



# CSRD & CSDD – transition in EU company law

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**eubelius**

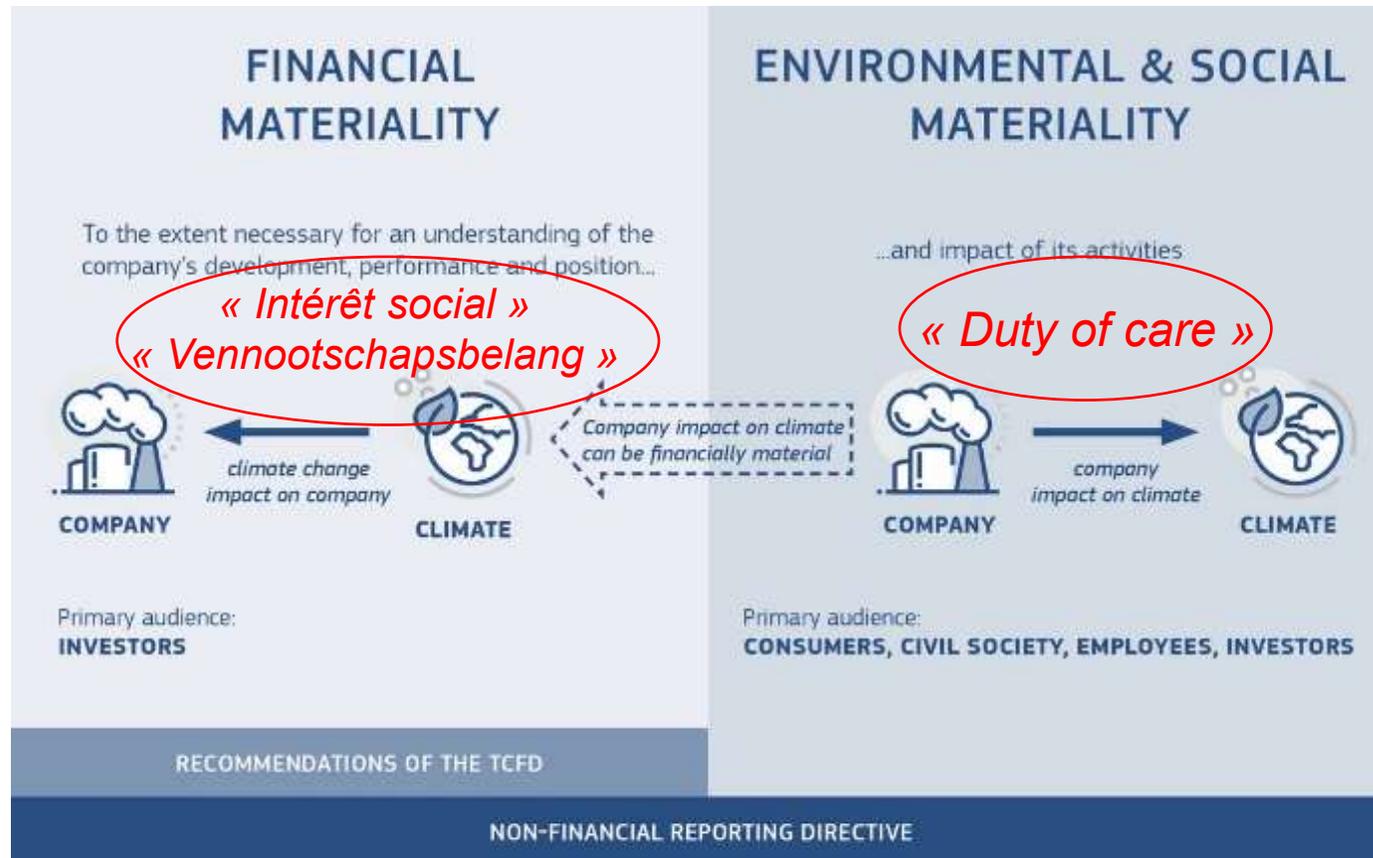
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# Introduction

# DOUBLE MATERIALITY (Guidelines II for NF reporting - CE 2019/C 209/01)



\* Financial materiality is used here in the broad sense of affecting the value of the company, not just in the sense of affecting financial measures recognised in the financial statements.

**CSDD, article 25, § 1<sup>er</sup> al. 1<sup>er</sup>**  
**« Directors' duty of care »**

« ... when fulfilling their duty to act in the best interest of the company, directors of companies referred to in Article 2(1) take into account the consequences of their decisions for sustainability matters, including, where applicable, human rights, climate change and environmental consequences, including in the short, medium and long term. »

#### Precedents:

- art. 1833 Civile Code (France, Loi PACTE 2019) and
- section 172 du UK Companies Act 2006

