * The guidelines are to be made available by 26 January 2027.
- The EU Commission should engage with stakeholders from non-EU countries,* including Korea, to assist those companies, particularly SMEs, in navigating the complexities and uncertainties associated with the CSDDD.
 - * Although Article 19.1 of the CSDDD mandates consultation with a range of organizations, it does not explicitly reference entities located outside the EU.
- Furthermore, these guidelines may serve as a framework to help other jurisdictions, such as Korea, in the development and implementation of their own domestic human rights due diligence legislation.

Privileged & Confidential

>

8

bkl

—
Thank you

Changwan HAN | Bae, Kim and Lee LLC

2024 KLRI E.S.G. Global Symposium

PART 2. European Perspectives

Safeguarding Biodiversity: Unveiling Corporate Governance's Silent Challenge



Prof. Dr. Marco Corradi

Professor, ESSEC Business School
(France)



Prof. Dr. Silvia Grandi

Adjunct Professor,
University of Bologna (Italy)

Marco Corradi is an Assistant Professor at ESSEC Business School in Paris and Singapore. He holds an MJur, an MPhil in Law, and a DPhil (PhD) in European and Comparative Corporate Law from the University of Oxford. Marco has extensive experience in policy research and consultancy across Europe and Asia, focusing on trade, competition, and corporate law. He is qualified as an attorney, mediator, and international commercial arbitrator. He has published articles in English, French, and Italian, and books with Hart (Oxford) and Cambridge University Press.

Silvia Grandi, PhD in geoeconomic sciences and National scientific qualification as a Full Professor. She is Adj. Prof. at the University of Bologna, board member of the Global Research Network on financial geography and board member of the J. of Finance & Space. With over 20 years of experience in sustainable development, she serves as tenure director of the Public Administration where she worked in the Italian Green Bond working group, the Committee for Sustainable Finance under the Ministry of Economy and Finance, and in EU regulatory negotiations.

Safeguarding Biodiversity: Unveiling the Corporate Governance Silent Challenge

Marco Corradi (ESSEC Business School) & Silvia Grandi (University of Bologna)



Corporate Law and Governance & Biodiversity Motivation



Inclusion of biodiversity in the **EU CS 3D**: cited **four times** in the preambles = inclusion in the core objectives of the directive

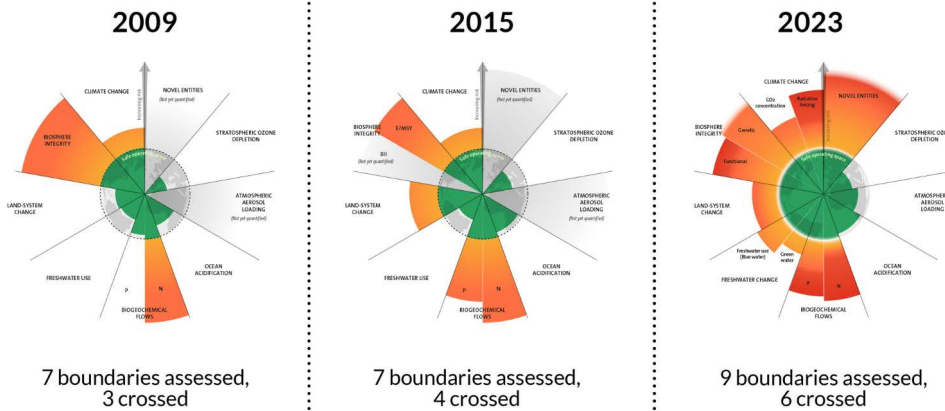


A multidisciplinary topic embedded in a wide array of **public policies** (slides 3ff.)



Biodiversity protection is highly relevant as well as **very technical** – hard to tackle exclusively with legal competences

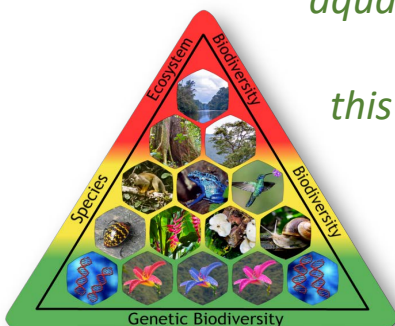
Why unveiling biodiversity?



Source: Azote for Stockholm Resilience Centre, Stockholm University. Based on Richardson et al. 2023, Steffen et al. 2015, and Rockström et al. 2009).
<https://www.stockholmresilience.org/research/planetary-boundaries.html>

How is biodiversity defined?

*“the **variability among living organisms from all sources,**
including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part;
this includes **diversity within species, between species, and of ecosystems.**”*



United Nations Convention on Biological Diversity (CBD)
adopted at the Earth Summit in Rio de Janeiro in 1992

The ecosystem
service concept

→
Interlinkages
Complexity

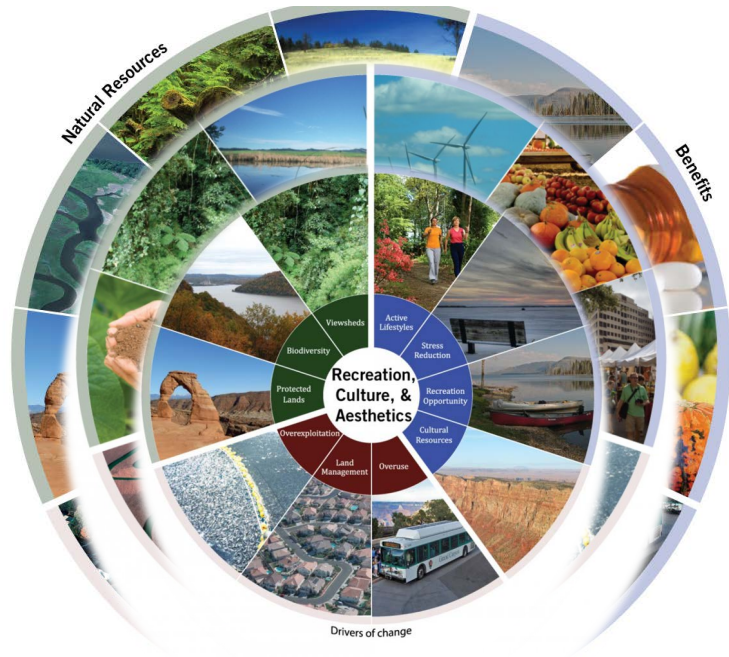
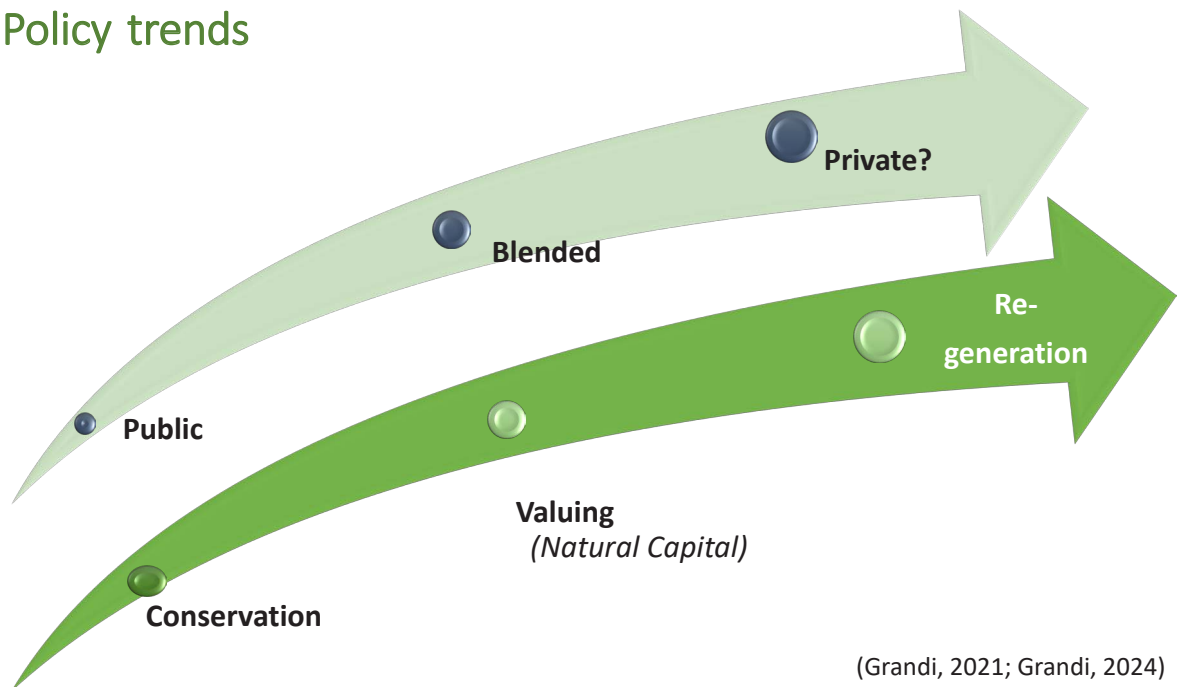


Photo credits:

Policy trends



(Grandi, 2021; Grandi, 2024)

Biodiversity & the UN SDGs



Explicit relations in targets



Implicit relations

EU Policy, Finance & Sustainability

- **2016** – EU High-Level Expert Group on sustainable finance
- **2018** – EU Action plan for sustainable finance
- **2021** – EU Sustainable finance strategy & 1st Package
- **2023** – EU Sustainable finance 2nd Package

Taxonomy, Metrics, Guidelines,
Certifications, Controls, ...



