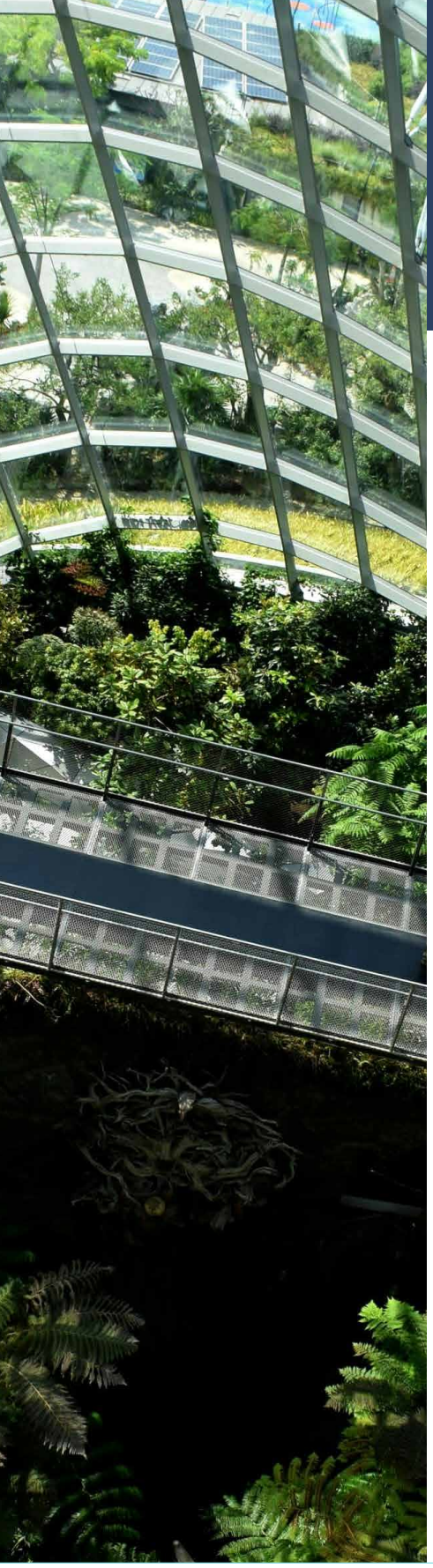

Corporate Environmental Due Diligence and Reporting in the EU

Legal analysis of the EU Directive on Corporate Sustainability Due Diligence and policy recommendations for transposition into national law

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From our non-profit Brussels Office, we strive to improve corporate governance, transparency and accountability on sustainability matters through the development of a harmonised EU legal framework as well as through the identification and promotion of best practice. We have been actively promoting ambitious European sustainability legislation since 2006 and are a Board member of the European Coalition for Corporate Justice (ECCJ).

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Published in the Official Journal of the European Union on 5 July 2024,[1] the EU Corporate Sustainability Due Diligence Directive ("CS3D") marks a step change in the ongoing process of translating international standards on human rights and environmental due diligence ("HREDD"), namely the United Nations Guiding Principles on Business and Human Rights ("UNGPs") and OECD Guidelines for Multinational Enterprises on Responsible Business Conduct ("OECD Guidelines"), into binding legislation. The CS3D is the culmination of a four-year effort to develop and adopt binding standards on sustainability due diligence for EU companies – a process that has seen wide participation and support from a broad range of citizens and stakeholders including civil society organisations, affected communities, trade unions, businesses and business associations. The CS3D sets a legal requirement, for certain very large companies, to identify and address the human rights and environmental impacts related to the companies' activities, including those in their value chains. It was preceded, in 2022, by the Corporate Sustainability Reporting Directive ("CSRD"), which requires companies to report on, among other things, the main negative environmental, social and governance impacts arising from a company's activity and value chains.

The adoption of the CS3D at the EU level is a first step in a longer process. As a Directive, the CS3D does not directly apply to companies, but must be incorporated ("transposed") into the domestic legal systems of EU Member States[2]. While they are bound by the terms of the Directive as to the result to be achieved and the deadline by which transposition should take place, Member States retain a degree of flexibility regarding the manner in which the Directive's requirements are incorporated into their national legal systems. They must refrain from reducing existing standards of protection when transposing the CS3D and enjoy a certain margin of discretion to set a higher level of protection for both human rights and the environment.

Some companies will find themselves at the beginning of a learning process. Many others however already have experience with these principles, thanks to legislation in France and Germany and voluntary implementation of the UNGPs and the OECD Guidelines.

While the CS3D is an important step forward in developing binding business and human rights requirements, it is not fully aligned with the international standards which represent society's expectations and best practices.

In light of the above, this guide primarily serves to support those actors involved in transposition (in particular public authorities) by providing in-depth analysis of the provisions related to the environment and recommendations on how to transpose the CS3D to ensure a high level of protection of the environment – including by capitalising on synergies with CSRD and maximising alignment to international standards.

1. 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 ("CS3D").

2. As well as Iceland, Liechtenstein and Norway by virtue of the European Economic Area (EEA) agreement.

Scope of companies

The CS3D will apply to companies with over 1000 employees and a net worldwide annual turnover above EUR 450 million, as well as to the ultimate parent companies of groups fulfilling those conditions when considered together. Both EU and non-EU companies will have to comply with the Directive[3]. This will result in a number of covered companies far below that of the CSRD, which will eventually apply to all large EU companies as well as EU-listed SMEs. This is not in line with international standards, which expect all businesses, regardless of size, to conduct due diligence. See Section A, sub-sections 1 and 2

Such misalignments risk limiting the effectiveness of CS3D in the fight against human rights abuses and environmental degradation. Additionally, in leaving most CSRD-covered companies out of the CS3D scope, they constitute a missed opportunity that can be rectified at the transposition stage to clarify how (negative) impacts should be identified for reporting purposes. See Section A, sub-section 3

Value chain coverage

With regards to the impacts that companies must identify and address beyond their own operations, the CS3D requires companies to consider their entire supply chains, as well as downstream distribution, transport and storage when done for or on behalf of the company. Here the CS3D deviates again from the CSRD and international standards, both of which require companies to identify and address impacts in their entire upstream and downstream value chains. See Section B, sub-sections 1 and 2