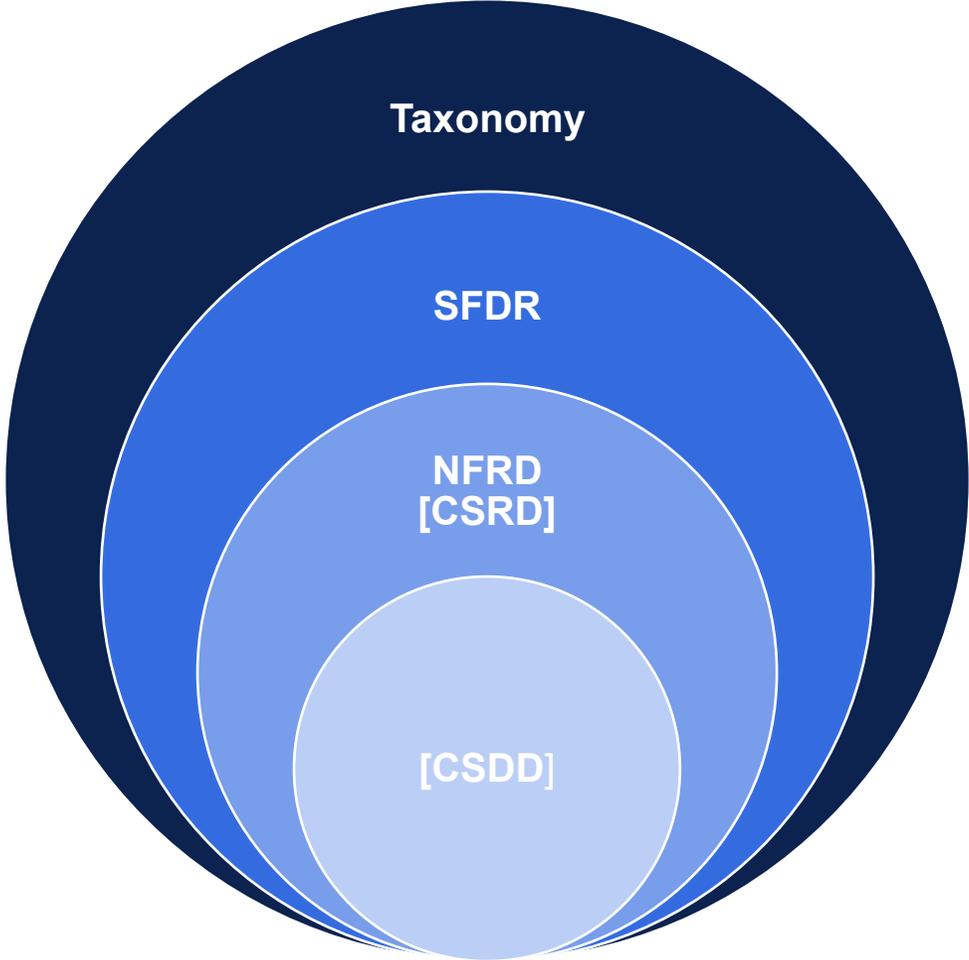
# Introduction – CSRD

- Proposal from the Commission & agreement between the Council and the Parliament
- **Extended scope** (amends NFRD)
  - all “large companies”
  - all companies listed on regulated markets (except listed micro-enterprises)
- **Audit** of reported information
- **More detailed** reporting requirements
- **Single ESG reporting standards**
  - European Sustainability Reporting Standards (ESRS)(EFRAG) – first batch to be adopted in October 2022
  - IFRS Sustainability Disclosure Standards (IFRS SDS)(ISSB) – TBA
- **Digital ‘tag’** of the reported information
  - Machine readable
  - Feeds into the (future) European single access point

# Introduction – CSDD

- Proposal for a directive of the European Commission on the obligation of due diligence of companies
- Focus on due diligence on the **value chain**
- **New duties for directors**
  - Directors' duty of care
  - Directors are responsible to put in place and oversee due diligence policies and their implementation
  - Directors must take steps to adapt the corporate strategy to take into account actual and potential adverse impacts (on human rights and the environment)
- Potential disruption of some business models → must prevent possible violations of fundamental rights and environmental abuses in the value chain
- **Mandatory net-zero plan**
  - Certain large companies must have a plan to ensure that their business strategy is compatible with limiting global warming to 1.5 °C in line with the Paris Agreement

# CSDD and CSRD will be incorporated into broader EU sustainable finance regulation



Warning: scopes are not aligned

# CSRD

# Which companies will CSRD apply to?

Large EU companies	Non-EU companies	Listed SMEs	Current framework NFRD
<p>All EU companies meeting at least 2 out of 3 criteria*:                      250+ employees                      €40m+ turnover                      €20m+ total assets</p> <p><b>+/- 50,000 companies</b></p>	<p>Non-EU companies with €150m+ turnover within the EU</p>	<p>SMEs that are public interest entities (including SMEs but excluding micro-listed entities)</p> <p><i>Simplified reporting standards</i></p>	<p>Large public interest entities</p> <p><b>+/- 11,600 companies</b></p>

\* NFRD thresholds – lower national thresholds may apply

# Which sustainability topics will be covered by CSRD?

<b>Environment</b> <i>Mirrors EU Taxonomy</i>	<b>Social</b> <i>Builds on EU Pillar of Social Rights</i>	<b>Governance</b>
Climate change mitigation <i>(e.g. greenhouse gas emissions &amp; plans to meet the objectives of the Paris Agreement)</i>	Equal opportunities	Role and composition of board and management
Climate change adaptation	Working conditions	Control and risk management
Water & marine	Human rights	Ethics and corporate culture
Resource use and circular economy		Political engagements
Pollution		Business relationships
Biodiversity and ecosystems		Anti-corruption & bribery