Corporate Governance & ESG

Corradi & Nowag, 2024: several potential points of entry, among which:

1. An external pressure exercised by regulatory compliance
 - > directors' duty of compliance
2. A modification of the main tenets of corporate law
 - > eg. for-profit vs. not-for-profit corporate objectives

EU CS 3D and Biodiversity



1. Preamble 13:

*Biodiversity is closely linked to the **Farm to Fork Strategy** and has a significant practical impact.*

2. Preamble 32:

*The directive should contribute to **preserving and restoring biodiversity** and improving the state of the environment*

(a) Biodiversity as variable pertaining to Environmental Concerns

1. A variable to be factored into teleological interpretation.
2. A key factor to be employed in risk assessment.

(b) Biodiversity as a *Per Se* Concern

What happens if biodiversity is the sole or most relevant concern in a supply contract?

1. Increased obligations for biodiversity protection.
2. Failure to comply may result in legal liability.



Examples of Damage to Biodiversity

- a) Company A enters into a contract with Company B for the supply of palm oil, a product commonly associated with deforestation.
- b) Company A enters into a contract with Company B for the supply of precious wood, which will result in the destruction of a biodiversity-rich forest area.



Prevention in the EU CS 3D

Article 10: Preventing potential adverse impacts

Its application to:

- 1) Balancing environmental objectives
- 2) Direct Biodiversity Impact



Remedies EU CS 3D

Article 11: Bringing actual adverse impacts to an end

Article 12: Remediation of actual adverse impacts

1. Application of Articles 11 and 12 to:
 - a) Balancing environmental objectives
 - b) Direct Biodiversity Impacts



Policy Questions

1. The Need to **Balance/Align Corporate Governance with Public Policy & timing for transition**
2. **The Need to operationalize (i.e. metrics, methods, standards, etc.)**

Risks of:

- a) **Over-Application:** Could lead to excessive restrictions, fatigue & backlash, stifling business operations, innovation, and competitiveness.
- b) **Under-Application:** Might result in greenwashing, inadequate protection, failing to address underlying issues or prevent further harm to biodiversity.

감사합니다
Thank you for your attention!

Marco Corradi* & Silvia Grandi**

*corradi@essec.edu;

s.grandi@unibo.it



*The most unique feature of **Earth**
is the existence of **LIFE**,
The most extraordinary feature of life is
BIODIVERSITY.*



2024 KLRI E.S.G. Global Symposium

PART 2. European Perspectives

Transforming the CSDDD into National Law. (How) Can/Must the German Lawmaker Modify the Scope of the LkSG?



Prof. Dr. Anne-Christin Mittwoch

Professor, Martin Luther University Halle Wittenberg (Germany)

Anne-Christin Mittwoch holds the chair of Private Law, European and International Business Law and is the Executive Director of the Institute of Economic Law at the faculty of Law, Economics and Business at Martin Luther University Halle-Wittenberg. She is also founder and Director of the Research Institute of Sustainable Economic Law (RISE) at the same University and author of the monograph 'Nachhaltigkeit und Unternehmensrecht' ('Sustainability and Company Law'), that has been published in 2022.



Transforming the CSDDD into national law: (How) can/must the German Lawmaker modify the scope of the LkSG?

Prof. Dr. Anne-Christin Mittwoch

Lehrstuhl für Bürgerliches Recht, Europäisches und Internationales Wirtschaftsrecht



Schafft Wissen. Seit 1502.

MARTIN-LUTHER-UNIVERSITÄT
HALLE-WITTENBERG



Official Journal
of the European Union

EN
L series

2024/1760

5.7.2024

DIRECTIVE (EU) 2024/1760 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 13 June 2024

on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859

Aim of this Directive: foster sustainable and responsible corporate behaviour in companies' operations and across their global value chains

Instruments: companies in scope must identify and address adverse human rights and environmental impacts of their actions inside and outside Europe – in their own operations and in their chain of activities.

Act on Corporate Due Diligence Obligations in Supply Chains Of July 16 2021

The Bundestag has passed the following Act:

Lieferkettensorgfaltspflichtengesetz = LkSG



Bundesgesetzblatt Jahrgang 2021 Teil I Nr. 46, ausgegeben zu Bonn am 22. Juli 2021

2959

Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten

Vom 16. Juli 2021

English version available at:

https://www.bafa.de/DE/Lieferketten/Multilinguales_Angebot/multilinguales_angebot_node.html

Fact Sheets also in French and Spanish:

https://www.bafa.de/DE/Lieferketten/Ueberblick/ueberblick_node.html

Scope of the CSDDD, Art. 2, 37 CSDDD

3 years from entry into
force

4 years from entry into
force

5 years from entry into
force

> 5000 employees

> 3000 employees

> 1000 employees

> 1,5 billion net
turnover

> 900 million net
turnover

> 450 million net
turnover

Art. 3 Nr. 1 a (i): Company
= legal forms listed in
Annex 1 Transparency
Directive (AG, KGaG,
GmbH, oHG, KG)

Scope of the German LkSG, sec. 1 LkSG

From 1 January 2023

> 3000 employees

Central admin, principal base of business, admin headquarters or statutory seat in Germany **or**

Domestic branch office in Germany

From 1 January 2024

> 1000 employees

Central admin, principal base of business, admin headquarters or statutory seat in Germany **or**

Domestic branch office in Germany

no criteria:

- annual turnover
- certain legal forms

Consequence:

- LkSG includes more companies than CSDDD

11.09.2024

Prof. Dr. Anne-Christin Mittwoch

2 Questions for the German legislator

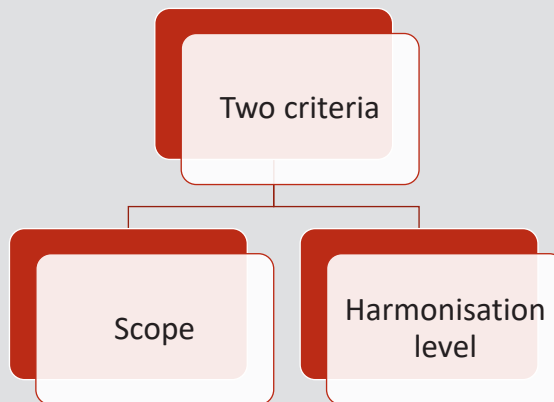
1. Must Germany adopt the thresholds of the CSDDD (employee numbers, turnover rates, specific legal forms) or can sec. 1 LkSG be maintained as it is?

2. Does Art. 1 para. 2 CSDDD prevent the German lawmaker from aligning the LkSG with the CSDDD – must sec. 1 LkSG be maintained as it is?

Question 1: Can § 1 LkSG be maintained as it is?

How much flexibility do national legislators have when implementing the CSDDD?

- Outside of the scope, national legislators are sovereign
- No harmonisation effect
- Primary law sets the frame



- Full harmonisation: 1:1 transformation is needed
- Minimum harmonisation: Stricter national rules are possible
- Art. 4 CSDDD: Art. 2, 37 = Minimum harmonisation

Mixed harmonisation level of the CSDDD:

Article 4 CSDDD Level of harmonisation

1. *Without prejudice to Article 1(2) and (3), Member States shall not introduce, in their national law, provisions within the field covered by this Directive laying down human rights and environmental due diligence obligations diverging from those laid down in Article 8(1) and (2), Article 10(1) and Article 11(1).*

2. *Notwithstanding paragraph 1, **this Directive shall not preclude Member States from introducing, in their national law, more stringent provisions diverging from those laid down in provisions other than Article 8(1) and (2), Article 10(1) and Article 11(1), or provisions that are more specific in terms of the objective or the field covered, in order to achieve a different level of protection of human, employment and social rights, the environment or the climate.***

Full harmonisation

Minimum harmonisation

Answer to Question 1:

I. Must Germany adopt the thresholds of the CSDDD (employee numbers, turnover rates, specific legal forms) or can sec. 1 LkSG be maintained as it is?

→ The German legislator can maintain sec. 1 LkSG as it is. It does not need to be aligned with Art. 2, 37 CSDDD due to minimum harmonization of these provisions (Art. 4 para. 2 CSDDD)

Question 2: must sec. 1 LkSG be maintained as it is?

Article 1 CSDDD

Subject matter

Rule of no deterioration /
deterioration ban

1. (...)

2. This Directive shall not constitute grounds for reducing the level of protection of human, *employment and social* rights, or of protection of the environment or of protection of the climate provided for by the national law of the Member States *or by the collective agreements applicable* at the time of the adoption of this Directive.

Does this apply to
provisions that model the
scope?

Does the deterioration ban cover sec. 1 LksG?

- Aim of the CSDDD: protection of human rights and the environment
- This aim is more important than creating a level playing field
- Recital 31
- Recital 17
- Advance effect of directives / prohibition on frustrating EU law

11.09.2024

Prof. Dr. Anne-Christin Mittwoch

Recital 31 CSDDD

It is essential to establish a Union framework (...). The emergence of binding law in several Member States has given rise to the need for a level playing field for companies in order to avoid fragmentation and to provide legal certainty for businesses operating in the internal market.

*Nonetheless, this Directive should not preclude Member States from **introducing more stringent provisions of national law** diverging from those laid down in Articles other than Article 8(1) and (2), Article 10(1) and Article 11(1), including where such provisions may indirectly raise the level of protection of Article 8(1) and (2), Article 10(1) and Article 11(1), **such as the provisions on the scope**, on the definitions, on the appropriate measures for the remediation of actual adverse impacts, on the carrying out of meaningful engagement with stakeholders and on civil liability; or from introducing provisions of national law that are more specific (...).*

11.09.2024

Prof. Dr. Anne-Christin Mittwoch

Recital 17 CSDDD

This Directive is without prejudice to obligations in the areas of human, employment and social rights, protection of the environment and climate change under other Union legislative acts. If the provisions of this Directive conflict with provisions of another Union legislative act pursuing the same objectives and providing for more extensive or more specific obligations, the provisions of the other Union legislative act should prevail to the extent of the conflict and should apply to those specific obligations.

