



Statement of the Finnish Corporate Responsibility Law Association regarding the Corporate Sustainability Due Diligence Directive

6 February 2024

Summary

The European Parliament and Council Directive on corporate sustainability due diligence ("the Directive," "CS3D directive"), long in preparation, is in the final stages of approval. However, unexpectedly, some EU member states have adopted a reserved stance towards the Directive. Finland is one such member state, which, according to the Government's follow-up letter (UJ 50/2023 vp, January 31, 2024), plans to abstain from voting on the Directive's negotiation outcome in the European Council. There is a risk that the Directive may fail at the final hurdle, and EU-level harmonized corporate responsibility regulation may not be realized at least in this legislative term.

The Finnish Corporate Responsibility Law Association is concerned about the government's proposed stance to the parliament and believes that Finland should vote in favor of adopting the Directive in the European Council. If adopted, the Directive would become a key cornerstone of EU sustainability regulation and a significant guarantee that companies respect human rights and the environment in a globalized economy. An EU-level Directive would also ensure equal operating conditions for businesses in Europe by managing the external impacts on people and the environment.

As outlined below, the Finnish Corporate Responsibility Law Association believes that the Directive, which has now reached political agreement in the EU, is necessary, and the critical issues raised by the government, such as group actions and the obligation to present evidence, do not constitute a barrier to the Directive's approval. Furthermore, the Association points out that many of the obligations established for companies by the Directive are already applicable law through the Corporate Sustainability Reporting Directive ((EU) 2022/2464). In addition, companies have been making their own responsibility preparations guided by drafts of the Directive, and a rejecting attitude sends conflicting messages to the business field. It is crucial for the legal certainty of Finnish companies that the legislation is predictable in this regard and sets common rules for businesses.

Background and Purpose of the Directive

The purpose of the CS3D Directive is to promote the respect for human rights and environmental protection in business operations. To this end, the Directive imposes a so-called due diligence obligation on large companies, requiring them to identify, prevent, mitigate, and cease adverse impacts on human rights or the environment. The due diligence obligation extends beyond the



companies' own operations to include their supply and value chains. Additionally, the Directive sets out other obligations and processes related to corporate sustainability impacts, including facilitating access to remedy for affected parties.

The obligations established by the Directive are broadly based on soft law documents drafted more than a decade ago, notably the United Nations Guiding Principles on Business and Human Rights (2011) and the OECD Guidelines for Multinational Enterprises (2011/2023). Numerous companies in Finland and internationally have already voluntarily committed to adhering to these guidelines.

In practice, the Directive creates EU-level frameworks for corporate sustainability obligations. Harmonization of regulation at the EU level is important, as various member states (e.g., the Netherlands, France, Germany) and other countries (e.g., Norway, the United Kingdom, Australia) have adopted different models of due diligence regulation. The fragmentation of regulation complicates the operating environments for globally active companies. EU-level harmonized corporate responsibility regulation is desirable, which served as the rationale during the last government term to abstain from further preparation of Finland's national corporate responsibility law.

Finland's Position

Finland has been positive towards the Corporate Sustainability Due Diligence Directive and, more broadly, the regulation of corporate sustainability impacts. The follow-up letter specifically states that "the text of the Directive agreed upon in the trilogues, together with the sustainability reporting regulation that came into force nationally on 31.12.2023, forms a logical regulatory framework for responsible business conduct." Other domestic stakeholders, such as the Confederation of Finnish Industries and key NGOs, also have a positive attitude towards the Directive.¹ Recent criticism has mainly targeted certain nuances included in the Directive, such as group actions and the presentation of evidence in damage compensation processes.

Although Finland is generally positive towards EU-level sustainability regulation, some obligations established by the Directive have been seen as problematic for the Finnish legal system during its preparation. At the time of the Commission's proposal for the Directive, Finland was reserved towards the corporate law provisions included in the proposal (see U 35/2022 vp). These provisions have been removed from the negotiated outcome of the Directive that is subject to vote. Finland's current position to abstain from voting is primarily based on two new aspects raised in the negotiations regarding the Directive: group actions and the obligation to present evidence.

The Finnish Corporate Responsibility Law Association believes that neither factor necessitates the downfall of the Directive. Finland's reaction is, on the contrary, disproportionate, considering the technical nature of the critical remarks and their limited scope.

¹ The Confederation of Finnish Industries (EK) has stated, "It is important for the EU area to have uniform sustainability regulation that covers all member states. Individual country-specific sustainability legislations produce inefficient regulation and complicate the functioning of the internal market. It also hinders the achievement of sustainability goals and causes undue additional burden on companies." See: Elinkeinoelämän keskusliitto: *Vastuullisuuden EU-sääntely etenee – mihin pk-yritysten on varauduttava?* (October 2022), p. 10.



The Directive Can Be Adopted

The Finnish Corporate Responsibility Law Association does not see the provisions on group actions or new obligations to present evidence as insurmountable issues. These are specific regulations within civil and civil procedural law, which are not foreign to the relationship between Finnish civil law and EU legislation.

For instance, the harmonization of the private enforcement of competition law (2014/104/EU) and the improvement of the position of the injured party led to special legislation in Finland, namely the Act on Competition Law Damages Actions (1077/2016). This special Act includes provisions on, among other things, the presumption of damage for the injured party, the effect of a violation decision on the damages judgment, and the burden of proof in passing on overcharges. These principles, implemented into national legislation nearly ten years ago based on an EU-level directive, differ radically from traditional national tort and civil procedural law, yet they have not challenged the coherence of the national legal system. The same applies to the problematic aspects identified in the CS3D Directive.