*Forward-looking & retrospective information*  
*Qualitative & quantitative data*

# Content of the non-financial statements

- **Business model & strategy**
  - Resilience & strategy with regard to sustainability risks
  - Opportunities relating to sustainability
  - Plans to ensure compatibility with the transition to a sustainable economy and the objectives of the Paris Agreement (limiting global warming to 1.5°C)
  - How interests of stakeholders are taken into account
  - Implementation of the business strategy with regard to sustainability matters
- **Sustainability targets** set by the undertaking
- **Role of management** and supervisory bodies
- **Policies** in relation to sustainability matters
- **Sustainability due diligence processes**, principal adverse impacts of the **value chain** and actions taken to prevent, mitigate or remediate actual or potential adverse impacts
- Principal **risks** incurred relating to sustainability and how they are managed
- Specific indicators

# Link with EU Taxonomy

- Undertakings in the scope of CSRD will have to comply with article 8 Taxonomy Regulation
- Taxonomy alignment of economic activities performed by the undertaking within scope
- Reporting of non financial undertakings based on 3 KPI's
  - Sustainable turnover
  - Sustainable Capex
  - Sustainable Opex
- Commission FAQ on article 8 TR disclosures

# Single ESG Accounting Standards

- Currently – many reporting frameworks → comparability issues
- EFRAG mandated to provide recommendations
  - Standards to be mandatory (Commission delegated act)
  - Simplified standards for SMEs required to report under CSRD
  - [EFRAG's proposals for a relevant and dynamic EU sustainability reporting standard setting](#)

# Other provisions

- **Audit requirement:** auditors (statutory auditor or certified professional) will have to give an opinion based on a limited engagement assurance on the sustainability reporting
- **Publication** in a single electronic reporting format
  - Digital-tag
  - Machine-readable
  - Should feed into the (future) European Single Access Platform
- Administrative sanctions
  - Public statement
  - Cease-and-desist order
  - Pecuniary sanctions

# When will CSRD apply?

- Large companies with **500+ employees**: financial year 2024 – reporting in **2025**
- Large companies with **500- employees**: financial year 2025 – reporting in **2026**
- Others (listed SMEs and smaller public interest entites): financial year 2026 – reporting in 2027
- Delegated acts to be adopted by the EC (on the ESG reporting standards)

# CSDD

# Existing supply chain due diligence frameworks

	EU 'Hard' law
<b>Existing</b>	<a href="#">Timber Regulation</a>
	<a href="#">Conflict Minerals Regulation</a>
<b>Proposals</b>	<a href="#">Batteries Regulation</a>
	<a href="#">Regulation on Deforestation-free products</a>
	<a href="#">Communication on Decent Work</a>

	'Soft' law
<b>General</b>	<a href="#">UN Guiding Principles on Business and Human Rights</a>
	<a href="#">OECD Due Diligence Guidance for Responsible Business Conduct (2018)</a>
<b>Sector-specific OECD</b>	<a href="#">Minerals</a>
	<a href="#">Agriculture</a>
	<a href="#">Garment &amp; footwear</a>
	<a href="#">Extractive</a>
	<a href="#">Finance</a>

# Which companies will CSDD apply to?

		Large EU limited liability companies	Non-EU companies	SMEs
<b>Group 1</b>	500+ employees €150m+ turnover*	<b>+/- 9,400 companies</b>	<b>+/- 2,600 companies</b>	Micro companies and SMEs are not directly concerned by the proposed rules. However, the proposal provides supporting measures for SMEs, which could be indirectly affected (as 'business relationship' of a Group1/2 company).
<b>Group 2</b>	250+ employees €40m+ turnover* operating in defined high impact sectors such as textiles, agriculture, extraction of minerals.  The rules will apply to this group 2 years later than to group 1.	<b>+/- 3,400 companies</b>	<b>+/- 1,400 companies</b>	

*\*Worldwide turnover for EU companies, and EU-wide turnover for non-EU companies*

# Companies in scope must

- Integrate **due diligence** into policies (art. 5)
- **Identify actual or potential adverse** human rights and environmental **impacts** (art. 6)
- **Prevent** or **mitigate** potential impacts (art. 7)
- Bring to an end or minimise actual impacts (art. 8)
- Establish and maintain a **complaints procedure** (art. 9)
- **Monitor** the effectiveness of the due diligence policy and measures (art. 10)
- **Publicly communicate** on due diligence (art. 11)

# Companies in scope must

- Integrate **due diligence** into a **policy** (art. 5) containing
  - A description of their approach, including in the long term
  - A **code of conduct** applicable to employees and subsidiaries
  - A description of **processes** implementing due diligence and measures to ensure compliance with the code of conduct and to extend its application to established business relationships
    - *Established business relationships* covers direct or indirect lasting relationships (on account of intensity or duration) which do not represent negligible or merely ancillary parts of the value chain
      - Concept inspired by
        - the **French law** on the duty of vigilance (2017),
        - the **UNGP** (2011) and
        - the **OECD** Due Diligence Guidance for Responsible Business Conduct (2018))
- **Update** the policy (at least) annually