Examples of such obligations in Union legislative acts include the obligations set out in Regulation (EU) 2017/821 of the European Parliament and of the Council, Regulation (EU) 2023/1542 of the European Parliament and of the Council and Regulation (EU) 2023/1115 of the European Parliament and of the Council.

11.09.2024

Prof. Dr. Anne-Christin Mittwoch

Advance effect of directives / prohibition on frustrating EU law

During the implementation period of an EU directive, member states may not adopt any regulations that seriously jeopardize or call into question the regulatory objectives of the directive

Established case law of the ECJ

11.09.2024

Prof. Dr. Anne-Christin Mittwoch

Answer to Question 2:

II. Does Art. 1 para. 2 CSDDD prevent the German lawmaker from aligning the LkSG with the CSDDD – must sec. 1 LkSG be maintained as it is?

- The German legislator must not align sec. 1 LkSG with Art. 2, 37 CSDDD. Due to the deterioration ban in Art. 1 II CSDDD, there is an obligation to maintain the current threshold of 1000 employees and not to introduce further thresholds for the scope (such as net turnover or specific legal forms).
- Due to the advance effect of directives, this applies from the entry into force of the CSDDD,

Summary

When implementing the CSDDD, the German legislator has the option of retaining the current threshold of the LkSG with regard to the number of employees and waiving the introduction of turnover thresholds. It would even be possible to lower the numbers of 1000 employees.

This option of maintainance becomes an obligation in the context of the deterioration ban pursuant to Art. 1 para. 2 CSDDD: The objective of the CSDDD requires an interpretation of Art. 1 para. 2 CSDDD to the effect that it precludes both an increase in the existing employee thresholds of the LkSG and the introduction of turnover thresholds.

2024 KLRI E.S.G. Global Symposium

PART 2. European Perspectives

EU Supply Chain Due Diligence - Questions on the Practical Implementation from a German Point of View



Dr. Michael Burian

Partners, Gleiss Lutz (Germany)



Dr. Marc Ruttloff

Partners, Gleiss Lutz (Germany)

Dr. Michael Burian, is a partner of Gleiss Lutz and based in the Frankfurt office. He co-heads the firm's Korea Practice. As a corporate/M&A lawyer, he has more than 15 years of experience advising Korean companies on their business activities in Germany and other parts of Europe.

Dr. Marc Ruttloff, lawyer, is a partner at Gleiss Lutz's Stuttgart and Berlin offices. He advises in the areas of regulatory, public commercial law and regulated industries. His practice focuses in particular on advising on ESG compliance and product compliance issues. He is also a lecturer for European Sustainability Law and Product Compliance at the Julius-Maximilians-University of Würzburg.

Gleiss Lutz

EU SUPPLY CHAIN DUE DILIGENCE

Questions on the practical implementation from a German point of view

Dr. Michael Burian | Dr. Marc Ruttloff | 20 September 2024

German LkSG vs. CSDDD

Overview

Gleiss Lutz

	LKSG	CSDDD
Status of the project or temporal applicability	Entered into force on January 1, 2023	Entry into force on July 25, 2024 Deadline for national transposition on July 25, 2026
Material area of application (in particular threshold values)	Companies with ≥ 1,000 employees in Germany (and indirectly for their suppliers)	Companies with ≥ 1000 employees / ≥ EUR 450 million Staggered application after entry into force: a) 3 years: ≥ 5000 employees / ≥ EUR 1.5 billion turnover b) 4 years: ≥ 3000 employees / ≥ EUR 900 million turnover c) 5 years: ≥ 1000 employees / ≥ EUR 450 million turnover
Authority	BAFA (Federal Office of Economics and Export Control)	Presumably BAFA



EU CSDDD with significantly larger scope of protection



How to implement the provisions of the Supply Chain Directive into existing national law from a practical perspective?

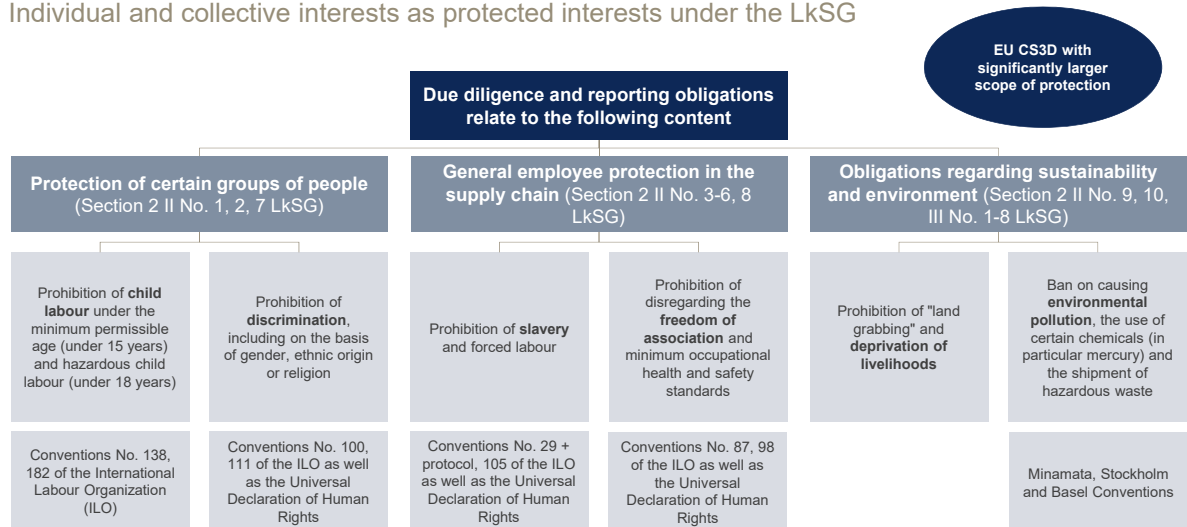
Challenges and impressions

Previous experience from legal advice

<p>1</p> <p>Very thorough implementation of the requirements by standard addressees</p> <ul style="list-style-type: none"> ▪ Even indirectly affected companies are adapting to the implementation 	<p>2</p> <p>Industry standards do not meet the requirements of the LkSG</p> <ul style="list-style-type: none"> ▪ Thorough revision with individual solutions for affected companies 	<p>3</p> <p>Difficulties in determining the scope of the supply chain</p> <ul style="list-style-type: none"> ▪ Overall considerations with imprecise criteria ▪ Definition of supply chain covers all "necessary" actions for the manufacture of products and the provision of services in the supply chain
<p>4</p> <p>Frequently complex questions in the area of application</p> <ul style="list-style-type: none"> ▪ Possible impact on foreign group companies ▪ Detailed case-by-case assessment necessary ▪ Example: Examination of affiliation pursuant to Section 1 (3) LkSG and exact determination of the number of employees 	<p>5</p> <p>Complex contract negotiations and global impact</p> <ul style="list-style-type: none"> ▪ Relevance of the topic has also reached "smaller" companies, especially within the EU and Asia ▪ Exact scope of compliance clauses often the subject of negotiations 	

What falls inside the scope of protection?

Individual and collective interests as protected interests under the LkSG



The legislator's intention

Gleiss Lutz

Explanatory memorandum to the Federal Government's draft bill on the LkSG

Since the EU Supply Chain Directive has been on the agenda of the EU Commission since 2020, the legislator of the LkSG already commented in the explanatory memorandum of the bill on the possible need for adaptation due to European requirements.

The LkSG should be evaluated under the following aspects:

- 1 The impact of national regulations on the international division of labor and possible relocation effects
- 2 Ensuring a level playing field
- 3 The economic and human rights impact of national legislation compared to the potential impact of European regulation.



In addition, the federal government has stated that it will:

- in the light of the evaluation, decide "whether to recommend to Parliament that the national provisions be repealed"; and
- evaluate by June 30, 2024, in light of European legal developments, "whether the personal scope of application should be adjusted by lowering the thresholds of the company size classes".

5

National transposition (1)

Gleiss Lutz

Why the scope of the LkSG can be adapted to the scope of the CSDDD

1. Intention of the EU legislator: level playing field in supply chain regulation



- By "freezing" the LkSG, the EU legislator would ensure that there would be **no level playing field** on the EU market
- EU legislator wanted to **prevent distortions of competition** within the EU internal market that would inevitably arise if different member states were to adopt different applicability requirements for their supply chain regimes.
- According to recitals: the introduction of various requirements in the Member States created a need to establish a level playing field for companies in order to **prevent the fragmentation of human rights protection** and to **provide legal certainty for companies** operating in the internal market.
- The proposal for the introduction of 23.2.2022 outlines the CSDDD's objective to **prevent obstacles to the free movement of persons and distortions of competition**.
- To ensure **uniform application and enforcement** of the provisions of national law: national supervisory authorities should cooperate and coordinate their actions. The more uniform the applicable provisions are, the more **effective the cooperation** is likely to be.

6

National transposition (2)

Why the scope of the LkSG can be adapted to the scope of the CSDDD

2. Systematics: comparison with the application of other “regression prohibitions”

- Standards comparable to Art. 1 II CSDDD can now be found in various EU directives.
- It has been argued that these standards are not to be understood as standstill clauses or as freezing the legal status quo.
- Rather, they are transparency requirements intended to force national legislators to disclose their motives and not to hide behind the pretext of implementing harmonization obligations under European law.

3. Hierarchy of norms: the European Union's system of competences

- It is doubtful whether the EU has the power to adopt "blocking regulations" that "freeze" national law.
- Art. 114 TFEU, on which the adoption of the CSDDD is explicitly based, is instructive for this question. Art. 114 I 2 TFEU expressly only covers "measures for the approximation of the laws, regulations and administrative provisions of the Member States", but not measures for the preservation of the law of the Member States.

National transposition (3)

Why the scope of the LkSG can be adapted to the scope of the CSDDD



4. Criteria of Art. 1 II CSDDD are not fulfilled

Even if Art. 1 II CSDDD as a strict blocking provision, there are important reasons **against** the fact that the elements of Art. 1 II CSDD would be fulfilled by adapting the LkSG to the CSDD.