The non-inclusion of most downstream activities in the CS3D leaves important gaps regarding damages related to the use and waste treatment of a company's products, which may eventually result in important clean-up costs being unduly shifted to States and the public. The limited downstream coverage is particularly significant in relation to financial services and investments – which are where most impacts resulting from those activities are found and which are, as a result of this definition, excluded from the due diligence of investors and financial services providers (the financial sector must, however, comply with obligations related to upstream due diligence and climate transition planning obligations). By contrast, the CSRD and the Sustainable Finance Disclosure Regulation ("SFDR") require the disclosure, respectively, of negative impacts related to investments and financial services and of due diligence policies. In both cases, the failure to specify how such duties can be effectively carried out by laying down requirements in CS3D is a missed opportunity that can be rectified at the transposition stage to provide clarity to companies under those frameworks. See Section B, sub-section 3

Scope of environmental impacts

The approach chosen in the CS3D to define the environmental impacts that fall within the scope of the due diligence obligations is twofold. First, the CS3D takes an integrated approach to human rights and the environment by encompassing environmental impacts with human rights implications. This underscores the interconnectedness between environmental degradation and human rights abuses – including the right to health, potentially addressing a wide range of scenarios where environmental impacts intersect with human rights. See Section C, sub-section 1.1

Second, the CS3D also encompasses environmental impacts that do not have direct human rights implications. These are defined only by reference to a list of prohibitions and obligations derived from international environmental conventions under Part II of the CS3D Annex. However, this approach is unduly narrow and incomplete. See Section C, sub-section 1.2

While these two approaches, when combined, have the potential to provide a strong framework for addressing business contributions to the triple planetary crisis, the intricate nature of the provision defining environmental impacts may result in may result in divergent interpretations by companies when conducting their due diligence, creating legal uncertainty and leaving significant environmental impacts meant to be covered

3. For non-EU companies, only turnover thresholds apply, and only relative to turnover in the EU (rather than worldwide).

unaddressed. Such complexity underscores the need for Member States to adopt a comprehensive and clear approach when transposing the definition of environmental impacts into national law, aiming to ensure adequate coverage and greater clarity through alignment with international standards and the CSRD. See Section C, sub-section 3

The OECD Guidelines require companies to conduct due diligence regarding their environmental impacts and include a non-exhaustive list of impacts such as climate change, biodiversity loss, pollution and ecosystem degradation. While focused on human rights, the UNGPs establish that businesses have a responsibility to respect internationally recognised human rights, which includes protecting people from harms arising from environmental degradation. Similarly, when determining what sustainability matters companies should report on, the CSRD provides a clear list of matters, comprehensively setting out the aspects of the environment that may be impacted by companies and so providing legal clarity and predictability. See Section C, introduction and sub-section 2

Climate transition plan obligation

In addition to requiring companies to conduct HREDD (see Section D), the CS3D requires companies to adopt and implement a transition plan to reduce their greenhouse gas ("GHG") emissions consistently with the decarbonisation trajectory needed to limit global warming to 1.5°C, in line with the Paris Agreement while recognising that limiting warming to 1.5°C is not within the control of any individual company. See Section E, sub-sections 1.1 and 1.2

Here, legislators took the opportunity to align the CS3D and CSRD. The CS3D establishes certain key elements of transition planning but allows plans adopted under CSRD to be recognised as a way to comply with the obligation to adopt a plan, minimising double-reporting and avoiding overlaps. However, companies covered by the CS3D have an independent obligation to implement the plan and update early on their progress in doing so. A better specification of targets under national rules transposing the CS3D would enhance such alignment and clarify that the GHG reduction targets in the plan should be specified in terms of scopes 1 to 3 in all cases (and not only where they relate to absolute reductions). See Section E, sub-section 2

Finally, it is important to note that, while transition plans are a central tool for reducing GHG emissions, they are embedded in the broader context of HREDD, and do not in and of themselves allow companies to discharge their due diligence obligations regarding climate change-related impacts. See Section C, sub-section 1.1.1

Enforcement mechanisms

The CS3D provides for two complementary enforcement mechanisms. See Section F

National-level supervisory authorities will oversee the implementation of all due diligence steps by companies, as well as the adoption and design of climate transition plans. Their monitoring of climate transition plans is thus limited to whether a company has in fact adopted a plan and whether it contains the mandatory elements set out in Article 22, but not whether the plan has actually been implemented. This risks reducing transition plans to mere greenwashing tools, thereby undermining the obligation to put the plans into place effectively. Member States can rectify this through transposition that goes beyond the minimum set out in the Directive.

When it comes to due diligence, the CS3D gives supervisory authorities broad competences, including the power to request information, conduct investigations and carry out inspections. While authorities can act on their own initiative, they can also act upon substantiated concerns raised by third parties. In the event of non-compliance, the CS3D empowers supervisory authorities to issue specific orders to companies, such as to refrain from or cease certain conduct, or to take interim measures in situations of imminent risk of severe and irreparable harm. See Section F, sub-section 1.5

Member States retain significant discretion to design the penalties that supervisory authorities are entitled to impose, but they must at least include turnover-based fines and public statements in cases of non-payment (in addition to the publication of all decisions imposing penalties). See Section F, sub-section 1.6

The CS3D also imposes a number of obligations designed to ensure that public authorities are accountable and that their activities are transparent. In particular, Member States must ensure that the

decisions, actions, and omissions of these competent authorities are subject to an effective right of appeal to an independent administrative or judicial body. See Section F, sub-sections 1.3 and 1.7

The procedure for submitting substantiated concerns is an important tool for raising concerns and pointing out potential instances of non-compliance. However, in order for supervisory authorities to fully play their role in ensuring compliance, they must not use their monitoring power solely on an ad hoc, reactive basis when presented with information relating to a potential breach of the CS3D. Instead, they will need to exercise their prerogatives in a proactive manner, using a risk-based approach to ensure that they cover, over time, a significant proportion of the companies under their jurisdiction, with a view to closing any potential compliance gaps that would otherwise not be reported or come to the attention of the supervisory authority.