Group Action

Regarding group actions, the Directive envisages a new type of legal protection mechanism. According to this, member states should set reasonable conditions under which any person claiming to have been harmed under the Directive can authorize an independent organization (e.g., a trade union) to file a lawsuit on their behalf to enforce the victim's rights. The content of the Directive in this regard differs from the current system in Finland, where representative or class actions can be initiated only in consumer matters.

However, the idea of utilizing class actions is not foreign to Finland. For example, the Finnish Bar Association, in the context of the Vastaamo data breach case, has suggested that class actions could enable victims to defend their rights more effectively and justly in court together.² The current legislation does not provide sufficient means to ensure the legal protection of victims of massive lawsuits, and a class action would allow for a fairer and more economical process for the victims and the legal system.

The group action approach adopted in the Directive is apt to facilitate the realization of the victim's rights and compensation for damages. When organizations can be authorized to file a lawsuit on their behalf to enforce the victim's rights, the party suffering adverse effects, in fact, has better chances of getting their case resolved. This supports one of the Directive's purposes, namely improving access to justice for victims.

Group action is particularly suited to improving the situation for victims who are procedurally in a weaker position in "mass situations," such as in the case of individual consumers against large corporations, where the corporation's actions have affected multiple consumers, and the stakes are

² Asianajoliitto: Suomeen tarvitaan joukkokanne (26 January 2024), <https://asianajaliitto.fi/2024/01/suomeen-tarvitaan-joukkokanne/>



comparatively small but significant to the consumers. Group action is also justified in situations typically falling within the scope of the Directive, where a corporation's actions or inactions could have caused harm to multiple individuals or the environment. In these cases, the affected parties are typically in a weaker position relative to the corporation and may not have the knowledge or resources to pursue legal action on their own. On the other hand, it could also be in the interest of the corporations and the legal system for issues to be pursued through group actions rather than numerous individual lawsuits. Thus, group action is a justified part of the Directive, and its incorporation into national legislation is not impossible

Obligation to present evidence

The Directive's second point of contention, according to the follow-up letter, concerns a new type of obligation to present evidence. The Directive allows the court, upon the plaintiff's request, to order the company targeted by a private legal claim for damages to disclose reasonably available additional evidence that supports the credibility of the claim for damages. The obligation to present evidence outlined in the Directive deviates from the national civil procedural system, especially in that, in Finland, the requirement to present evidence cannot generally be used to search for evidence or to ascertain whether the opposing party or a third party possesses evidence relevant to the case.

This change is fundamentally significant but also important for the Directive's and, more broadly, corporate sustainability regulation's central goal of enhanced legal protection for the injured party. The obligation to present evidence is a key tool for balancing the relative positions of the parties in a dispute. Since a company's core operations (e.g., production process, selection of suppliers and contract partners, management of human rights, and environmental issues) are characteristically internal processes, it is often challenging for those alleging harm caused by the company to demonstrate the fault in the defendant's actions.

The change proposed by the Directive is not unique but can also be compared to other recent EU-level regulations, such as directives on product liability and liability related to artificial intelligence. These directives also required the creation of a pre-trial discovery process foreign to Finland's civil procedural system. In the government's follow-up letter assessed (U 82/2022 vp) and the statement given by the legal affairs committee (LaVL 30/2022 vp), it was considered that the procedure "seems necessary to achieve the objectives of the Directive" and thus acceptable, "if further preparation can ensure the procedure's sufficient specificity." The absolute conformity of these directives with national civil procedural legislation was not deemed necessary from the government's or legal affairs committee's perspective when it comes to achieving the objectives of a crucial EU regulation.

The same logic applies to the CS3D Directive. The Directive aims to facilitate the position of plaintiffs pursuing compensation claims, thereby strengthening companies' propensity to fulfill the Directive's broader goals of human rights realization and environmental protection. One factor in achieving this broader goal is modifying the rules of evidence presentation so that plaintiffs, at least in certain situations, can have actual opportunities to obtain information about the company's internal processes as far as they relate to the incident causing damage. However, the obligation to



present evidence created by the Directive is limited in many ways, and the court is given broad discretion to ensure that the disclosure of requested evidence is restricted to what is necessary and proportionate in support of a potential claim for damages or the claim itself. This is clearly a specific procedure that supports the achievement of the Directive's objectives.

Conclusions

The Finnish Corporate Responsibility Law Association recognizes that the final form of the Corporate Sustainability Due Diligence Directive contains elements that are new and to some extent untested for the Finnish legal system. However, the Association reminds that it is not foreign for the Finnish legal system to adapt to specific regulations stemming from EU-level legislation. Our national legal system is capable of integrating such EU-level requirements without jeopardizing the system's coherence. In this light, the government's hesitant attitude towards certain parts of the directive proposal, and thereby the directive as a whole, appears disproportionate. These issues do not constitute a sufficient reason to reject the entire directive.

The Finnish Corporate Responsibility Law Association views the directive as a powerful and necessary instrument to harmonize the current fragmented regulatory practices and to guarantee legal certainty for businesses. The directive offers significant improvements in legal protection for individuals and the environment, and its adoption would ensure uniform rules across the entire EU. Rather than focusing on potential national challenges – which are nonetheless solvable – the Association encourages voting in favor of the directive, thereby focusing on the broad and long-term benefits it brings to Finland, the EU, and the world.

In Helsinki on 6 February 2024

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Activity: The purpose of the Association is to promote the understanding of corporate responsibility as a legal phenomenon, as well as the development of related legislation, regulation, and research in Finland and internationally; to contribute to the dissemination of knowledge and information related to corporate responsibility law; and to provide its members and partners with information about legislation concerning corporate responsibility, related legislative initiatives, its application practices, and utilization.

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