No reduction in the level of protection

Prohibition of regression according to the principles of the ECJ case Angelidaki (C-378/07) not violated: The harmonization does not affect the content or standards of human rights, environmental and climate protection and does not restrict the scope of the protected goods. No material restrictions, but extensions; No "erosion" of the scope of application

Does the CSDDD serve as a justification?

Even if one were to assume that the amendments to the LkSG fall within the scope of the prohibition of regression this would not mean that the prohibition of regression actually has a blocking effect. According to the wording, this is only the case if the CSDDD serves "as a justification" for lowering the level of protection.

National transposition (4)

Gleiss Lutz

Why the scope of the LkSG can be adapted to the scope of the CSDDD



Retention of the legal **form-neutral approach** of the LkSG is permissible under the conditions of the prohibition of deterioration pursuant to Art. 1 para. 2 CS3D

Retention of **branch rules**; this could be waived if the head office is located in a Member State, thus ensuring that the branch and the head office are covered by CS3D.

With regard to companies from **third countries**, the LkSG must at least be adapted to the requirements of the CS3D (net sales of more than 450/900/1,500 million euros).

Regulations on **license and franchise companies** must be included in the LkSG as part of the minimum protection pursuant to Art. 4 para. 2 CS3D.

For German companies: **no further turnover threshold** in addition to the number of employees (prohibition of deterioration pursuant to Art. 1 para. 2 CS3D).

No increase in **number of employees** in Art. 1 LkSG to highest threshold of the CS3D (5,000 emp.) and reduction back to 1,000 emp. (Art. 1 para. 2 CS3D).

Part-time employees continue to be counted in the headcount (no deterioration Art. 1 para. 2 CS3D).

The **domestic reference** for employees in Section 1 para. 1 sentence 1 no. 2 LkSG must be **deleted** (minimum protection Art. 4 para. 2 CS3D).

Conclusion: No material restrictions, but extensions; No "erosion" of the scope of application.

For provisions of the LkSG that must be tightened due to the CS3D and for provisions that did not exist in the LkSG before but must be included due to the CS3D (e.g. civil liability), the **scope of application can be limited to companies in accordance with the threshold scale of the CS3D** for the period contained in the CS3D, as this does not constitute a deterioration of the existing regulations.

9

Legal entities under public law

Gleiss Lutz



Adopting a **legal form-neutral approach** allows foundations and institutions **under public law**, such as public broadcasters, state banks, credit institutions, and, last but not least, universities, to be designated as **LkSG addressees** without further ado, in accordance with the formal requirements set forth in § 1 LkSG.




- The LkSG also covers legal entities under public law, with the **exception of those that perform the administrative functions of a local authority and are not commercially active on the market.**
- However, this is **only clarified in the explanatory memorandum**; it is **not reflected in the law**. Therefore, it is not appropriate to justify exemptions for the public sector.



The CS3D does not follow a legally neutral approach, but is based on the formal definitions of the Accounting Directive (Directive (EU) 2013/34). The CS3D therefore mainly covers the AG, KGaA, GmbH, oHG and KG as well as more precisely defined regulated financial companies.

10

Conclusion



- **Importance of the topic will increase in the future**
 - **Further sharpening after seven years** (EU Commission report on implementation and effectiveness with regard to the achievement of the directive's objectives)
 - In addition: further legislative initiatives at EU level (in particular on sustainability reporting and the global promotion of decent work and sustainable recovery)
- Due to the **depth of detail** of the CS3D, the expansion of human rights and environmental risks, the extensive stakeholder involvement, and the possibility of civil liability for violations, companies should **address the implementation of the CS3D** and any gaps in risk management under the LkSG at an **early stage**.
- Companies that are already subject to the LkSG have a competitive advantage over their internal market competitors when implementing CS3D.
- It remains to be seen whether the **LkSG will actually be amended** in this legislative period and, if so, how the federal government will interpret Art. 1 para. 2 CS3D, e.g. who will fall under or be temporarily excluded from the scope of application in the future.
- **Important:** A system must be created that is flexible enough to be tightened up in the future in the event of legislative adjustments
- **Involvement of legal expertise and external advice is recommended.** Especially if the requirements are only to be implemented to the extent absolutely necessary. Risk of severe sanctions/liability risks

11

Dr. Michael Burian, LL.M.

Partner, Corporate/M&A



Taunusanlage 11
60329 Frankfurt am Main
T +49 69 95514-280
M +49 174 3407808
E michael.burian@gleisslutz.com

"Recommended for M&A law"
Handelsblatt / Best Lawyers in Germany
2024/2025

"Frequently recommended for M&A"
JUVE Handbuch 2022/2023

"Notable Practitioner for M&A"
IFLR 1000 2022/2023

"Particularly notable is the firm's Asia practice, where Michael Burian comes especially recommended."
The Legal 500 EMEA 2021

COMPETENCES

Michael's practice covers corporate and competition law as well as mergers & acquisitions, with a special focus on Asia-related cross-border transactions. He regularly advises Asian clients, in particular Korean companies, on German and European law issues.

SELECTED CREDENTIALS

- **Shinhan Asset Management** on a potential enforcement of pledge over shares and takeover offer for Accentro
- **Daishin Securities** on its investment in a major Berlin office building
- **Daishin Securities** and **Shinhan Alternative Investment Management** on its investment in Frankfurt high-rise building FBC
- **Hansol Paper** and **Mirae Asset Daewoo Private Equity** on the sale of R+S and Schades
- **NICE Holdings** on the sale of its majority shareholding in BBS GmbH
- **MBK Partners** on the acquisition of the machine tools business of Doosan Infracore
- **Mirae Asset Global Investments** on the acquisition of the Lanxess Arena together with Junson Capital
- A **Korean automotive supplier** on an acquisition in Germany (ongoing)
- **TZEN** on the acquisition of Farymann Diesel
- **SK Global Chemical** and **JX Nippon** on European law aspects of their Joint Venture in Korea
- **Doosan Industrial Vehicle** on the acquisition of the forklift business from Doosan Infracore
- **SK Chemicals** on a proposed acquisition in Germany
- **Hyundai Capital Services** on its joint venture with Santander Consumer Bank in Germany
- **Daewoo Shipbuilding & Marine Engineering** on the restructuring of its German operations
- **Doosan Heavy Industries** on a proposed large-scale acquisition in Germany

12

Dr. Marc Ruttloff

Partner, Regulatory, ESG

Gleiss Lutz



Lautenschlagerstrasse 21
70173 Stuttgart
T +49 711 8997-169
M +49 172 7708243
E marc.ruttloff@gleisslutz.com

"Often recommended for dispute resolution: litigation, arbitration and product liability"
JUVE Handbuch 2023/2024
"Top lawyer for environmental and construction planning law"
WirtschaftsWoche Top-Kanzleien 2024
"Frequently recommended for ESG"
JUVE Handbuch 2023/2024
"One of the core lawyers for product liability. (client)"
Legal500 Germany 2023
"Pioneer in the field of ESG regulation. Promoting the interdisciplinary exchange that is so fundamental to the success of the sustainable transformation and, in particular with their trade journal (ESG) and seminars, prepare the ground for the joint definition of legal guidelines in the area of ESG compliance."
Legal500 Germany 2024

EXPERTISE

Marc advises on public commercial law, in particular on issues of administrative law, constitutional law, European law, public liability, energy, automotive & mobility and other regulated industries. Another focus of his advice is on product liability and product safety law, all aspects of product compliance including current developments such as connectivity, data protection and artificial intelligence as well as sustainability transformation. Another focus advising on supply chain and ESG/CSR compliance. He is Head of the Public Law Practice Group and Co-Head of the ESG Practice and the Automotive & Mobility Industry Group. Marc is the author of numerous publications and regularly gives lectures and presentations on ESG compliance and litigation topics.

Lecturer at the University of Würzburg for European sustainability law and product compliance Lecturer at the University of Würzburg for European sustainability law and product compliance the Julius Maximilians University of Würzburg. He is also the editor of the first and leading legal journal on sustainable corporate governance (ESG), published by C.H. Beck, and is also founder and co-host of product.compliance.bites, Germany's leading product compliance podcast, since 2021. <https://open.spotify.com/show/6BEHvyvus1aLlCKeylB6P4?si=c812e475d98f4292>.