Civil liability is pivotal in empowering victims of environmental damages by enabling compensation claims for damages caused as a result of a company's violation of its due diligence obligations under the CS3D. While Article 29 presents significant opportunities to bring civil claims to obtain such compensation, a restricted transposition of this provision could entail several limitations to the remedial of the consequences of environmental damages, including by hindering the efforts of environmental defenders and environmental non-governmental organisations in protecting the environment and affected communities. Six potential limitations – and strategies for addressing them during transposition – have been identified with regard to the following areas: the coverage of pure environmental damages; the liability of companies for the actions of their business partners; access to justice for victims located outside the EU; the burden of proof; the types of remedies available; and the liability of non-EU companies. See Section F; sub-section 2.2

Summary of key recommendations

The following table summarises this report's main recommendations regarding the level of protection for the environment and climate:

Article	What should be improved through national transposition
Article 3(1)(b) on the definition of adverse environmental impacts and Annex, Parts I and II	Clarifying Point 15 of Annex, Part I by explicitly including the right to a healthy environment. It is recommended that the terms "measurable" and "substantially" be removed from the text. (See Recommendation n°5) Ensuring comprehensive coverage of environmental impacts (See Recommendation n°6 , and Section C, sub-section 1.2): • **Option A** - Defining impacts on the environment primarily through a comprehensive list of environmental impacts. • **Option B** - Ensuring the list of environmental conventions is complete and refers to their overall objectives, or to all relevant provisions.
Article 3(1)(g)(ii) on the downstream value chain	Bringing the definition of the downstream chain of activities in line with the CSRD and international standards by including all activities, in particular the use and waste management of products and the provision of services. (See Recommendation n°2) Introducing due diligence requirements for financial products and services, in line with international standards and UN recommendations. (See Recommendation n°3)
Article 22 on climate transition plans	Improving the wording on targets in coherence with the ESRS E1 and clearly stating that targets must be GHG-emission reduction targets for scopes 1-3. (See Recommendation n°8)

Article	What should be improved through national transposition
Articles 24-27 on administrative enforcement	Ensuring that all obligations under the Directive are subject to enforcement by empowering supervisory authorities to require information and carry out investigations under Article 25(1) as to whether and how transition plans have been put into effect. (See Recommendation n°10) Maximising the effectiveness of substantiated concerns by requiring supervisory authorities to provide an answer within clearly defined timelines and providing all legal or natural persons having submitted a concern access to a court competent to review the supervisory authorities' decisions by establishing that all submitters have a legitimate interest. (See Recommendation n°11)
Article 29 on civil liability	Explicitly recognising that human rights and environmental non-governmental organisations or trade unions can bring claims for damages caused to collective interests and that such claims are not limited to the situation where these organisations or unions have been authorised to act on behalf of a victim under Article 29(3)(d). (See Recommendation n°15) Providing for the possibility for a victim to seek compensation for a loss of chance to ensure a company's civil liability for damages caused exclusively by a business partner is not excluded altogether. (See Recommendation n°16) Ensuring that a victim can authorise non-governmental organisations representing members of local communities located outside of the EU to act on their behalf. (Recommendation n°17). Providing for a reversal of the burden of proof in favour of the victim. (See Recommendation n°18)

List of acronyms

The following acronyms and abbreviations are used in this report:

CBD	Convention on Biological Diversity
CESCR	United Nations Committee on Economic, Social and Cultural Rights
CITES	Convention on International Trade in Endangered Species
CS3D	Corporate Sustainability Due Diligence Directive
CSRD	Corporate Sustainability Reporting Directive
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EEA	European Environment Agency
EFRAG	European Financial Reporting Advisory Group
EIA	Environmental Impact Assessment
ENGOs	Environmental Non-Governmental Organisations
ESRS	European Sustainability Reporting Standards
FAO	Food and Agriculture Organisation
GBF	Global Biodiversity Framework
GHG(s)	Greenhouse Gas(ses)
HCFCs	Hydrochlorofluorocarbons
HFCs	Hydrofluorocarbons
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IPBES	Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services
IPCC	Intergovernmental Panel on Climate Change
ITLOS	International Tribunal for the Law of the Sea
LRTAP	Long-range Transboundary Air Pollution
MARPOL	International Convention for the Prevention of Pollution from Ships

MEA	Millennium Ecosystem Assessment
MPLs	Maximum Permissible Limits
NFRD	Non-Financial Reporting Directive
NOx	Nitrogen oxide
ODS	Ozone-depleting Substances
PFAS	Per- and polyfluoroalkyl substances
PIC	Prior Informed Consent
PM2.5	Fine particulates
POPs	Persistent Organic Pollutants
SFDR	Sustainable Finance Disclosure Regulation
SOx	Sulphur oxide
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UNCLOS	United Nations Convention on the Law of the Sea
UNDP	United Nations Development Programme
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
UNGPs	United Nations Guiding Principles on Business and Human Rights
UNWG	United Nations Working Group on the issue of human rights and transnational corporations and other business enterprises (also referred to as the Working Group on Business and Human Rights)

Introduction

The recently adopted Corporate Sustainability Due Diligence Directive (**"the Directive"** or **"CS3D"**)[4] is the first cross-sectoral legislation that will require large companies operating in the EU market to identify, prevent and address actual and potential adverse impacts on human rights and the environment, including throughout their own operations, those of their subsidiaries, and those of their business partners in their value chains. Additionally, companies must adopt and implement a transition plan for climate change mitigation that aims to ensure compatibility of the company's business model and strategy with the transition to a sustainable economy and the goal of limiting global warming to 1.5°C.

Companies will also have to communicate relevant information externally on their due diligence policies, processes and activities to identify and address actual or potential adverse impacts, including the findings and outcomes of those activities. For the majority of companies subject to the CS3D, this reporting obligation is covered by rules laid down in the Corporate Sustainability Reporting Directive **("CSRD")**,[5] that amended, among others, the Accounting Directive to require the disclosure of sustainability information.[6]

The CSRD entered into force on 5 January 2023 and the associated European Sustainability Reporting Standards (**"ESRS"**)[7] were adopted by the European Commission on 31 July 2023. Together, the CSRD and ESRS create detailed sustainability reporting requirements that will apply to a significant number of EU and non-EU companies, beyond those covered by the CS3D, and substantially increase the scope of their sustainability reporting compared to its predecessor, the Non-Financial Reporting Directive **("NFRD")**. Under the CSRD, companies are required to disclose information on the social and environmental risks they face, and on how their activities impact people

4. 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 ("CS3D").

5. Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting ("CSRD").

6. Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC ("Accounting Directive", "AD"). In this analysis, references to specific Articles or Recitals in the CSRD should be understood to mean references to Directive (EU) 2022/2464, while references to the specific Articles or Recitals in the Accounting Directive should be construed as references to the corresponding Articles in the Accounting Directive, as modified by the CSRD. Non-specific references to the CSRD (for instance, "alignment to the CSRD") refer to the modifications in the Accounting Directive introduced by the CSRD in combination with the ESRS).

