



# Corporate Social Responsibility & Due Diligence

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Environmental - Human Rights - Social & Security Risks

Corporate Social Responsibility is a hard-edged business decision. Not because it is a nice thing to do or because people are forcing us to do it, because it is good for our business.

Niall Fitzgerald

## Preface

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On April 24<sup>th</sup>, 2013, a garment factory building called the Rana Plaza collapsed in Dacca, Bangladesh, leading to the death of at least 1129 workers and injuring 2500 others. The factory produced clothing pieces for numerous companies, subcontractors of worldwide fashion companies like European brands Mango, Benetton, Primark, Carrefour and Auchan. In France, public outrage accompanied this tragedy and soon began demands for an extensive liability regime holding companies liable under French law for the violation of social and environmental norms by one of their contractors. This context led to the passing of law n°2017-399 on the March 27<sup>th</sup>, 2017 concerning the due diligence duty of parent companies (*Loi n°2017-399 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*).

This law imposes companies with the duty of putting together a “vigilance” plan to prevent, as much as possible, violations of human rights and social and environmental laws, regardless of whether these violations are posed by the company directly or one of its subcontractors or subsidiaries.

While France is the only country, for now, to set up such an extensive liability regime, further developments can and should be expected in other countries. In Finland, the #ykkösketjuun campaign demands for a human rights due diligence legislation mir-

roring the same law the Swedish Agency for Public Management called for. In Switzerland, the Swiss Coalition for Corporate Justice gathers over 70 Swiss organizations that campaign to make human rights and environmental responsibility an obligation for Swiss businesses globally. In Germany, both the Green Party and the Social Democrats have called for similar legal developments in their campaigns. In 2019 the Netherlands adopted the “Dutch Child Labour Due Diligence Act”, while the Italians established legislation stating parent company human rights violations will lead to criminal liability. The 2015 United Kingdom Slavery Act requires businesses to disclose policies, plans and actions to address the issues of slavery and human trafficking in supply chains. These are merely legislative processes; one must keep in mind that courts have their own agenda and are quickly heading towards the same conclusion. In short, companies have to rethink the way they engage in commercial relations.

And as such, **Due Diligence now takes on a whole new meaning.**

This white paper identifies the trends around these new responsibilities in the European Union and BRICS (Brazil, Russia, India, China and South Africa) and highlights how to approach CSR Due Diligence globally.

# Table of Contents

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Definitions and Identifying Risks	5
CSR in the European Union	5
Three Pillars: Environment,	5
Human and Social Rights, Health and Safety	5
Country Results and CSR Tendencies	7
General findings	7
Similarities between countries	8
Identified global trends across risks	8
CSR and Due Diligence	10
Thoughts for the Future	11
About Us	12
Our Leading Solutions and Unique Features	12
We have your back: Traceability & Accountability	12

# Definitions and Identifying Risks

Corporate Social Responsibility (CSR) is the concept gaining momentum in the annual reports of many companies over the years. However, what does the term and the responsibilities that accompany it really mean?

## CSR in the European Union

In its 2001 Green Book on CSR, the European Union defined it as follows: “Most definitions of corporate social responsibility describe it as a concept whereby companies **integrate social and environmental concerns in their business operations** and in their interaction with their stakeholders on a voluntary basis. Being socially responsible means not only fulfilling legal expectations, but also **going beyond compliance** and investing “more” into human capital, the environment and relations with stakeholders.”

In addition to endorsing the United Nation’s guidelines on business and human rights and promoting the OECD report on Due Diligence Guidance, the EU has established various directives to encourage the formalization of CSR. This includes the directive on non-financial reporting (n°2014/95/EU), according to which large companies must disclose information relating to their management of human rights and social issues. One could also mention here the extensive legislation on waste management and mandatory environmental risk assessments. We are therefore seeing a non-negligible political will to concretely frame both the

notion of CSR and the duties that accompany it.