SELECTED CREDENTIALS

- **Numerous mandates** on the implementation of compliance structures in the supply chain, human rights, occupational health and safety and environmental standards in an international context, advice on reporting obligations and the establishment of internal structures, processes and investigations
- **Numerous mandates** on ESG compliance issues as well as greenwashing prevention and the implementation of corresponding compliance systems
- **Numerous mandates** on authorities' investigations with regard to the implementation of and compliance with due diligence obligations for supply chain compliance
- **Numerous Mandates** on whitewashing and climate litigation
- **Numerous mandates** on circular economy, requirements for sustainable product design and the legally compliant design of green claims and in defending against greenwashing complaints
- **Numerous mandates** on the implementation of compliance structures in the supply chain, human rights, occupational health & safety and environmental standards in an international context, obligations under the LkSG, CS3D, EUDR, CBAM, Battery Regulation, Conflict Minerals Regulation, advice on reporting obligations and the establishment of internal structures and processes, drafting supplier codes of conduct, et al.
- **Leading logistics service provider** on international authorities' investigation into greenwashing allegations regarding climate-neutral shipping claims
- **Numerous mandates** on the introduction of Chief Sustainability Officer (CSO) functions, corresponding compliance structures and reporting lines
- **Numerous mandates** on M&A transactions regarding ESG requirements
- **Leading OEM** on a project to establish processes, methods and models for the fully digital and sustainable product development of sustainable electric drive architectures
- **Fund company** on requests for information on the investment portfolio of an institutional state investor on the development of greenhouse gas emissions of this investment portfolio according to ESG index
- **Scope Rating Agency** on requirements and criteria for ESG ratings

13

Standorte

Gleiss Lutz

Berlin

Washingtonplatz 3
10557 Berlin
Deutschland
T +49 30 800979-0
F +49 30 800979-979

Frankfurt

Taunusanlage 11
60329 Frankfurt
Deutschland
T +49 69 95514-0
F +49 69 95514-198

München

Karl-Scharnagl-Ring 6
80539 München
Deutschland
T +49 89 21667-0
F +49 89 21667-111

Brüssel

Rue de Loxum 25
1000 Brüssel
Belgien
T +32 2 551-1020
F +32 2 551-1039

Metaverse

Gleiss Lutz
42,-55 Decentraland

Düsseldorf

Dreischeibenhaus 1
40211 Düsseldorf
Deutschland
T +49 211 54061-0
F +49 211 54061-111

Hamburg

Görtz-Palais
Neuer Wall 86
20354 Hamburg
Deutschland
T +49 40 460017-0
F +49 40 460017-28

Stuttgart

Lautenschlagerstraße 21
70173 Stuttgart
Deutschland
T +49 711 8997-0
F +49 711 855096

London

125 Old Broad Street
London EC2N 1AR
Vereinigtes Königreich
F +44 20 7374 0811

www.gleisslutz.com

14

2024 KLRI E.S.G. Global Symposium

PART 2. European Perspectives

Italian Corporate Law's Unreadiness to Implement EU CS3D (Despite Its Regulatory Lightness)



Prof. Carlo Amatucci

Professor, University of Naples Federico II (Italy)

Carlo Amatucci is professor of Commercial Law at the University of Naples Federico II. His primary research interests deal with Corporate Governance, CSR and Insolvency Law.

He has been member of the PhD Board in Commercial Law of the State University of Milan.

He is the coordinator of several Erasmus programs - Complutense de Madrid, Vilnius, Latvia, Cote d'Azur, Panteion of Athens - within which he often gives lectures, and is responsible for the cooperation agreements with Saint Petersburg University and People's University of China, where he was a summer school visiting scholar in 2014.

He's lawyer and his practice covers the whole range of corporate law, contracts and insolvency proceedings.

1. Italian corporate law is certainly not at the forefront of sustainability issues and related corporate liability, so the CS3D Directive will certainly have a significant and not easy impact. There is still little research into the issues and problems that the Directive seeks to address, and yet they are occasionally discussed because they are high on the agenda of international institutions.

I would like to explain this premise by looking at the legislative and academic landscape.

The most important pieces of corporate legislation are silent. I am referring to the Civil Code for partnerships and limited liability companies and to the Consolidated Financial Law for listed companies, the two main pillars of Italian Corporate Law. None of them deals with CSR or with stakeholders policies in general, nor it states any principle or rule on Directors' duties in this area.

Italian directors are obliged to pursue the company's interest, which remains the one set out in the corporate contract provision, unchanged since the Civil Code of 1942, namely the division of profits. And this despite the great reform of limited liability corporations in 2004.

No rule of the Italian legal system sets limits or conditions to this purpose, nor - as other European legal systems such as France - prescribes the balancing of maximizing shareholder value with the interests of stakeholders.

Similarly, the legal notion of the entrepreneur, still in its original 1942 version, does not impose any conditions on the production of goods or services, which can therefore be carried out, as is still the case in most cases, using methods and procedures that can harm the environment or be disregarding of human rights in the global value chain. The existing Italian circular economy businesses are the result of voluntary initiatives.

There is indeed a great regulatory emptiness in the Italian jurisdiction, as far as the relationship between corporations and sustainability is concerned.

On the different side of Italian public law, it has to be much welcome the recognition of sustainability in two articles of the Constitution that were integrated in 2022. I refer to Article 9, among those dedicated to fundamental principles, according to which the Republic "protects the environment, biodiversity and ecosystems, also in the interest of future generations. The law of the State regulates the ways and forms of animal protection" and to Article 41, on the freedom of economic initiative, for which: "Private economic initiative is free. It may not be carried out in conflict with social utility or in such a way as to damage health, the environment, security, freedom or human dignity. The law determines the appropriate programs and controls so that public and private economic activity can be directed and coordinated for social and environmental purposes". Therefore, on the constitutional principles front, CS3D will be fully consistent.

Returning to corporate regulation, the only specific legal framework dealing with CSR issues is the Italian Corporate Governance Code, which applies to all corporations listed on the main market managed by Borsa Italiana and whose adoption is voluntary and disclosed in the report on corporate governance and ownership structures ("Corporate Governance Report").

I am referring to the principle of "sustainable success", namely "the objective that guides the actions of the Board of Directors and consists in creating long-term value for the benefit of shareholders, taking into account the interests of other stakeholders relevant to the company". Such a principle has been provided, since 2020, by art. 1 of the Code, which states that "the Board of Directors shall manage the Company with a view to its sustainable success". For

almost all Code member companies, 'sustainable success' consists of integrating environmental and social objectives into their strategies (82%) and/or disclosing information on the adoption of environmental or social policies or plans (63%). It is difficult to assess the concrete impact of these commitments beyond the formal compliance. It would be necessary to analyze the decisions taken and their results. No study has been carried out in this respect.

There is another piece of legislation that will soon come into force, related to CS3D and of EU derivation, but pertaining to reporting. On 10 June last, the Council of Ministers approved the Draft Legislative Decree implementing the Corporate Sustainability Reporting Directive, which will replace the Non-Financial Statement (DNF) that, since its entry into force to date, has only affected so-called public interest corporations with more than 500 employees, while the new Directive will progressively affect a broader range of subjects, going to include - from 2026 - also listed small and medium-sized corporations.

I will conclude this quick review of the relevant Italian legal sources with the Benefit Corporations, introduced by a special law of 2016, whose objective is to generate a positive impact on society and the environment compatible with financial profit. Benefit corporations integrate CSR into their business model, adopting sustainable and transparent practices, along the lines of the Benefit Corporations existing in the USA, Canada - British Columbia (2019), France (2019, in the form of Société à Mission). This is undoubtedly a valuable trend, but one that is entirely spontaneous, and therefore cannot be considered within the scope of the principles and mandatory rules that will come into force thanks to CS3D. In any case, there were 3600 Italian benefit corporations by 2023, a small but not a negligible number.

2. Even in Italian academic research, there is an unjustified reluctance to deal with the urgent problems that CS3D has set out to address. An historical attitude which, actually, has distinguished most European jurists from North American ones since last century.

Let's only think, for example, to the seminal debate between ADOLF BERLE and MERRICK DODD on the subject of corporate purpose, which captured American corporate law in the 1930s, with BERLE's theorization of "shareholder primacy" opposed to DODD's "stakeholder theory". The latter, starting from the premise that the corporation is an institution managed by fiduciaries on behalf of the shareholders and not on behalf of the shareholders, argued that the maximization of shareholders' interests could not correspond to the essence - or the so-called 'raison d'être', to use the expression of the recent French legislator - of the corporation as institution, pointing to the existence of interests other than those of the shareholders, in particular those of the company's employees and customers.

In Italy, between the 1950's and 1960's, there was a debate between those who believed that the corporation should pursue profit for the shareholders, and those (Alberto Asquini, *I battelli del Reno*, in *Studi giuridici in memoria di Filippo Vassalli*, I, Turin, 1960, p. 119 ff.), for whom it should "make the boats navigate the Rhine at best", using the successful expression of the German entrepreneur and foreign minister of the Weimar Republic, Walther Rathenau. Alberto Asquini summarised his thought as follows: "The enterprise is a typical example of an institution [...] whose common goal, i.e. the achievement of a socially useful productive result, prevails over the individual goals of the entrepreneur (intermediation, profit) and the subordinate workers".

This was the playing field of the Italian debate, enlightened in any case, but which, however, did not go so far as to fully glimpse the scope of corporate external interests and their wideness. If we wanted to update the metaphor just

quoted, we would say that the corporation, in making its boats navigate the Rhine as best it can, must do so without polluting it, and, probably, until it is able to realize a transport that is completely free of impact on the waters of the river, the corporate boats will not be able to navigate it.

Only in recent years there has been a return of such issues in the research of Italian business law scholars, who are, however, still minority compared to other areas such as corporate crises or capital markets, for instance. I believe that this trend reflects a culture of sustainability, in the broadest sense, still not rooted in the Italian civil and political society. Despite the mentioned voluntary framework for listed corporations and the increasing number of benefit corporations, the vast majority of Italian businesses have not familiarized yet with corporate sustainability due diligence, therefore corporations are not sufficiently integrating sustainability aspects into their operations.

Last June 12th, at the conference celebrating the 50th anniversary of the *Giurisprudenza commerciale* in Bologna, one of the main Italian corporate law Journal, I was entrusted with the task of looking after the monographs linked to the series. Among the 399 volumes, only four touched on the area of CSR, of which three collected conference proceedings. It may not be a significant sample, but it says something. On the contrary, the number of articles published in law journals is increasing.

3. I would like to complete this brief overview by pointing out another element of the Italian legal system's unreadiness to implement CS3D, namely the problem of enforcement. In recent decades, the EU policy maker has intensified the production of regulations in the field of business and corporate law, empowering the administrative authorities with the task of monitoring and applying the sanctions provided for in the various regulations.

The Italian authority likely to be entrusted with the task of applying sanctions for breaches of due diligence will be Consob, which supervises the financial markets and listed corporations. The public budgets of all administrative authorities are generally and often inadequate in relation to the scope of their already very extensive functions, so the additional allocation of powers cannot but raise critical questions.