7. Commission Delegated Regulation (EU) 2023/2772 of 31 July 2023 supplementing Directive 2013/34/EU of the European Parliament and of the Council as regards sustainability reporting standards ("ESRS"). In this analysis, the internal reference system of the ESRS is used. Therefore, references to the ESRS should be understood as references to the relevant parts of Annex I (ESRS) and Annex II (ESRS - Definitions) of Commission Delegated Regulation (EU) 2023/2772.

and the environment, when these risks and impacts are considered material. That is referred to as the double materiality perspective, in which the risks to the undertaking and the impacts of the undertaking each represent one materiality perspective.

These two legal frameworks, the CS3D and CSRD, work hand in hand. On the one hand, the outcome of a due diligence process under the CS3D will inform a company's assessment of its material risks and impacts to be reported under the CSRD.[8] On the other hand, once a company identifies a material impact under the CSRD (and thus needs to report on it), the impact should also be subject to due diligence obligations under the CS3D. **These two directives must therefore be applied together, taking relevant international voluntary standards** like the UN Guiding Principles on Business and Human Rights **("UNGPs")**[9] and the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct **("OECD Guidelines")**[10] **into account, to ensure a complete understanding of what is expected from businesses in terms of transparency and responsible business conduct.**

Member States must transpose the CS3D into national law within two years from its entry into force. **The objective of this legal analysis is to provide a guide to transposition for Member States.** It is therefore intended for national parliamentarians and lawmakers, law commissions and similar independent bodies called upon to propose legislation designed to transpose the CS3D, and executive officials tasked with drafting national legislation in compliance with EU laws.

This legal analysis first unpacks the company, material and normative scope of the two directives, as well as their main obligations and enforcement mechanisms. **The analysis places a particular emphasis on understanding the environmental scope of these laws.**

By highlighting synergies between these two directives in the context of transposition of the CS3D, this guide seeks to maximise their potential alignment and ensure national legislation provides a legislative framework that delivers their common objective: to ensure businesses play their role in protecting human rights and the environment.

This legal analysis provides recommendations for transposing the CS3D into national law. As Member States have the right to set higher standards than those set in the directive,[11] they can close some of the structural gaps of the CS3D, by **ensuring full alignment with the OECD Guidelines and UNGPs as well as better coherence with the CSRD.**

8. Ibid. See ESRS Annex I, ESRS 1 Chapter 3.4 para. 45, p.10 "The materiality assessment of a negative impact is informed by the due diligence process defined in the international instruments of the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises." and Chapter 4 para. 58, p.12 "The outcome of the undertaking's sustainability due diligence process (referred to as "due diligence" in the international instruments mentioned below) informs the undertaking's assessment of its material impacts, risks and opportunities."

9. UN Guiding Principles on Business and Human Rights ("UNGPs").

10. OECD Guidelines for Multinational Enterprises on Responsible Business Conduct ("OECD Guidelines").

11. Article 4 CS3D, see below the section "National transposition and level of harmonisation".

Background

Corporate due diligence is a concept that has become mainstream over the last decades, in particular through the adoption of the UNGPs and the OECD Guidelines. It should be understood as a bundle of interrelated responsibilities and processes for identifying, preventing, mitigating and bringing to an end adverse impacts of business as well as accounting for them, tracking the implementation and results of these processes and communicating about how adverse impacts are addressed with respect to the enterprises' own operations, their value chains and other business relationships. When causing or contributing to adverse impacts, companies also have obligations to provide remediation, such as apologies, restitution or rehabilitation, or financial or non-financial compensation.

The UNGPs are recognised as a codification of the legal obligations on States and business enterprises to guarantee fundamental human rights in accordance with international human rights law. They, together with the OECD Guidelines, have played a pivotal role in promoting responsible business conduct around the world since their adoption by the UN Human Rights Council in 2011. Thousands of companies now use these frameworks to guide compliance with their human rights obligations and have integrated due diligence standards into their operations. These initiatives have been instrumental in fostering a culture of responsible business conduct aimed at ensuring that companies uphold human rights, labour standards and environmental protection in their operations. However, despite significant progress by some companies, there is a need for scaling up the effort across sectors and creating a level-playing-field. Moreover, greater transparency, strengthened enforcement mechanisms and enhanced accountability measures are essential to strengthen the effectiveness of these frameworks.

There has been growing pressure from various stakeholders asking the EU to establish mandatory due diligence rules for companies that are based in the EU or that provide goods or services in the EU market. This pressure comes not only from civil society organisations,[12] but also from businesses themselves[13] in light of the emergence of national due diligence legislation and the need to avoid fragmented rules across the EU.[14] One of the 10 actions in the Action Plan on Sustainable Finance that the Commission adopted in March 2018 was to foster sustainable corporate governance and attenuate short-termism in capital markets.[15] This action plan led to a study on human rights and environmental due diligence commissioned by the Directorate-General for Justice and Consumers.[16] The study was followed by the launch of a legislative initiative on sustainable corporate governance in April 2020,[17] which ultimately resulted,

12. Civil society calls for human rights and environmental due diligence legislation, European Coalition for Corporate Justice, October 2019.
13. List of large businesses, associations & investors with public statements & endorsements in support of mandatory due diligence regulation, Business & Human Rights Centre, last updated in May 2024.
14. See existing due diligence legislations in Germany and France.
15. Communication from the Commission, Action Plan: Financing Sustainable Growth, COM/2018/097 final, March 2018.
16. Study on due diligence requirements through the supply chain – Final report, European Commission, Directorate-General for Justice and Consumers, February 2020.
17. Sustainable Corporate Governance initiative, European Commission, July 2020.

after a four-year long legislative process, in the adoption of the Corporate Sustainability Due Diligence Directive on 24 May 2024.[18]

The CS3D forms a key piece of the puzzle of the EU regulatory framework on business, human rights and the environment.[19] As noted in Recital 25 of the CS3D, "[t]his Directive is complemented by other legislative acts which also address negative adverse impacts in the field of human rights or environmental protection". The corporate sustainability framework of the EU contains a set of different legislations and enforcement measures which are designed, through different approaches, to achieve a common objective:

- **product-level legislation** (many including trade-related measures), such as the Timber Regulation, the Conflict-Minerals Regulation, the Deforestation Regulation and the Forced-Labour Ban, the Batteries Regulation, the Ecodesign Regulation and the Critical Raw Materials Act;
- **sustainable finance legislation:** Sustainable Finance Disclosure Regulation, Green Taxonomy, ESG Rating Regulation;
- **company-based legislation:** CSRD (including ESRS), CS3D.