# Companies in scope must

- **Identify actual or potential adverse human rights and environmental impacts** (art. 6)
  - Own operations
  - Subsidiaries
  - Established business relationships where related to their value chains
- **Prevent or mitigate** potential impacts (art. 7)
  - Take appropriate measures to prevent, or where not possible, adequately mitigate potential adverse impacts identified (or that should have been identified)
  - Companies could be liable for impacts they are not aware of, if they did not adequately (or at all) diligence their operations and value chain
- **Bring to an end to or minimise** actual impacts (art. 8)
  - Bring actual adverse impacts identified (or that should have been identified under art. 6) to an end
  - If it cannot be ended, companies will have to minimise the extent of such an impact

# Companies in scope must

- Establish and maintain a **complaints procedure** (art. 9)
  - Interested parties with legitimate concerns regarding actual or potential adverse human rights or environmental impacts may submit complaints
  - Complainants would be allowed to meet with representatives and request a follow-up on the complaint
- **Monitor** the effectiveness of the due diligence policy and measures (art. 10)
  - Periodic assessments of their own operations, their subsidiaries' operations and their value chain's operations
  - Assessments at least every 12 months and integrated into the company's due diligence policy.
- **Publicly communicate** on due diligence
  - With non-financial information
  - For companies not subject to the obligation to publish non-financial information, they must publish an annual statement on their website (article 11)

# SMEs will be impacted

- Smaller companies will have to conduct some due diligence themselves to the extent that they are **part of the value chain** of a company in scope
- Specific support for SMEs (art. 14)
  - Guidance and other **tools to help SMEs** (at EU and at national level)
  - Regulatory protection of SMEs from excessive requirements from large companies
  - **Commission will propose contractual template clauses to incorporate 'due diligence' into the value chain**

# Companies in scope carry due diligence with respect to

- **Human rights**

- List of rights enshrined in international legal instruments to take into consideration, including (not exhaustive)
  - Universal Declaration of Human Rights
  - International Covenant on Civil and Political Rights
  - International Covenant on Economic, Social and Cultural Rights
  - 1998 ILO Declaration
  - UN Convention on the Rights of the Child
- Also covers violations of a prohibition or right not specifically listed which directly impairs a legal interest protected in the listed instruments

- **Environmental protection**

- List of objectives enshrined in international legal instruments to take into consideration, including (not exhaustive)
  - Conventions for the Protection of Biodiversity
  - Convention on Trade in Endangered Species
  - Various conventions on the prohibition of the use of certain polluting substances and the treatment of wastes

# Group 1 companies must have a net-zero plan (art. 15)

PARIS AGREEMENT

- Plan to ensure that their business strategy is **compatible with transition to a sustainable economy and limiting global warming** to 1.5 °C in line with the Paris Agreement
- Means net-zero GHG emissions by 2050 at the latest
- [What is net-zero?](#)
- Minimum content of the plan:
  - Extent to which climate change is a risk for, or an impact of, the company's operations
  - If climate change is or should have been identified as a principal risk for/impact of the operations → emission reduction objectives in the plan
  - If variable remuneration linked to the contribution of a director to business strategy and long-term interests and sustainability → emission reduction objectives must be duly taken into account



# Administrative supervision – sanctions

- Supervisory authority designated (art. 17)
  - Likely FSMA in Belgium
- Powers of the supervisory authority will include at least (art. 18)
  - Investigation, including inspection without prior warning
  - Compliance orders
  - Pecuniary sanctions based on the company's turnover (art. 20)
  - Interim measures to avoid risk of severe and irreparable harm
- If breach identified → remedial action, if possible
- Reporting of breaches and/or substantiated concerns to the supervisory authority (art. 19)
  - By natural or legal persons
  - The authority will transmit its assessment to the person raising concerns
  - If legitimate interest, the person raising concerns will be able to challenge the decision of the authority
  - The whistleblowing directive will protect persons reporting breaches of CSDD rules (art. 23)
- Companies applying for public support must certify that no CSDD sanctions have been imposed on them (art. 24)

# Civil liability

- **Companies** in scope (art. 22) are **liable**, in the case of:
  - Failure to comply with due diligence obligations **and**
  - As a result, an adverse impact occurred and led to damage
- Some *exceptions* apply (e.g. for adverse impacts caused by an indirect business partner in some circumstances)
- Overriding mandatory application with regard to IPL
  - → **National (EU Member State) law will apply if the applicable law would be the law of a non-EU Member State**
- **Directors must take into account** consequences of their decisions on sustainability matters (art. 25 – see next slide). They are **responsible** for putting in place adequate due diligence procedures (article 26)

# Cases

« duty of care »