With regard to private enforcement, I can see a first weakness of the Directive mentioned in the title of my speech, together with the lowering of the thresholds for its applicability, which will affect only very large companies. This is the absence of any specific obligation on directors' duties and liabilities for failing to take account of the interests of stakeholders in their decisions, thereby causing them harm. As, for example, the French legislator has done (through the Pacte law) with article 1833 of the Civil Code, which provides that "The company is managed in its social interest, taking into consideration the social and environmental issues of its activity" and especially with art. L225-64 of the Commercial Code, according to which "The management board [...] determines the orientations of the company's activity and ensures their implementation, in accordance with its corporate interest, taking into account the social and environmental issues of its activity".

A similar provision would have given injured parties a specific right of action also against board members in the event of negligence in the implementation of the obligations imposed by the Directive. If the Directive had required directors to consider the environmental and social consequences of their decisions, it would undoubtedly have acted as a strong deterrent to diligent and honest management.

On the other hand, the success of the action against the company will depend, to a large extent, on the use of the class action by consumer organizations and associations, environmental protection, trade unions and local public

administrations (municipalities, regions). It's a strange situation in Italy, where the class action was introduced in 2010, was amended twice and had been regulated by the Civil Procedure Code since 2021. Despite the interest of the policy maker, the efficient tool never truly took off, and it is difficult to trace very few judgments, such as the one against Volkswagen for the diesel gate and one against Trenord, a railway corporation. In this case the Court of Milan had awarded the class members of the compensation of one hundred euros each for the non-pecuniary damage suffered for the conditions under which the transport had been performed (delays, cancellations, unsuitable carriages for the transport of persons, etc.). Compensation which was added to the one passengers were entitled by virtue of the specific legislation on the subject of contracts of carriage.

Enforcement of civil liability is confirmed to be the real weakness of Corporate law - indeed, in my view, a critical feature of law in general - and it is from this point of view that even the implementation of CS3D, at least in my Country, is likely to bring about little benefit to the interests it is intended to protect.

On August 21st, the European Environment Agency released a report on 2002 and 2023 air quality in the major EU cities, making a map of the continent with different colours from blue (good) to red (very poor), passing through three intermediate colours (fair, moderate and poor). It was sad to see a predominance of moderate and poor colours in the north of Italy, the industrial heart of the country, where one can see the highest European concentration of polluted cities, second only to Poland and other eastern Countries. The equal distribution of the population between north, centre and south of Italy should rule out the possibility that this air pollution is due to cars, transport or domestic energy. It is more likely that the high level of industrialization, certainly influenced by a certain conformation of the Po Valley, is the main cause of the pollution, which does not exist to such an extent in other parts of the Country.

A picture that, in short, reports a major environmental concern of a Country whose legal system for the reasons I hope I made clear – and this is truly a sharp contradiction – looks unprepared to implement the Due Diligence Directive.

2024 KLRI E.S.G. Global Symposium

PART 3. International Organization's + Asian Perspectives

International Instruments on Responsible Business: in the Context of Emerging Supply Chain Due Diligence Regulation



Ms. Kate Wilson

Project Manager-Asia, Center for Responsible Business Conduct (OECD)

Kate Wilson is the Project Manager for Asia in the OECD Centre for Responsible Business Conduct.

Before joining the OECD Secretariat in 2023, Kate worked for the Australian National Contact Point for Responsible Business Conduct. Prior to that, Kate worked for the Australian Department of Foreign Affairs and Trade, managing capacity-building projects, conducting human rights reporting, and liaising with Australian companies entering new markets in Southeast Asia. Kate has also worked for the Australian Department of Treasury advising on Australia's engagement with multilateral finance institutions.

Kate is an Australian national. She holds a Bachelor's degree in public policy and international development, and a Master's degree in Asia-Pacific Policy Studies from the University of British Columbia.

Responsible Business Conduct for Green, Digital and Resilient Supply Chains in Asia

International instruments on Responsible Business

in the context of emerging supply chain due diligence
regulation

Kate Wilson
OECD Centre for Responsible Business Conduct



Unclassified - Non classifié

Overview

1. RESPONSIBLE BUSINESS – Key messages from international instruments

2. OECD Guidelines for Multinational Enterprises on Responsible Business Conduct

3. OECD analysis and tools available



Unclassified - Non classifié



References in the Corporate Sustainability Due Diligence Directive



OECD RBC ASIA Funded by the European Union

Unclassified - Non classifié

RESPONSIBLE BUSINESS

KEY MESSAGES FROM INTERNATIONAL INSTRUMENTS

International Labour Organization OECD UNITED NATIONS HUMAN RIGHTS

Unclassified - Non classifié

Responsible business is **EVERYONE'S BUSINESS**



Each organisation brings added value based on its mandate and experience

COHERENT and COMPLEMENTARY approach **BETWEEN THE THREE INSTRUMENTS**



A shared overarching principle of responsible business conduct:
All companies have the responsibility to avoid and address adverse impacts, while making a positive contribution to economic, environmental and social progress

5

main COMMON ELEMENTS

FRAMEWORK FOR ALL COMPANIES

SHARED UNDERSTANDING OF IMPACT

CONDUCTING DUE DILIGENCE

RESPONSIBILITY THROUGHOUT THE SUPPLY CHAIN

ACCESS TO REMEDY

ONE

FRAMEWORK FOR ALL COMPANIES



TWO

SHARED
UNDERSTANDING
OF IMPACT

DUE
DILIGENCE



THREE

CONDUCTING
DUE DILIGENCE

-  Involves multiple processes and objectives
-  Concerns internationally recognised standards on RBC
-  Is risk-based
-  Seeks to prevent negative impacts
-  Does not shift responsibilities

-  Is tailored to an enterprise's circumstances
-  Can be adapted to the limitations of working with business relationships
-  Is dynamic, ongoing and responsive
-  Involves ongoing communication
-  Is informed by engagement with stakeholders

FOUR



RESPONSIBILITY
THROUGHOUT
THE SUPPLY
CHAIN

FIVE



ACCESS TO
REMEDY

Download the brochure



RESPONSIBLE BUSINESS

KEY MESSAGES
FROM INTERNATIONAL
INSTRUMENTS



International
Labour
Organization



BETTER POLICIES FOR BETTER LIVES



UNITED NATIONS
HUMAN RIGHTS
OFFICE OF THE HIGH COMMISSIONER

Unclassified - Non classifié

OECD Guidelines for Multinational Enterprises on Responsible Business Conduct



OECD



RBC ASIA
RESPONSIBLE BUSINESS CONDUCT
FOR ASIA



Partnership
with the European Union

Unclassified - Non classifié

OECD Guidelines for Multinational Enterprises on Responsible Business Conduct

Most comprehensive international standard on responsible business conduct (RBC)

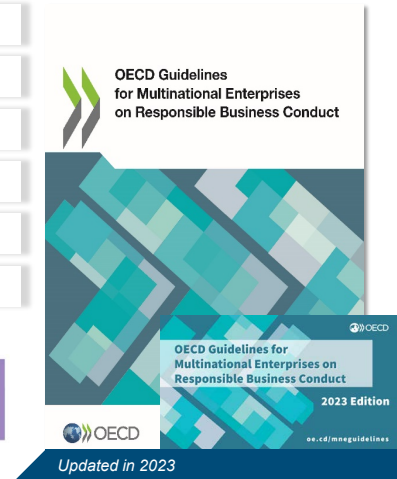
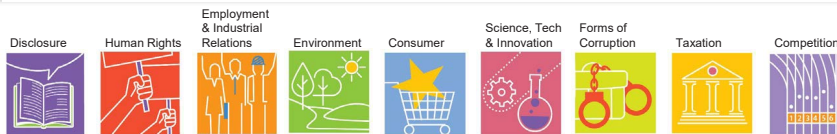
Recommendations from governments to businesses

Addressed to business in all sectors and to SOEs

Open to non-OECD members: 51 adherents

Government commitment: promotion & grievance mechanism (National Contact Points for RBC)

Incorporate expectation of risk-based due diligence

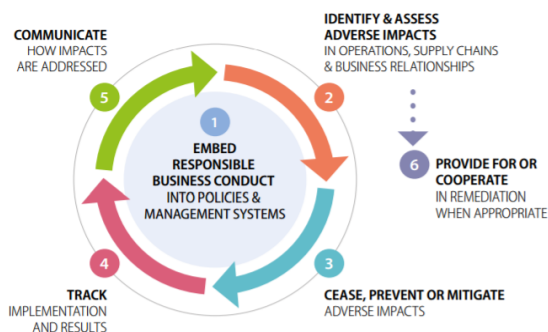


OECD Due Diligence Guidance for RBC: operationalising the Guidelines

Explain in plain language what due diligence means and how it should be undertaken

Contain good examples and practical actions to help businesses

Implementation through multi-stakeholder process



DUE DILIGENCE ESSENTIALS

- Preventative
- Involves multiple internal processes
- Based on international standards
- Ongoing, dynamic & responsive
- Risk-based
- Engages stakeholders
- Tailored to size & circumstances of the company
- Adapted to different business relationships
- Involves ongoing communication

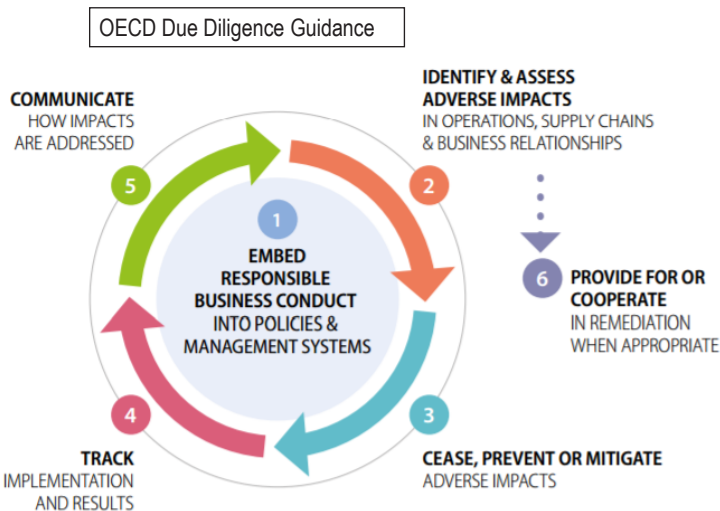
Links to the OECD standards in CSDDD

CSDDD explicitly references and is modeled on OECD due diligence standards:

- > References to OECD MNE Guidelines, Due Diligence Guidance on RBC and sectoral guidance.
- > Consistent with the **six-step due diligence framework** of the OECD Due Diligence Guidance for Responsible Business Conduct.