## Three Pillars: Environment, Human and Social Rights, Health and Safety

CSR broadly includes three main themes companies need to focus their attention: The Environment, Human and Social Rights and Health and Safety. Socially responsible companies therefore have to integrate these concerns in their daily business practices. Of course, not all companies are concerned by the same aspects: While a mining factory might want to delve into the environmental component, a technology company will likely interpret these broad pillars differently. The key task is to therefore identify the risks associated with each pillar on the one hand, and then relate it to the company’s specific activities on the other.

To illustrate this, one could try to frame a number of risks associated with each pillar. For example:

### Environment

- Pollution or degradation
- Resource depletion
- Trade and possession of protected species

### Human and Social Rights

- Deprivation of liberty
- Slavery
- Data Protection
- Freedom of expression
- Discrimination

- Sexual violence
- Labor Law

one pillar can help in determining the best tools available to prevent them.

#### Health and Safety

- Negligence
- Trafficking of controlled products (tobacco, alcohol)
- Safe work conditions
- Violation of the obligation to wear protective gear
- Sexual Harassment

While these lists are far from exhaustive, a few patterns can already be identified.

First, risks identified in the Human and Social Rights pillar do not, at first sight, seem to relate to common commercial activities. Second, the three pillars are not only broad, but they also intersect. The right to not be sexually harassed is as much a matter of Human Rights as it is a question of Health and Safety (psychological health and well-being at work). Similarly, the right to work in a healthy environment concerns both Environment issues and Health and Safety issues. As such, it can be more straightforward to think about placing and enforcing measures that ensure a healthy environment under Health and Safety concerns rather than focus only on protecting the Environment.

Two conclusions can therefore be drawn from this preliminary framework: Identifying risks can be a difficult task that should not be underestimated and therefore promoting a clear understanding of the extent to which different risks can concern more than just

## Country Results and CSR Tendencies

To identify the trends related to Corporate Social Responsibility (CSR) in each country, one might proceed with two methods. The first is to review national legislation and infer expected behavior. The other method is to work the other way around by exploring which company practices are condemned. These methods not only provide an idea of what companies are expected to do, but also who has the power to sanction companies that don't follow the rules.

### General findings

There are generally two governmental institutions that have the power to sanction an individual or a company: courts and administrative agencies. It has emerged from this study that there are important sanctions implemented by administrative agencies when it comes to CSR. This lies in the fact that CSR is not a specific and delineated legal obligation. Rather, it is a fluid concept for which it is difficult to impose rigid rules that lead to hard sentences. As such, there are very few legislations that directly deal with CSR. Government strategy is therefore to legislate within specific fields (labor, waste treatment, health and safety regulations) and delegate sanctioning power to the appropriate administrative agency.

Another explanation for the lack of broad legislation regarding CSR is the novelty and fluidity of its definition and application. The administrative path has therefore proved more efficient and flexible than judicial ruling. However, if administrative agencies have increasing power, then how can that power be limited, or in other words, how can their decisions be appealed? In most cases, a judicial ruling still has the final word since administrative decisions are challenged in front of administrative courts. The administrative courts' caselaw is therefore just as informative in understanding a country's stance on CSR as its judicial caselaw.

As an example, one may look at the way India is dealing with the environmental component of CSR. India is one of the few countries that has an Environmental Tribunal that hears violations of legislations pertaining to the protection of the environment (water act, environment protection act, biological diversity act.. etc). Additionally, the government has also established Pollution Control Boards (on the federal and state levels) in charge of inspecting large treatment facilities and industrial factories. They have the power to fine non-compliant construction projects and even closed industrial units, and as such can be seen as powerful upholders of CSR.

## Similarities between countries

Not so surprisingly, states close to each other and states that have the same kind of government systems bear similarities. Three groups of countries that have similar trends have been identified: the European Union, Northern European countries and Federal countries.

First, there is an undeniable uniformity in legislation concerning CSR in the European Union. For the environment, the functioning of high-risk industries and waste treatment organizations are highly regulated. This also holds true for health and safety regulations at work, which not only represents principle 10 of the European Pillar of Social Rights, but also constitutes a necessary requirement for members of the European Union through the OSH Framework Directive. For Human Rights, the recent GDPR directive has set the standard for data privacy within the European Union and led to the creation of the position of Information Commissioner in numerous countries.