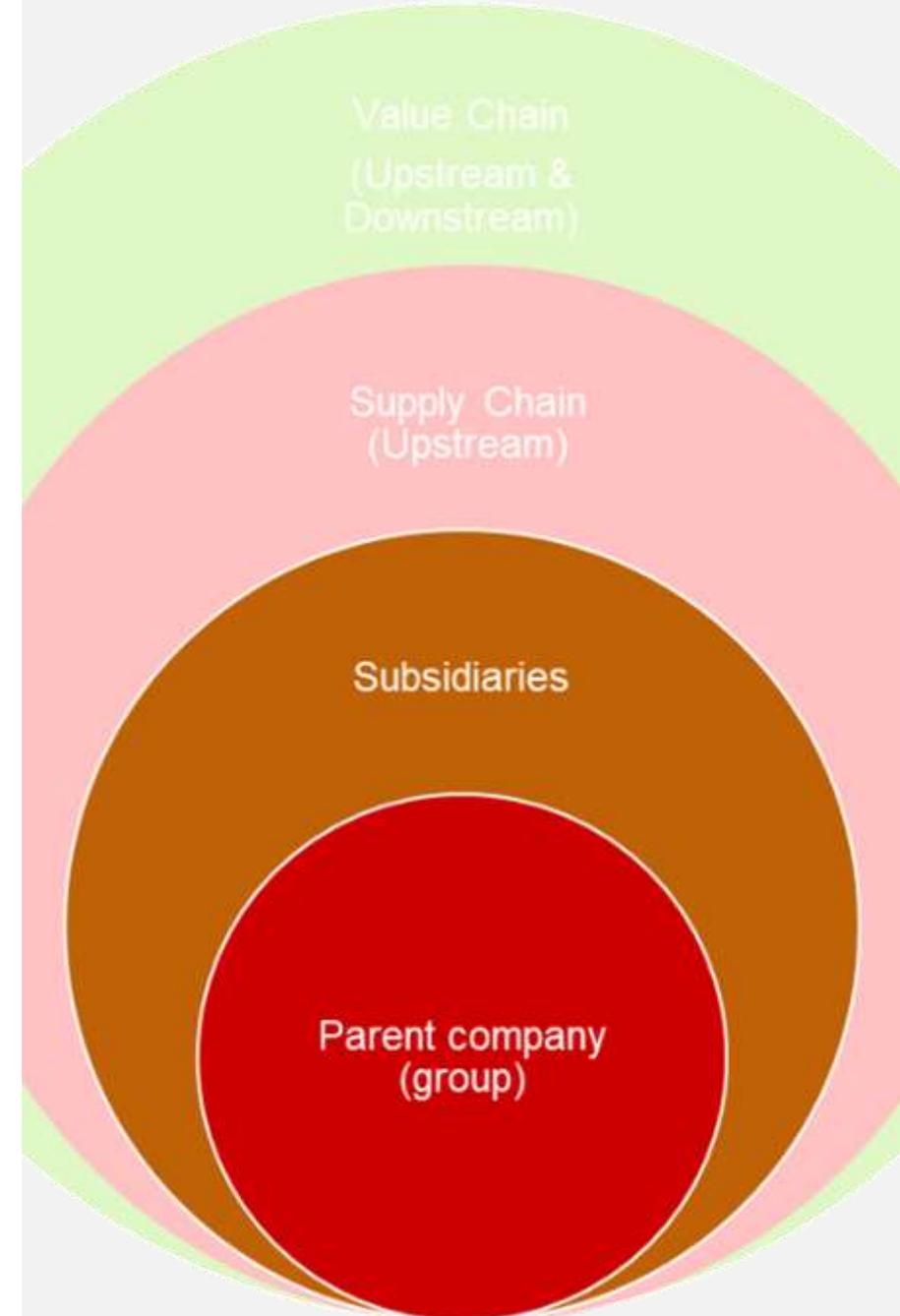
« ongeschreven  
zorgvuldigheidsnorm »

# RECENT JURISPRUDENCE:

## - responsibility in a group

### ■ Shell in Nigeria:

- The Hague, 29 January 2021 (13 years of proceedings), 'Oguru' judgement:
  - AUTHORS: **Shell Plc** (head company) and **SPDC**: Shell's Nigerian subsidiary
  - VICTIMS: Niger Delta communities
  - FAULT: Proven failure of leak prevention system and late remediation
  - DAMAGE: health, environmental and economic
  - CONDEMNATION (under Nigerian common law)
    - **For the past SPDC to compensate** the damage suffered and
    - **For the future SPDC and Shell Plc (Vedanta case law) to install effective prevention systems**
- Supreme Court UK on 12 February 2021 ('Okpabi') - application of precedent '**Vedanta v. Lungowe**', same opening as The Hague