Recital 25 of the CS3D further specifies that "[c]ompliance with this Directive should facilitate compliance with the provisions and objectives of these other legislative acts, and with the terms and conditions of the applicable authorisations implemented thereunder". Hence, CSRD and CS3D both function as an enabler and guidance for related EU legislation as they define the standard of conduct on disclosure and due diligence.

18. Corporate sustainability due diligence: Council gives its final approval, Council of the EU, 24 May 2024.

19. See notably on this How do the pieces fit in the puzzle? Making sense of EU regulatory initiatives related to business and human rights, The Danish Institute for Human Rights, April 2024.

National transposition and level of harmonisation

Transposition is the process of incorporating an EU directive into the national laws of EU Member States, through the adoption of legislation, regulations and administrative provisions.

Article 288(3) of the Treaty on the Functioning of the European Union (**"TFEU"**) states that "a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods". This implies that Member States retain a certain degree of flexibility regarding the manner in which the directives' requirements are incorporated into their national legal systems. However, they are bound by the terms of the directive as to the result to be achieved and the deadline by which transposition should take place (in this case, 26 July 2026).

Article 4 allows Member States to go beyond most of the CS3D's requirements through the adoption of more stringent provisions. Indeed, Article 4(1) of the CS3D requires full harmonisation only for the provisions laid down in Article 8(1) and (2), Article 10(1) and Article 11(1). This means that Member State's discretion to introduce provisions more protective of the environment, when transposing the CS3D, is only constrained when it comes to the transposition of core elements of the duty of conduct into national law – i.e. to obligation to identify, prevent and bring impacts to an end.

Article 4(2) explicitly acknowledges that, with regard to provisions other than those pertaining to core due diligence duties, Member States may introduce *"more stringent provisions* [...] or [...] 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" (emphasis added).

This minimum harmonisation approach is further clarified in Recital 31: "Nonetheless, this Directive should not preclude Member States from introducing more stringent provisions of national law diverging from those laid down in Articles [...], 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 in terms of their objective or the field covered, such as provisions of national law regulating specific adverse impacts or specific sectors of activity, *in order to achieve a different level of protection of human, employment and social rights, the environment or the climate"* (emphasis added).

In line with the aim of the CS3D to ensure that companies "contribute to sustainable development and the sustainability transition of economies and societies",[20] the concept of a "different" level of protection should be interpreted as conferring flexibility upon Member States to adopt a "higher" level of social, environmental, consumer and health

20. Recital (16) CS3D Justice, Oc.

protection than that mandated by the EU ("more stringent provisions"; "raise the level of protection").

Transposition into national legislation thus represents a pivotal opportunity to ensure a high level of environmental protection, by reinforcing the CS3D's alignment with international standards and enhancing coherence with other legal frameworks, such as the CSRD and other EU due diligence legislation.

Moreover, Article 1(2) states that "[t]his 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" (emphasis added). A**rticle 1(2) includes a non-regression clause.**[21] **Hence, if the existing standard of protection at Member States level (including in existing due diligence legislations) is more stringent than CS3D, Member States shall not lower the level of protection when transposing CS3D.** Article 1(2) moreover explicitly mentions the protection of the environment and climate.

21. Rechtsgutachten: Möglichkeiten und Grenzen der Gestaltung des Anwendungsbereichs des Lieferkettensorgfaltspflichtengesetzes (LkSG) bei der Umsetzung der Corporate Sustainability Due Diligence Directive (CSDDD) [Legal opinion: Possibilities and limits of the design of the scope of application of the Supply Chain Due Diligence Act (LkSG) in the implementation of the Corporate Sustainability Due Diligence Directive (CSDDD)], Prof. Dr. Anne-Christin Mittwoch (published by Germanwatch), July 2024. See also CJEU, Case C-144/04 Werner Mangold v Rüdiger Helm, Judgment of 22 November 2005 and Case C-246/09 Susanne Bulicke v Deutsche Büro Service GmbH, Judgment of 8 July 2010.

Analysis and recommendations

A Scope of companies and timeline for application

All businesses, whether large or small, can have an impact on a range of internationally recognised human rights and on the environment. Size is not strictly correlated with risk, as small companies can sometimes generate significant risks and impacts. The purpose of due diligence, as set out in the UNGPs and the OECD Guidelines, is to ensure respect for human rights and the environment by companies, regardless of their size, sector, operational context, ownership and structure, wherever they operate.

1. CS3D

According to its Article 2, the CS3D applies to three groups of companies.

Firstly, it applies to **very large EU companies** with over 1 000 employees and a net worldwide annual turnover exceeding EUR 450 million.[22] It also applies to **third-country** companies with significant operations in the EU, i.e. those that generated a net turnover of at least EUR 450 million in the Union.[23]

Secondly, the CS3D applies to EU and non-EU companies that do not meet the above thresholds but are the ultimate **parent company of a group** that meets them.[24] Where the ultimate parent company has as its main activity the holding of shares in operational subsidiaries and does not engage in taking management, operational or financial decisions affecting all or part of the group, it may designate (by application to the parent company's supervisory authority) an operational subsidiary to carry out its obligations under the Directive, giving it all the necessary means to effectively perform said duties.[25]

Thirdly, the CS3D also applies to companies or parent companies of groups with a net worldwide turnover exceeding EUR 80 million (or an equivalent EU net turnover in case of non-EU companies) that have entered into **franchising or licensing** agreements ensuring a common identity, a common business concept, and the application of uniform business methods in exchange for royalties of more than EUR 22.5 million with independent third-party companies.[26]

22. Article 2(1)(a) CS3D.

23. Article 2(2)(a) CS3D.

24. Article 2(1)(b) and (2)(b) CS3D. The group should be considered as a whole, in accordance with the reference to "consolidated" statements in Articles 2(1)(b) and (2)(a) and to "groups [···]taken together" in Recital 28. If an entity within the group meets the thresholds, it is itself subject to CS3D (without prejudice to the parent company performing due diligence obligations for both in accordance with Article 6, as the parent company would then also be covered).