Northern European countries (Denmark, Finland, Norway, and Sweden) share the same system for the protection of Human Rights through "Ombudsmen". An Ombudsman is a public advocate that investigates the complaints of the public against the administration and when rights have been violated. In fact, Ombudsmen, who act as mediators, are often recognized as National Human Rights Institutions. Furthermore, those countries also share a mandatory mediation procedure for labour-related conflicts.

For federal countries, a similar organization of administrative agencies is witnessed. Federal countries often have a central, federal administration, which is then multiplied in each subordinate state. For example, while Russia's Federal Labor Inspectorate is responsible for policymaking and coordinating state agencies, each State Labour Inspectorate can also inspect and sanction companies.

No matter the system in place, these trends showcase how companies and businesses need to adapt to meet increasing regulations.

## Identified global trends across risks

Besides similarities that countries with the same government systems share, there are also global trends that can be identified for each risk pillar.

### Environment

The Environment has become, through public actions and scientific developments, the priority in most countries. As such, one can witness the emergence of Environmental Agencies everywhere, although they may not all share the same functions (some are limited to policymaking while others may complete inspections and issue fines). Furthermore, the protection of the environment through a CSR policy primarily seems to come from a strictly framed permit regulation. Compelling companies to apply for a specific permit whenever they want to start an activity also subordinates them to the



duties and obligations linked to this permit. Finally, all countries share the difficulty of defining what an "ecological prejudice" is. In judicial dealings, prejudice to the environment is for now only recognized when it is linked to the prejudice a legal personality has suffered (i.e. an association, a citizen, a city).

#### Health and Safety

The diffusion of ISO norms has led to both the establishment of minimal rights ensuring health and safety at work and the creation of work-related administrative agencies. In fact, since most countries also share the proliferation of work-related trials, understanding the CSR Health and Safety policy of a country might be easier through the analysis of their Occupational Safety and Health (OSH) inspection policies.

#### Human and Social Rights

Last but not least, Human Rights preoccupations in the CSR frame are hard to define in most countries. In fact, because these issues are dealt with in front of courts, there are no administrative agencies that could give hints to the country's stance towards Human Rights and company behavior. As such, it is preferable to identify a right that could have been violated in relationship to a company's activity or location, and then to look for the appropriate legislation or court decision. As an example, while trying to define CSR Human Rights policy in Brazil would be nearly impossible, it is possible, rather, to determine the Brazilian policy towards the rights of indigenous people and the behavior expected from companies in this context.

## CSR and Due Diligence

As CSR gains momentum in the corporate planning of companies, and more importantly as regulations surrounding company behaviors increase, it is clear that CSR is becoming a key component of Due Diligence processes. This means that a company's CSR statement, or lack thereof, may impact its business dealings; whether or not a company is living up to its CSR requirements is of increasing concern.

Buyers are increasingly interested in the ways companies are living up to their CSR commitments, and this goes beyond simply reputation risks. Why get involved in a company that carries with it the risk of a human-rights related lawsuit? As CSR becomes both a public and business concern, the increase of companies facing lawsuits pertaining to the three risk pillars should not be undermined. Everything from how company treats its employees to which third parties it engages, need to acknowledge a CSR influencing factor.

Therefore, companies need to be aware if they are exposing themselves to potential claims by not paying attention to their CSR commitments. This can create a domino effect of issues for the company. For example, a health and safety or human rights claim may impact a company's stock,

which may then trigger securities class actions, which may lead to investors questioning misstatements by management of a given situation. Following through with CSR means that companies can't say one thing, and then do another.

Therefore, as CSR goes through a transition from a public relations exercise to something that triggers concrete legal liabilities, companies are needing to adapt by concretely understanding the nature of their legal responsibilities. Different legal responsibilities trigger different reporting and disclosure requirements, placing pressure on management for transparency in terms of CSR. This pressure is coming from different angles; from investors, stakeholders, legal requirements, in addition to consumers.