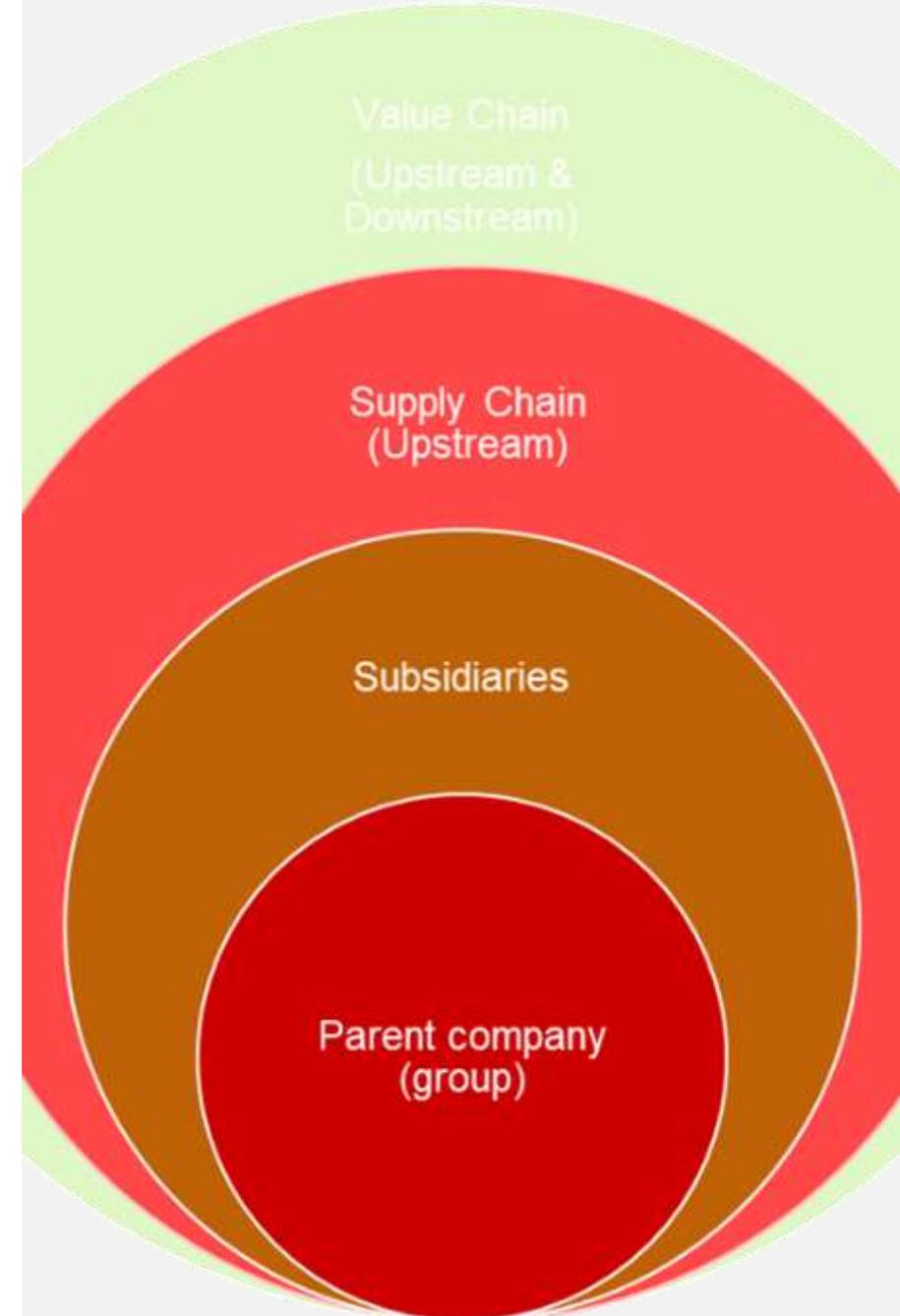


# RECENT JURISPRUDENCE :

- liability in a **group**
- liability for an act of a **subcontractor**

## ■ **Total - Erika:**

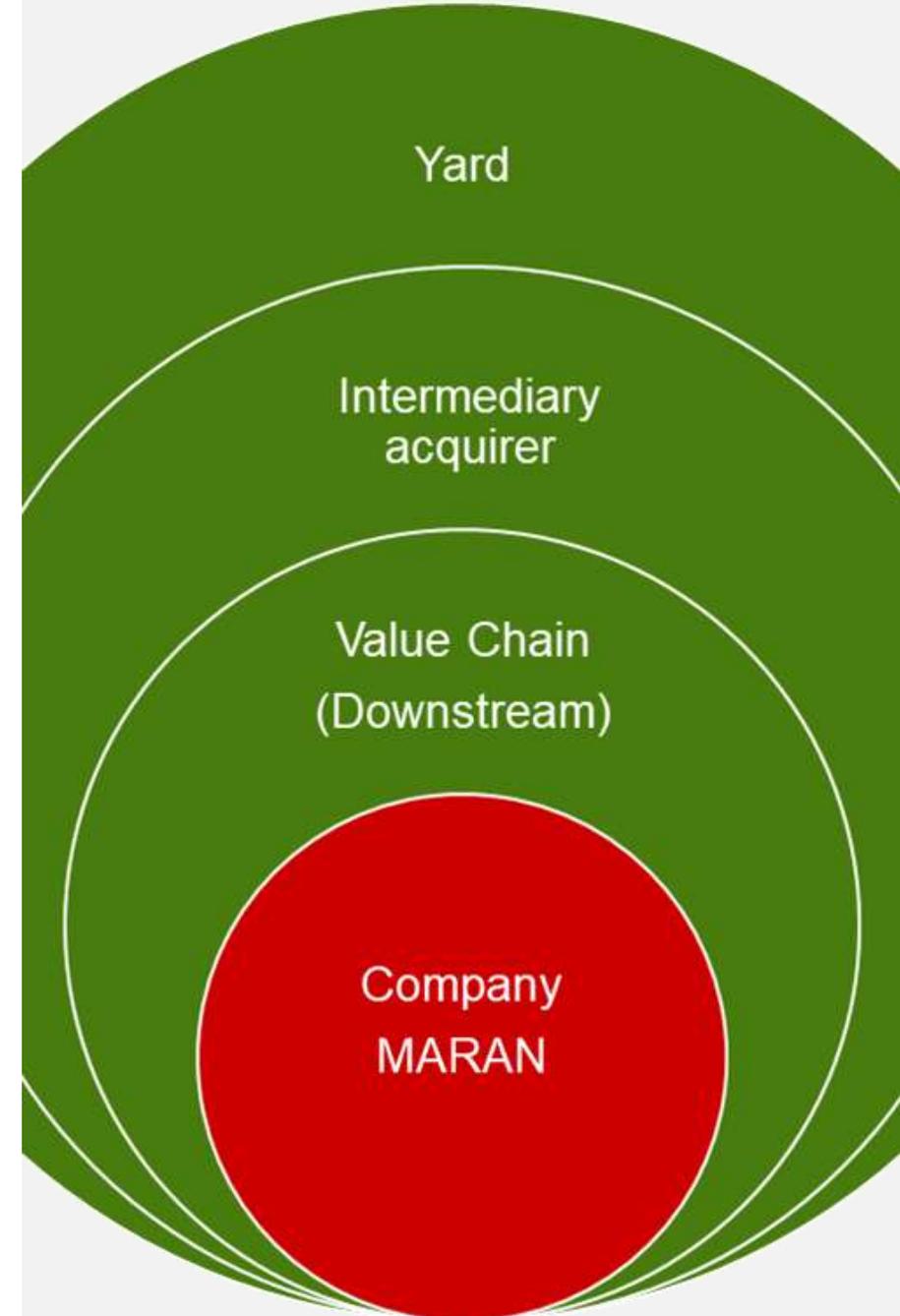
- 12 December 1999: sinking of the Erika off the coast of Brittany
- It is chartered under the control of **TOTAL SA, a listed company, which communicates on its CSR. It has voluntarily undertaken** to monitor (through its maritime subsidiaries) the quality of the carriers of its products (*vetting*)
- The judicial court of Paris on 16 January 2008, the Court of Appeal of Paris on 30 March 2010 and finally the **Court of Cassation on 25 September 2012:**
  - **TOTAL SA was convicted for "recklessness, within the meaning of the CLC 69/92 Convention, on the part of Total SA, and that as a result its representative was necessarily aware that pollution damage would probably ensue"**