25. Article 2(3) CS3D. In such cases, the parent company and the designated subsidiary remain jointly liable for the obligations of the Directive, see Section F, sub-section 2.1.

26. Article 2(1)(c) and (2)(c) CS3D.

Member States must transpose the CS3D into national law within two years from its entry into force, and apply it to companies in three phases from 2027 to 2029:

- **three years after entry into force:** EU companies and parent companies of a group with over EUR 1 500 million global turnover and more than 5 000 employees, as well as non-EU companies with more than EUR 1 500 million in the EU.
- **four years after entry into force:** EU companies and parent companies of a group with over EUR 900 million global turnover and more than 3 000 employees, as well as non-EU companies with more than EUR 900 million in the EU.
- **five years after entry into force:** all other EU and non-EU companies covered by the CS3D.

2. CSRD

According to Article 5 of the CSRD, the reporting requirements will be implemented in stages from 2024 to 2028 for different categories of companies.

Firstly, large EU public interest companies or parent companies of groups already subject to the NFRD, i.e. all listed companies with over 500 employees on EU-regulated markets will be subject to reporting from 2025 for financial year starting after 1 January 2024.[27]

Secondly, **all large EU companies or parent companies of groups** that fulfil two of these three criteria will be subject to reporting from 2026 for the financial year starting after 1 January 2025: over 250 employees; EUR 50 million net turnover; and over EUR 25 million on the balance sheet.[28]

Thirdly, **EU listed SMEs** (excluding micro-undertakings) will also be subject to reporting from 2026[29] onwards although, they will only be subject to simplified reporting standards,[30] and may opt out from reporting until 2028.[31]

These three first groups also comprise **non-EU companies listed in EU regulated markets,** who apply the same thresholds (individually or at group level) and years of application as EU companies.[32]

Fourthly, other **non-EU companies** or parent companies of a group with a significant presence in the EU (i.e. which generated a net turnover of EUR 150 million in the EU market) and at least one large subsidiary or listed SME subsidiary which is not a micro-undertaking, or a branch in the EU generating a net turnover of more than EUR 40 million, are obliged to report under the CSRD as of 2029, for financial year 2028.[33] The report is prepared and published by the concerned subsidiary or branch,[34] at the group level, according to specific standards for third-country undertakings.[35] However, subsidiaries of global non-EU firms are exempt from having to report when their non-financial information is included in the parent company's consolidated management report in line with EU sustainability reporting standards.[36]

27. Article 5(2)(a) CSRD.
28. Article 5(2)(b) CSRD.
29. Article 5(2)(c) CSRD.
30. Article 19a(6) Accounting Directive.
31. Article 19a(7) Accounting Directive.
32. Article 4(5) Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC.
33. Article 40a(1) Accounting Directive, and Article 5(2), second subparagraph CSRD.
34. Articles 40a(1) Accounting Directive.
35. Article 40a(2) Accounting Directive.
36. Articles 19a(9) and 29a(8) Accounting Directive.

3. Commentary

The final scope of the CS3D adopted in May 2024 has been reduced by around 60 to 70 percent compared to the text initially agreed on in December 2023.[37] Instead of 16 800 companies before the recent changes made by the European Council, the CS3D is now expected to cover around 5 500 businesses in total.[38] In more than half of all EU countries, CS3D applies to less than 100 companies.[39] This clearly limits the impact such legislation is intended to have.

Smaller companies active in "high impact" sectors, namely textiles, agriculture, forestry, fisheries (including

Figure 1: Estimated numbers of EU companies under the scope of the CSDDD.

Source: SOMO with some data from Orbis & Eurostat, calculations are made based on publicly available data and come with attached methodological limitations.

37. Scope of EU supply chain rules cut by 70% ahead of key Friday vote, Euractiv, March 2024.
38. Overview of the Corporate Sustainability Due Diligence Directive; Advancing Corporate Responsibility, ECCJ, May 2024.
39. Ibid.

aquaculture), and mineral extraction were initially covered by the deal reached in December 2023 but have ultimately been excluded as part of last-minute compromises. These companies may be reintroduced in the scope of the CS3D at a later stage, pursuant to a future review of the CS3D scheduled by 26 July 2030.[40]

By leaving out a considerable number of companies, the current thresholds of the CS3D undermine the international standards and the purpose of due diligence to ensure respect for human rights and the environment by companies, regardless of their size. **Many companies are already required to disclose information regarding their material impacts and their due diligence process in accordance with the CSRD.** Given that due diligence is evidently intended to inform the materiality assessment, the CS3D would assist those companies in performing and complying with their reporting requirements under the CSRD.

Thresholds also take away opportunities to facilitate SMEs' transition to sustainability, potentially putting them at a commercial and competitive disadvantage. It should be noted however, that SMEs have obligations under international human rights law to respect human rights, and States have separate legal obligations to regulate these entities so as to avoid adverse impacts and to provide remedy to victims of the operations of all companies, regardless of size.

Despite the significantly reduced scope, CS3D recognizes that SMEs are part of the value chain of larger companies and provides measures to rebalance and clarify those responsibilities. Large companies are expected to allocate sufficient resources for the due diligence process and support business partners by providing capacity-building and even targeted and proportionate financial support.[41] So far, large companies have been passing on responsibilities and paperwork to SMEs, but CS3D intends to correct that practice and moreover requires companies to set up fair purchasing practices[42] to avoid unfair production deadlines or pulling out of orders at the last minute.

Recommendations for transposition

- **Recommendation n°1: Expanding the personal scope of the CS3D in order to achieve greater alignment with international standards and align with the CSRD.** This will encourage a greater number of companies to adopt a responsible conduct and ensure greater consistency between EU legislations.

40. Article 36(2)(b) CS3D.
41. Article 10(2)(e) CS3D.
42. Article 10(2)(d) CS3D.

B Value chain coverage

Due diligence covers the whole value chain, as per the UNGPs and OECD Guidelines, including the material sourcing and production as well as the end of life of the product, for example its reuse, recycling, repurposing, recovery or disposal. The environmental impact of the goods and services we use every day can only be captured if it is assessed at every stage of their life cycle.

1. CS3D

Companies' due diligence obligations apply to their own operations, those of their subsidiaries and the activities of their business partners in their "chains of activities" (a subset of value chains as understood in the CSRD, the UNGPs and the OECD Guidelines).

Therefore, the two concepts of "business partners" and "chain of activities" are central to understanding the value chain coverage of the Directive.