Recital (16): The due diligence process set out in this Directive should cover the six steps defined by the OECD Due Diligence Guidance for Responsible Business Conduct

Six-step due diligence framework



Corresponding Articles in the CSDDD

- Art. 5: Integrate due diligence into policies and risk management systems
- Art. 6: Identifying and assessing actual and potential adverse impacts
- Art 6a: Prioritisation of identified impacts
- Art. 7: Prevent potential impacts
- Art. 8: End actual impacts
- Art. 10: Monitoring
- Art. 11: Communicating
- Art. 8c: Remediation
- Art. 8d: Meaningful stakeholder engagement
- Art. 9: Notification mechanisms and complaints procedure

Other analysis and tools



Unclassified - Non classifié

2022 OECD Background note



- ✓ a useful reference for both regulators and businesses
- ✓ Findings canvassed in this briefing note include:
 - ✓ the flexibility of the risk-based approach does not mean business and authorities are left to their own devices in determining what good looks like
 - ✓ international standards are useful for setting parameters for what a credible risk-based process looks like
 - ✓ the challenge of combining flexibility with consistency is not specific to sustainability due diligence laws

Unclassified - Non classifié

OECD tools for business

OECD e-learning Academy
on Responsible
Business Conduct

Register now &
learn with us!

OECD



OECD Due Diligence Checker | Garment and Footwear Sector



Unclassified - Non classifié

Responsible Business Conduct for Green, Digital and Resilient Supply Chains in Asia

Thank you

- RBCAsia-project@oecd.org
- Business and Finance at the OECD
- @OECD_BizFin
- OECD Business and Finance



Unclassified - Non classifié

2024 KLRI E.S.G. Global Symposium

PART 3. International Organization's + Asian Perspectives

ILO's Approach to Responsible Business Conduct and the Labour Dimension of Human Rights Due Diligence



Ms. Emily Sims

Senior Specialist and Manager, ILO Helpdesk for Business (ILO)

Emily Sims is a Senior Specialist in the ILO Programme on Multinational Enterprises and Social Policy and manager of the ILO Helpdesk for Business. She provides technical assistance to a range of industry and multi-stakeholder initiatives, GRI, and individual companies. Her work also focuses on promotion of sustainable and responsible investment. She has published numerous articles and books on the linkages between respect for workers' rights and productivity improvement and competitiveness.



2024 KLRI E.S.G. Global Symposium

▶ ILO's approach to responsible business conduct and the labour dimension of human rights due diligence

Emily Sims, Senior Specialist and ILO Helpdesk for Business Manager, Multinational Enterprises and Responsible Business Conduct Unit, ILO

Advancing social justice, promoting decent work

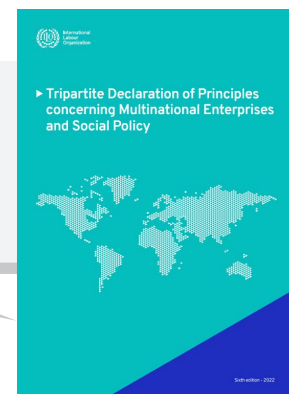


▶ ILO Framework for RBC and HRDD

« *encourage the positive contribution which multinational enterprises can make to economic and social progress and the realization of decent work for all; and to **minimize and resolve the difficulties** to which their various operations may give rise.* »

MNE Declaration, paragraph 2

Adopted by 187 member States of ILO
Provides a level playing field for all countries and companies



Advancing social justice, promoting decent work

▶ ilo.org

Comprehensive approach

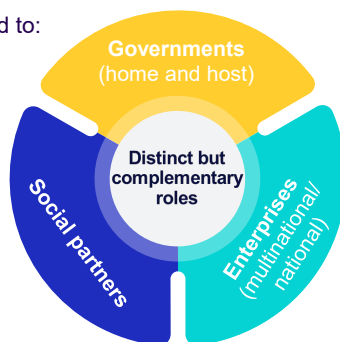


Advancing social justice, promoting decent work

ilo.org

MNE Declaration – an integrated approach based on dialogue

▶ Recommendations addressed to:



▶ Dialogue at all levels

- ▶ Between government and social partners (**social dialogue**)
- ▶ Within the enterprises between management and workers (**industrial relations**)
- ▶ Between government, social partners and multinational enterprises (**tripartite-plus dialogue**)
- ▶ Between home and host countries of multinational enterprises (**cross-border social dialogue**)

Advancing social justice, promoting decent work

ilo.org



5

▶ Role of workers in human rights due diligence

- ▶ Undertake meaningful consultation with potentially affected groups and other relevant stakeholders, including workers' organizations, as appropriate to the size of the enterprise and the nature and context of the operation.
- ▶ Take account of the central role of freedom of association and collective bargaining as well as industrial relations and social dialogue.
- ▶ Establish as an ongoing process.

MNE Declaration, Paragraph 10 e)

Advancing social justice, promoting decent work

▶ ilo.org



6

▶ Operational tools to promote uptake

Promotion

- ▶ Regional level
- ▶ National level tripartite-appointed national focal points
- ▶ ILO technical assistance; and information and guidance from the ILO Helpdesk for Business

Company-union dialogue

- ▶ When a company and a union voluntarily agree to take advantage of using the dialogue facilities offered by the ILO for discussion on issues of mutual concern

Advancing social justice, promoting decent work

▶ ilo.org



International
Labour
Organization

7

▶ Operational tools to promote uptake

Promotion

- ▶ National level tripartite-appointed national focal points
- ▶ ILO technical assistance; and information and guidance from the ILO Helpdesk for Business

Company-union dialogue

- ▶ When a company and a union voluntarily agree to take advantage of using the dialogue facilities offered by the ILO for discussion on issues of mutual concern

Advancing social justice, promoting decent work

▶ ilo.org



International
Labour
Organization

8

▶ Global Policy Coherence

- ▶ ILO also is committed to inter-institutional dialogue to promote policy coherence among international development organizations.



Advancing social justice, promoting decent work

▶ ilo.org



International
Labour
Organization

9

Resources for companies



Advancing social justice, promoting decent work

▶ ilo.org



International
Labour
Organization

10

ILO Helpdesk for Business

- ▶ for companies, trade unions and others seeking information on the application of principles of international labour standards and the MNE Declaration to company operations
- ▶ **free** and **confidential** expert advice service for individual questions
- ▶ dedicated website organized by topic with Q&As, tools and resources, training opportunities, engagement through ILO business platforms - to help them put the principles of the MNE Declaration into practice.

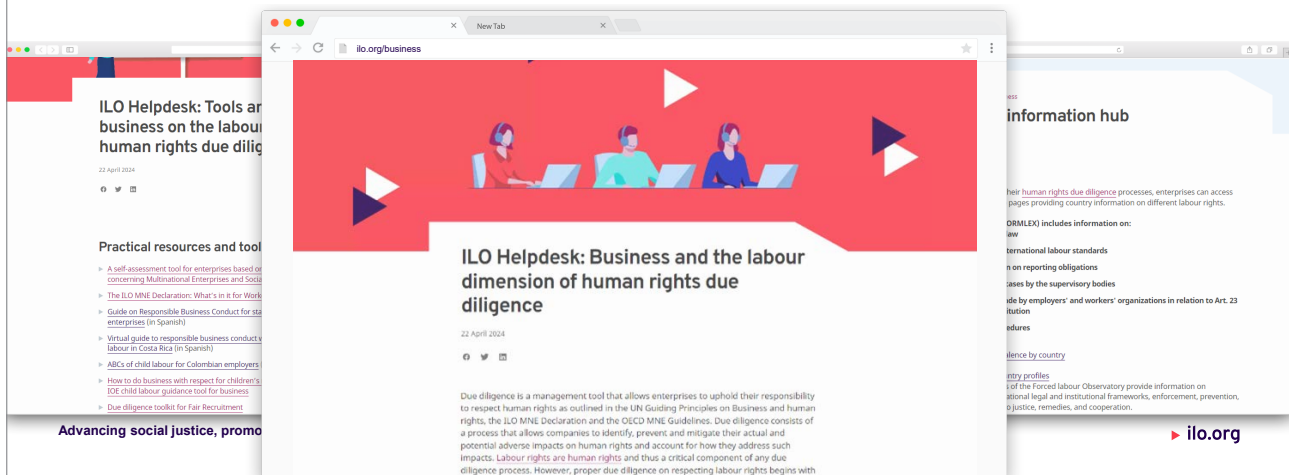
www.ilo.org/business and assistance@ilo.org

Advancing social justice, promoting decent work



50 000+ website visitors each month
1 500+ individual confidential queries have been answered

ILO assistance to enterprises to undertake human rights due diligence

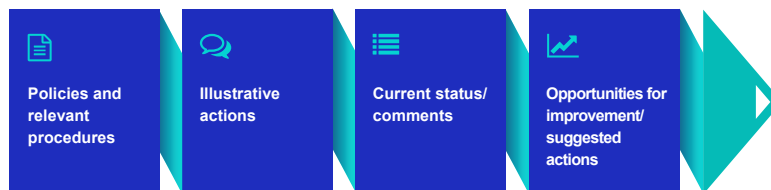


Advancing social justice, promoting decent work

ilo.org

A self-assessment tool for enterprises

- ▶ This self-assessment tool is to help enterprises **benchmark existing policies and practices against the principles of the MNE Declaration** and to **identify potential gaps or opportunities for improvement**.
- ▶ Enterprises are encouraged to conduct this self-assessment and develop the improvement action plan in consultation with the workers and their representatives.