Given the importance of CSR, companies are now facing the challenge of properly reporting for legal and public relations reasons, while at the same time effectively managing risks. Third party risk management is of the utmost importance as companies need to ensure that they are meeting CSR commitments from all directions. All these forces call for more due diligence that assess third parties to go above and beyond the usual anti-corruption criteria.



## Thoughts for the Future

CSR is and will remain a burning issue in the coming years. One can expect that rules regulating companies' behaviors towards the environment, human and social rights and health and safety will only become tougher. As such, it is essential to watch out for legal, judicial and cultural developments.

A main evolution to be expected is the implementation of courts or chambers specialized in environmental offenses. Depending on how environmental abuses are translated, the notion of an "ecological prejudice" and the ability to sue a company or an individual for having caused an ecological prejudice means important judicial decisions will emerge.

Another evolution to be expected is the growth of consumer protection. Consumer protection agencies, Ombudsmen and other such mediators have already flourished across the globe. However, such regulators focus on the right to not be deceived by companies concerning a product or ensuring delivery of said products. Now, consumer protection has integrated CSR to include data protection and the right to information, which are incorporated into the broader understanding of human and social rights.

Finally, in order to better frame the Human and Social Rights branch of CSR, one should keep an eye out for the work done by NGOs. Such work may place

pressure on companies to follow through on CSR responsibilities. This creates repetitional risks for companies that may trigger a domino effect of legal action for not fulfilling CSR commitments.

All of these developments call for broader and more extensive Due Diligence practices. Third party risk assessments are of the utmost importance to ensure that companies have all their bases covered when it comes to CSR.

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There are undeniable discrepancies between a) how a society expects companies to behave, b) how the law in reality regulates company behavior, and c) how companies can actually fulfill all CSR expectations. The fact that CSR remains an imprecise notion means that companies are still trying to figure out their legal expectations and its application vis-a-vis their practices. The first step is to identify the risks linked to a company's activities, but also those linked to the activities of its subcontractors and subsidiaries. A well enforced legal framework will therefore be made up of both judicial and administrative decisions and should guide the company's behavior. While companies may adopt CSR protocols without thinking of the legal weight attached to it, increasing government enforcement means legal risk is putting CSR commitments on the map and should not be underestimated.

## About Us

### Due Diligence as your best asset

Global Risk Profile (GRP) is a leading third party risk management company specializing in Due Diligence. Our services are designed for efficiently identifying, assessing and mitigating third-party risks in accordance with ever-evolving regulatory frameworks.

### Manage your risks

Global Risk Profile offers a wide range of compliance services, solutions and tools customizable according to your specific needs:

- **Due Diligence Checks & Investigations** - Anti-corruption, KYC & Anti-Money Laundering, ESG Risks, M& A and Joint Ventures, Human Resources
- **Risk Management Platform** - Unique compliance software for managing and monitoring third parties on a large scale
- **Investigations** of various scale and complexity, including Asset Search and Litigation Support
- **Customized Risk Indexes** measuring third party risk exposure from a country and industry perspective, for an initial mapping of corruption and ESG risks
- **Consulting & Support** for efficient development and implementation of third-party risk management strategies
- **Training** - Training programs designed for compliance professionals, provided by GRP experts as a stand-alone or in partnership with various organizations

## Our Leading Solutions and Unique Features

Our Due Diligence solutions offer a true added value:

- Rigorous methodology built by compliance experts, blending the best of top-end technology and human intelligence
- International coverage thanks to a broad knowledge of languages and jurisdictions worldwide
- Tools and proprietary archives providing exclusive access to thousands of sources
- Optional on-site verification & retrieval of exclusive first-hand information
- Rapid and fixed delivery (10 business days) with express options (3 or 5 business days)

### We have your back: Traceability & Accountability

- Sources are traced and disclosed in our Due Diligence reports
- Complete archive of our research is stored and available on demand
- On occasion of litigation or regulatory authority request, our records provide additional evidence of a high quality Due Diligence process

**More information please visit us at:**

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