# RECENT JURISPRUDENCE :

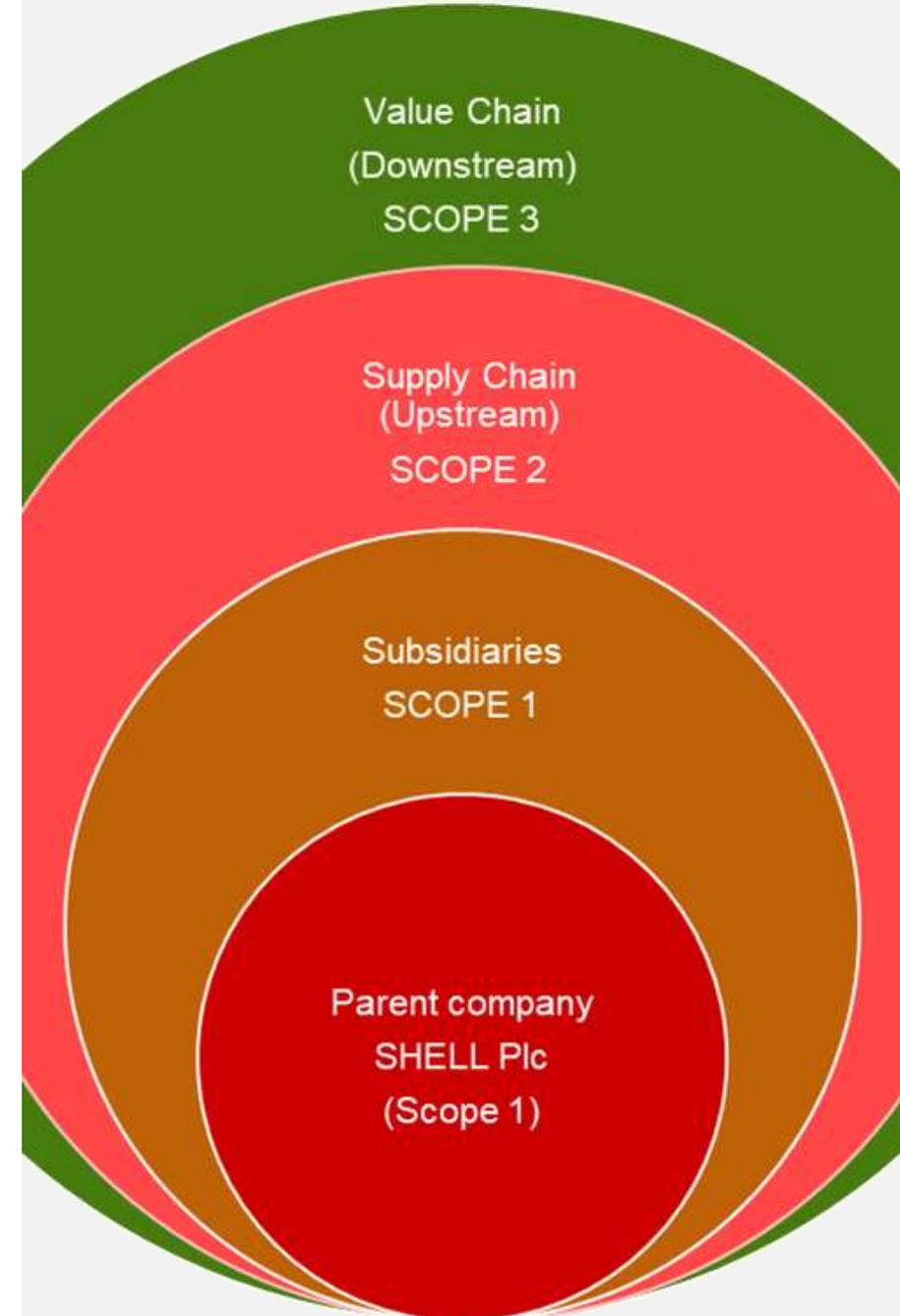
- liability for an act of **a business relationship downstream**