Advancing social justice, promoting decent work

ilo.org



Self-assessment for labour rights in supply chains

This provides a practical training guide and self-assessments on key labour issues:

- ▶ Responsible business
- ▶ Occupational safety and health
- ▶ Wages and benefits
- ▶ Hours of work
- ▶ Child labour
- ▶ Forced labour
- ▶ Discrimination
- ▶ Harassment
- ▶ Freedom of association
- ▶ Grievance

Question	Yes	No	Part
Do you have an OSH policy that details your organisations commitment, Major OSH risks, key prevention programmes and responsibilities of managers and workers?			
Have you appointed someone to oversee OSH with the time, seniority and expertise to fulfill the role?			
Do you have an OSH Committee that meets regularly and effective?			
Are workers active in the OSH committee and on the shop floor, point out unsafe practices and come forward with suggestions to improve work safety?			
Do you assess OSH atleast annually? <input type="radio"/>			



Examples

Advancing social justice, promoting decent work

▶ ilo.org



Sector-specific compliance assessment tool



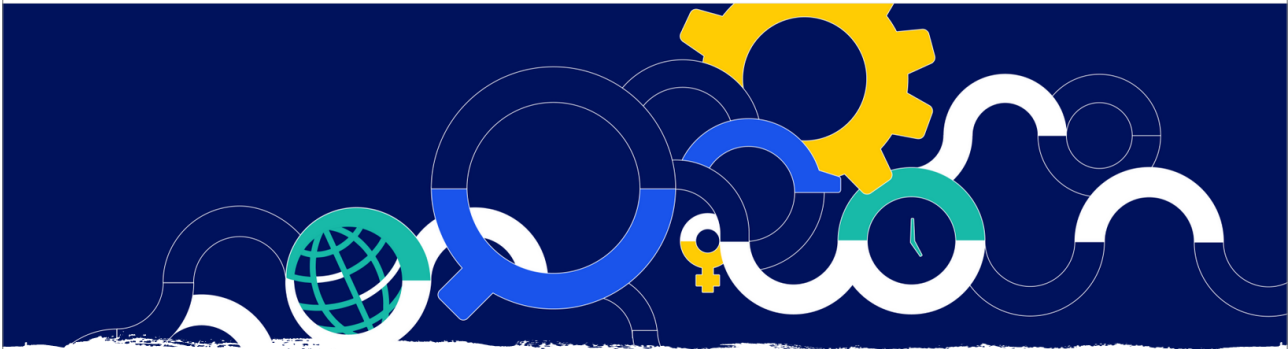
The [Better Work Compliance Assessment Tool \(CAT\)](#) is designed to assess compliance with core international labour standards and national labour laws.

- ▶ **Level 1:** Clusters – four on core international labour standards and four on working conditions.
- ▶ **Level 2:** Compliance Points – each cluster comprises a set of compliance points.
- ▶ **Level 3:** Questions – each compliance point has a set of associated questions.

Cluster	Compliance Point	Question	Child Question	Reference
Child Labour	Hazardous Work and other Worst Forms	Have you found any workers under the age of 15? Does the employer subject any workers under age 18 to the worst forms of child labour (including hazardous work, work at night, or work for long hours)?	Option 1: Are all workers who are under age 18 and doing hazardous work (i) at least 16 years old, (ii) working in accordance with national laws, regulations, or authorization of the competent authority, (iii) working in such a way that their health, safety and morals are fully protected, and (iv) adequately trained to do the work safely?	C138, C182, R190
Child Labour	Hazardous Work and other Worst Forms	Do workers who are under age 18 perform work that is hazardous to their health?	Option 2: Do workers who are under age 18 perform work that is hazardous to their health?	C138, C182, R190
Child Labour	Hazardous Work and other Worst Forms	Do workers who are under age 18 work overtime, at night, or more hours than allowed by law?	Option 3: Do workers who are under age 18 work overtime, at night, or more hours than allowed by law?	C90, C138, C171, C182, R190
Child Labour	Hazardous Work and other Worst Forms	Does the employer subject any workers under age 18 to the unconditional worst forms of child labour?	Option 4: Does the employer subject any workers under age 18 to the unconditional worst forms of child labour?	C182
Child Labour	Documentation and Protection of Young Workers	Does the employer have a reliable system in place to verify the age of workers prior to hiring?	Option 5: Does the employer have a reliable system in place to verify the age of workers prior to hiring?	C138, R146

Advancing social justice, promoting decent work

▶ ilo.org



FREE RESPONSIBLE BUSINESS CONDUCT

HUMAN RIGHTS DUE DILIGENCE FOR DECENT WORK



Photo © Rawpixel.com

RESPONSIBLE BUSINESS CONDUCT

INTERNATIONAL LABOUR STANDARDS AND RESPONSIBLE BUSINESS CONDUCT

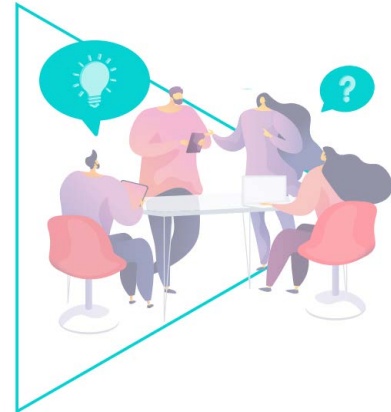
THE LABOUR DIMENSION OF HUMAN RIGHTS DUE DILIGENCE

4-8 NOVEMBER 2024



▶ Conclusion

- ▶ Trade and investment have brought many benefits but also many challenges concerning protection of workers' rights and local economic development.
- ▶ The MNE Declaration provides a comprehensive framework for labour issues in RBC and HRDD.
- ▶ Operational tools such as the ILO Helpdesk for Business, National Tripartite Focal Points, and the Company-Union Dialogue facility are there to assist you.



Advancing social justice, promoting decent work

▶ ilo.org



▶ More information can be found on the website:
www.ilo.org/business



Advancing social justice, promoting decent work

2024
KLRI E.S.G.
Global Symposium

PART 3. International Organization's + Asian Perspectives

Discussions



Prof. Dr. Florian Möslein

Professor, Philipps-Universität Marburg (Germany)

Florian Möslein is Director of the Institute for Law and Regulation of Digitalisation (www.irdi.institute) and Professor of Law at the Philipps-University Marburg, where he teaches Contract Law, Company Law and Capital Markets Law. He previously held academic positions at the Universities of Berlin, St. Gallen, and Bremen, and visiting fellowships in Italy (Florence, European University Institute), the US (NYU, Stanford and Berkeley), Australia (University of Sydney), Spain (CEU San Pablo, Madrid) and Denmark (Aarhus). Having graduated from the Faculty of Law in Munich, he also holds academic degrees from the University of Paris-Assas (licence en droit) and London (LL.M. in International Business Law). Florian Möslein published three monographs and over 80 articles and book contributions, and has edited seven books. His current research focus is on regulatory theory, corporate sustainability and the legal challenges of the digital age.



Dr. Hwa Ryung LEE

Director, Korea Fair Trade Commission (ROK)

Hwa Ryung Lee is the director of the economic analysis division at KFTC. She holds a Ph.D. in economics from UC Berkeley and previously worked as a research fellow at the Korea Development Institute before joining KFTC in December 2022. In her position, she contributes to competition cases by analyzing markets and providing insights into the competitive landscape.



Prof. Björn Lundqvist

Professor, Stockholm University (Sweden)

Björn Lundqvist is Professor of Law at Stockholm University. He is the Chair of the Swedish Network of European Legal Studies, Director of the European Law Institute and Director of Ascola Nordic. Björn is a well-renowned European Competition Law scholar and has published extensively, both books and articles, on Competition, Data, and IP Law and Policy related issues. His latest book is available since April 2023, titled *Regulating Access and Transfer of Data* by Cambridge University Press.



Dr. June Namgoong

Senior Research Fellow, Korea Labor Institute (ROK)

Dr June Namgoong is a Research Fellow and Director of the International Cooperation and Information Office at the Korea Labour Institute (KLI). He holds a PhD in Law (University College London), an LLM (Vanderbilt University) and an LLB (Korea University). His main research interests are the interaction between labour regulation and trade/investment at the global level and new forms of work arrangements arising from technological developments. He serves as a labour judge on a regional labour relations commission (Chungbuk) and as a public interest member of the Domestic Advisory Group and the Civil Society Forum under the EU-Korea FTA and the UK-Korea FTA.



Ms. Hyunyoung Jee

Deputy Director, Attorney at Law, Institute of Green Transformation (ROK)

Ms. Hyun young Jee, lawyer, is a deputy director at Institute of Green Transformation which is a nonprofit climate policy think tank. She focuses on policies such as climate due diligence and climate disclosure to impose climate responsibilities on corporations. She is a member of the Seoul Green Policy Advisory Council and the National Assembly Speaker’s Climate Advisory Committee



Ms. Youngah Park

Attorney at Law, GongGam Human Rights Law Foundation (ROK)

Youngah Park works as a lawyer at the GongGam Human Rights Law Foundation where her work focuses on the rights of migrants and refugees, the right to social security and business and human rights.

Jointly with other members of Korean Transnational Corporations Watch, she has actively participated in monitoring and addressing human rights violations occurring in the course of overseas operations of Korean companies.

2024
KLRI E.S.G.
Global Symposium

한국법제연구원 
KOREA LEGISLATION RESEARCH INSTITUTE