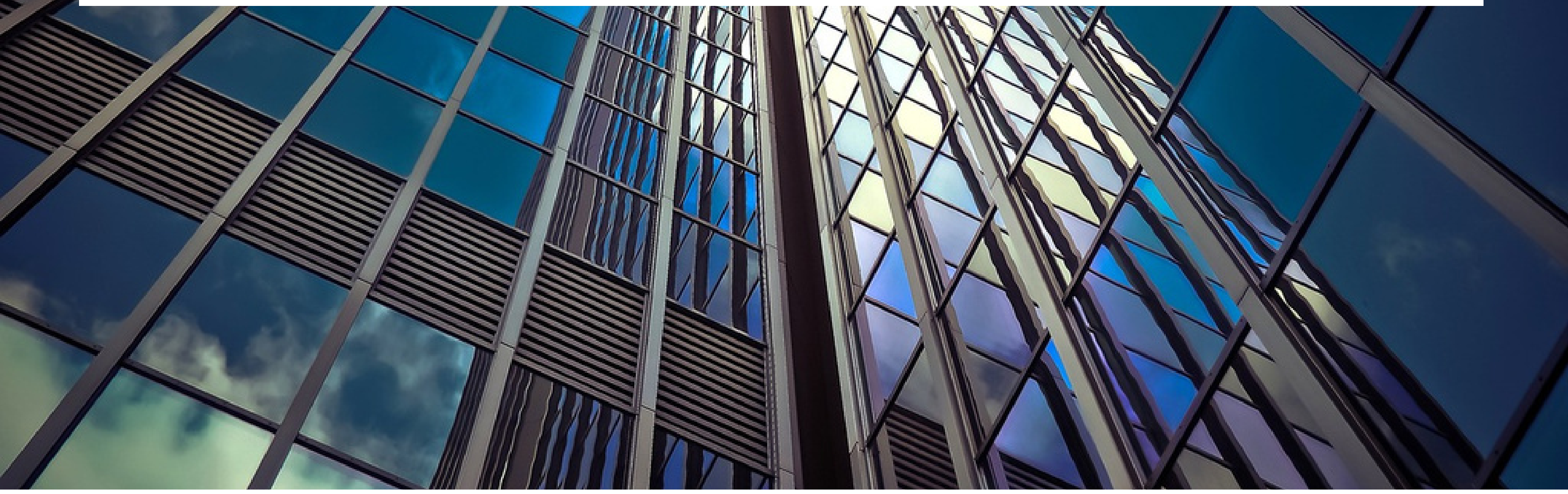
The Corporate Sustainability Due Diligence Directive: The possible impacts on Directors’ Duties



November 2023, Webinar Summary Report

The Corporate Sustainability Due Diligence Directive (CS3D), proposed in February 2022, is now debated in the Trilogues and the outcome of the final text is still open.

ecoDa, together with Allen & Overy organized a related webinar in light of their recent survey across the European Union on director’s duties and liabilities.

The survey results revealed that directors' duties universally involve a "duty of care," with expectations of reasonable diligence to protect and promote company interests. The liability framework encompasses civil, tort, and criminal liabilities, with nuances in each jurisdiction regarding breach of contractual obligations, claims by third parties, and limitations on liability amounts.

A common feature in these frameworks is that most of the directors’ duties are obligations of means rather than of result. Directors are generally only liable if they have not acted prudently. There is generally no liability cap, but some limited exceptions exist in certain jurisdictions.

On the question of who can be held liable, usually there is no difference in the legal frameworks in the various jurisdictions between executive and non-executive directors' liability. However, in practice, their liability is assessed differently, as the duties for executive and non-executive directors are not the same. Generally speaking, the principle of joint and several liability applies for collective decisions, with a possibility to escape if the director has opposed the decision.

The increasing obligations on companies in the realm of Environmental, Social, and Governance (ESG) considerations impacts directors and should be of their concern.

The CS3D will definitely have a considerable impact on directors' liability. Firstly, the CS3D introduces a new source of liability, who could be held accountable for the company's compliance or non-compliance with the CS3D obligations and standards, as well as for the harm caused or contributed to by the company's CS3D failures. Secondly, the directive influences directors' fiduciary duties, requiring to act in the best interest of the company and its stakeholders. Thirdly, the CS3D exposes directors to increased claims, sanctions, reputational damage, financial losses, and ethical and moral challenges tied to their CS3D responsibilities.

When analyzing the different stances towards the CS3D, disparities among the European Commission, the Council, and the European Parliament exist in the legislative text, particularly in their approach to company size and inclusion of the financial sector. Divergence also arises in defining the value chain, on the extent to which companies may be held liable and which aspects of the directive may lead to liability.

In conclusion, it was emphasized that the CS3D will undoubtedly impact directors' duty of care and liability. However, the effectiveness of enforcement and the frequency of liability cases in practice remain uncertain. The evolving nature of case law, will play an important role in shaping the practical implications of the CS3D on directors' liability.

ecoDa and Allen and Overy would like to thank all participants for their contribution to the Webinar and interesting discussions.

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Speakers:

Gauthier Van Thuyne, partner at Allen & Overy, specialised in sustainable supply chain regulations;
Bart De Bock, Senior Associate at Allen & Overy, specialised in corporate litigation;
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The recording of this webinar is available here.

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