- **Maran** (*Begum v Maran (UK) Ltd* [2021] EWCA Civ 326):
  - Death of a man on the Chattogram site.
  - <https://shipbreakingplatform.org/>
- Liability of the **seller** of the vessel who could not have been unaware that the **buyer** was going to have the vessel dismantled under disastrous conditions of worker protection.
- The Court found that the contract between Maran and Hsejar contained a **"durable" clause** requiring the buyer *"to confirm that they would only sell to a yard that would carry out the demolition in accordance with good health and safety working practices"*.



# RECENT JURISPRUDENCE :

- responsibility in a group
- responsibility for a **consumer** act
- **Shell v/ Milieudefensie**, 26 May 2021 (appeal struck)
- The Hague Tribunal
  - considers that **damage of extreme gravity** will occur in the near future if prompt action is not taken to **prevent** its occurrence. **The evidence of this damage is based on**
    - **IPCC SR15-report (1,5 °)**,
    - **IEA 2020 "World Energy Outlook"**.
  - The court relies mainly on the **United Nations Guiding Principles on Businesses and Human Rights (UNGP 2011)** and, to a lesser extent, on the **Sustainable Development Goals**, which complete an “unwritten standard of care”.
  - The court orders Shell *"to reduce the volume of annual CO2 emissions into the atmosphere resulting from all company activities and energy products sold by the Shell group in such a way as to limit this volume to 45% by the end of the year 2030, compared to the level in the year 2019"*
    - scope 1, scope 2 (group+upstream emissions): performance obligation;
    - scope 3 (downstream emissions=clients): obligation of means.



# Some ongoing cases

- TotalEnergies** and its duty of care:
  1. New oilfield development projects in Uganda (Tilenga and **Eocap**) - introduced on 29 October 2019 - Cass. 15 December 2021 (jurisdiction);
  2. "**Our [climate] business** for all" introduced on 19 June 2019 - order of 12 February 2021: "**if the due diligence plan** undoubtedly affects the operation of the Total SE, it goes far beyond the strict framework of the management of the commercial company by virtue of its raison d'être and the risks it is intended to prevent from occurring.... **It falls within the social responsibility of the Total SE....**".
- VW, BMW, Daimler, Mercedes** cited by Greenpeace in November 2021 in Germany to demand "require, among other things, that the manufacturer cease selling climate-damaging internal combustion vehicles worldwide by 2030 at the latest."
- MILIEUDEFENSIE puts **thirty major companies in the Netherlands** on notice in January 2022 to stop failing to comply with the Paris Agreement
- CLIENTEARTH site **13 directors of SHELL plc in Great Britain** on 15 March 2022 "for failing to properly prepare the multinational oil and gas company for net zero" "If successful, Shell's board could be forced by the courts to change its strategy, taking specific concrete steps to align its plan with the Paris deal. But if the claimants lose, they could be liable for the full costs of the case, including directors' legal fees" (Source: *The Guardian*)



Conclusion:  
Responsible or guilty,  
perhaps you have the choice

# What are we responsible for and Who is responsible for what is coming?

## Philosophically

- K. Jaspers (1883-1969) *Die Schuldfrage* (1946) "**Blindness** to the misfortune of others, that absence of imagination of the heart, and the **inner impassivity** to the very misfortune that strikes the sight, **all this establishes moral guilt**" ≠ criminal guilt
- H. Jonas (1903-1993) "**The definitively unleashed Prometheus, to whom science confers forces never before known and the economy its unbridled impulse, calls for an ethics which, by freely consented fetters, prevents man's power from becoming a curse for him**" (*The Responsibility Principle* (1979))
- E. Levinas (1905-1995): The subject exists only "in the discomfort or uncondition of the accusative" (*Otherwise than being or beyond essence* (1974)). Responsibility is "**the essential, primary, fundamental structure of subjectivity**".

## In law

- **A company** is recognised by the law as a "**subject of law**" because it is responsible ("**licence to operate**"). At the same time
  - "being" **turned inwards** (the interest of shareholders, workers, suppliers, etc.) and
  - "other than being", **turned outwards** (responsibility (for its impact) towards customers, local communities, public authorities, environment).

↪ The outward-looking commitment corresponds to what will be put in place by the **directive on corporate sustainability due diligence** (23.2.2022 - COM(2022) 71 final - 2022/0051(COD))