"Business partners" comprise both direct and indirect relationships. Under Article 3(1)(f), **'business partner**' means an entity:

> *(i) with which the company has a commercial agreement related to the operations, products or services of the company or to which the company provides services pursuant to point (g) ('direct business partner'); or*
>
> *(ii) which is not a direct business partner but which performs business operations related to the operations, products or services of the company ('indirect business partner').*

According to Article 3(1)(g), activities of a company's **upstream** business partners relate to the production of goods or the provision of services by the company, for instance the design, extraction, sourcing, manufacture, transport, storage and supply of raw materials, products or parts of the products and development of the product or the service. Both direct and indirect business partners are covered.

The activities of **downstream** business partners that companies must exercise due diligence on are limited to those related to the distribution, transport, and storage of a product, where the business partners carry out those activities for or on behalf of the company subject to the CS3D. While this covers both direct and indirect business partners involved in the distribution, transport and storage, the requirement for the business partners to be acting "for the company or on behalf of the company" introduces a limitation to the activities covered under this definition. Recital 25 clarifies that the CS3D does not apply to impacts arising out of the disposal of the product by a company's business partners and Recital 26 further clarifies that the chain of activities should not include the activities of a company's downstream business partners related to the "services" of the company.

Recital 25 also clarifies that the more limited value chain coverage denoted by the term "chain of activities" does not affect the understanding of "value chain" or "supply chain" in other Union legislation. Moreover, the obligation to adopt and put into effect climate transition plans does not build on the chain of activities, since it is based on greenhouse gas ("**GHG**") emission scopes (including, among others, the use of sold products within scope 3) (see Section E below).

2. CSRD

Article 19a(2)(f)(ii) of the Accounting Directive requires companies to report on the impacts connected to their own operations and value chains, including their products and services, their business relationships, and their supply chains. The reference to supply chain information as part of value chain information must be read in conjunction with Recital 33 of the CSRD, which states that "[r]eported sustainability information should [...] contain information about the undertaking's whole value chain".[43]

43. Recital (33) CSRD.

The ESRS further clarify the definition of value chain, which comprises "the full range of activities, resources and relationships related to the undertaking's business model[44] and the external environment in which it operates". Therefore, all activities, resources and relationships that "the undertaking uses and relies on to create its products or services from conception to delivery, consumption and end-of-life" are included. The definition further clarifies that a company's value chain "includes actors upstream and downstream from the undertaking".[45]

"Business relationships" under the CSRD are understood to be "[t]he relationships the undertaking has with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services".[46] As such, business relationships under the CSRD include indirect relationships and shareholding positions in joint ventures or investments.[47]

From a practical implementation perspective, companies should in particular identify their suppliers beyond Tier-1, the users of their services and goods, how the goods are treated at end-of-life, and potentially affected individuals and communities.[48]

3. Commentary

The value chain coverage of the CS3D is more limited than that of the CSRD and fails to align with the international standards in three key respects.

First, while value chains in the ESRS are defined as covering "activities, resources and relationships" related to the system of the company to transform inputs into outputs,[49] the CS3D more clearly focuses on the activities carried out by business partners in relation to the company's product or service. This can be seen in the definition of chain of activities,[50] as well as looking at the references to the chain of activities in the different articles laying down the due diligence duty.

Second, the CS3D has a potentially more limited understanding of business relationships than the CSRD. Under the CSRD, any "entity" (be it a business partner, an entity in the value chain or other State or non-State entities) is considered a business relationship insofar as it is linked to the business' operations, products or services. Therefore, rather than the nature of the relationship (commercial or not), the underlying criterion to determine what constitutes a business relationship for CSRD purposes is the

44. ESRS define a company's business model as "The undertaking's system of transforming inputs through its activities into outputs and outcomes that aims to fulfil the undertaking's strategic purposes and create value over the short-, medium- and long-term. ESRS use the term "business model" in the singular, although it is recognised that undertakings may have more than one business model.". See ESRS - Definitions, p. 262.

45. Ibid., pp. 281-282.

46. Ibid., p. 262.

47. Ibid. For financial assets, see also Implementation Guidance 2: Value Chain Implementation Guidance, EFRAG, May 2024, paras. 100-103.

48. Implementation Guidance 2: Value Chain Implementation Guidance, EFRAG, May 2024, para. 97.

49. See the definition of value chain in ESRS (ESRS Annex II, Table 2, p. 281), in combination with the definition of business model (p. 262).

50. Article 3(1)(g) CS3D.

existence of a linkage to the company. As a result, business partners – direct or indirect – are only a subset of business relationships in the CSRD, in line with international due diligence standards.[51]

The third and most important way in which the CS3D differs from the CSRD as well as international due diligence standards is the exclusion of most downstream activities from the scope of due diligence. While the upstream categories listed in Article 3(1)(g)(i) of the CS3D are of an illustrative nature, Article 3(1)(g)(ii) takes the opposite approach and lists some specific categories included in the chain of activities ("distribution, transport and storage"). **There are three severe limitations on the downstream coverage under the CS3D that should be addressed by Member States when transposing into national laws.**

- **The exclusion of disposal, sale and use of products from the downstream chain of activities** means numerous adverse impacts will remain unaddressed. However, companies will still be expected to be transparent about how they manage their impacts in these parts of their value chain under the CSRD. The fact that disposal and use are not covered presents an issue also for Member States responsibility. Indeed, this lacuna means that cleaning costs may be more likely to end up being borne by States or their local water and waste disposal authorities, thereby undermining the polluter pays principle. The chemical industry is an illustrative example. While the impacts are not easy to quantify, some health-related costs for exposure to per- and polyfluoroalkyl substances ("**PFAS**") across Europe have been estimated at EUR [52]-84 billion per year, for potential consequences such as liver damage, decreased fertility, and cancer. EUR 10-20 billion is a plausible figure for European environmental clean-up costs.[52] Claims have also been filed in respect of diminished property values because of the presence of PFAS in soil and water systems, and for the costs of remediating water and soil where PFAS have been detected.[53] Another example is how the plastics industry has created a widespread perception that its products can or will be recycled, thereby shifting the financial burden of waste management to local authorities, sub-contractors or waste collectors.[54]

- **The overly narrow definition of the downstream chain of activities excludes financial services from the scope of the CS3D when considered from the perspective of financial service providers** (who are otherwise obliged to comply with the Directive).[55] Regulated financial undertakings will only need to comply with due diligence obligations in their own operations and upstream value chains, leaving a gap in their downstream operations (their clients) which is particularly relevant for the financial sector as this is where most of their adverse impacts arise. Financial undertakings will however be subject to climate transition plan requirements (see Section E below). The CS3D includes an early review clause requiring the EU Commission to publish a report, two years after entry into force, on the necessity to lay down additional due diligence requirements tailored to the financial sector with respect to the provision of financial services and investment activities, and the options for such due diligence requirements as well as their impacts.[56]

By excluding their downstream activities, the financial sector is largely excluded from human rights and environmental due diligence obligations under the CS3D, in clear conflict with international standards such as the UNGPs and the OECD Guidelines. The (positive or negative) impact of financial institutions on human rights and the

51. See UNGPs, commentary to Principle 13, p. 15 and OECD Guidelines, commentary on Chapter II: General Guidelines, para. 17.
52. PFAS are forever?, Corporate European Observatory, July 2023.
53. PFAS litigation risks mount as EU claims rise, Kennedys Law, November 2023.
54. The-Plastic-Recycling-Deception, Planet Tracker, April 2024.
55. See to this effect Recital (26), and Article 3(1)(a) CS3D.
56. Article 36(1) CS3D.

environment through their financing, underwriting and advisory activities cannot be overstated.[57] By the same token, as the UN has recognised,[58] financial institutions wield unparalleled ability to influence companies to act responsibly and respect human rights and the environment. The UN has stated time and again[59] that, under existing human rights standards, all financial institutions are subject to human rights obligations just like any other business, and that carve-outs and exemptions for the sector are unjustified and damaging, stating recently that "all financial institutions, of every type, have the same responsibility to respect human rights, and creating carve outs or presumptions for the financial sector in the [then] draft Corporate Sustainability Due Diligence Directive would be inconsistent with international standards on business and human rights".[60]

Moreover, certain financial institutions are already required to report the adverse impacts of their investment activity and disclose their due diligence policies under the Sustainable Finance Disclosure Regulation ("SFDR").[61] Others will be required to disclose not only how their business model and strategy takes account of sustainability matters, but also the due diligence steps and actions they are taking across their entire value chain with regard to those matters, in order to meet their sustainability reporting obligations under the CSRD.[62] However, these rules do not provide financial institutions with concrete conduct requirements on how to undertake an effective due diligence process. At the same time, the CSRD and the EU Taxonomy will provide financial institutions with a wealth of sustainability data, but without a legal obligation to act when impacts are identified and disclosed. By providing a clear framework on the due diligence process to be followed, the CS3D would assist financial institutions in performing and complying with their reporting requirements under the SFDR and CSRD.

- Finally, **the additional requirement that the activities included in the definition of downstream chain of activities be performed "for the company or on behalf of the company"** strongly deviates from the international standards. The way a company is involved in an adverse impact should be considered at a later stage when determining the appropriateness of measures taken. It is important to note that CS3D does not use the word "indirect" to define this exclusion. Hence, the distinction to act "for the company or on behalf of the company" should not be interpreted as excluding indirect relationships from downstream distribution, transport and storage. Overall, these terms make the downstream definition very convoluted and unclear.

57. See, for example, the Case Studies by Fair Finance International, which demonstrate the role of financial institutions in financing companies and projects causing human rights violations and environmental damage.

58. See para. 77 of the Human Rights Council Report: UN Guiding Principles at 10 - Taking stock of the first decade, April 2021.

59. See, for instance, the Office of the High Commissioner for Human Rights position on the financial sector.

60. Statement of the UN Working Group on Business and Human Rights on 'Financial Sector and the European Union Corporate Sustainability Due Diligence Directive', July 2023.

61. Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability related disclosures in the financial services sector ("SFDR"), in particular Article 4.

62. Article 19a Accounting Directive.

The table below summarises the types of relationships covered under the CS3D as compared to the CSRD and international due diligence standards, as well as the areas of the value chain that are covered in the same instruments. While companies are expected to conduct due diligence on their own operations and those of their subsidiaries under all frameworks, requirements differ when it comes to business partners in the value chain.

Table 1: Value chain coverage and terminology

Due diligence should be exercised towards		**Due diligence should be exercised in: (Value chain coverage)***	
Business relationships (CSRD/UNGPs/OECD)	**Business partners (CS3D)**	**CSRD/ UNGPs/OECD****	**CS3D**
Business partners	Direct business partners	Along the entire value chain	In the "chain of activities", which comprises: • Entire upstream value chain • Distribution, transport and storage "for the company or on behalf of the company" in the downstream value chain
Entities in the value chain	Indirect business partners		
Other entities (non-commercial relationships)	NA		NA

* This table refers solely to value chain coverage and business relationships. In all cases, companies are required to perform due diligence on their own operations and those of their subsidiaries.

** The CSRD does not require companies to take action with regards to a company's impacts, but the process to determine material information requires companies to identify and assess actual and potential impacts along the entire value chain.

Recommendations for transposition

To ensure that the CS3D appropriately fulfils its objective of protecting human rights and the environment and aligns with international frameworks, Member States must consider the following in transposition:

- **Recommendation n°2: Bringing the definition of downstream chain of activities in line with the CSRD and international standards by including all activities.** The CS3D introduces an artificial limitation of the value chain that prevents a truly risk-based approach. Any consideration of leverage has to be placed in the context of determining appropriate measures. With its limited downstream approach, the CS3D takes a step backwards from the international practice of progressive companies.[63] In particular, Member States should consider **adding the use and waste management of products and the provision of services** among the downstream activities covered in their national legislations.

- **Recommendation n°3: Introducing downstream due diligence requirements for financial undertakings for their lending and investment activities,** as well as other financial services they provide, in line with international standards and UN recommendations. Full inclusion of the financial sector to conduct upstream and downstream due diligence was proposed by all institutions in their negotiating positions, providing a basis on which to easily introduce said requirements.

- **Recommendation n°4: Clarifying the scope of downstream activities by deleting the requirement that they must be performed "for the company or on behalf of the company".** This strongly deviates from the international standards and introduces additional concepts for which no guidance is provided elsewhere in the Directive, seemingly with the intention to import proximity and leverage into the definition of value chain. However, both proximity and leverage are already included among the factors to be considered when determining appropriate measures under Articles 10(1) and 11(1), in line with international standards.

63. See for example Due diligence in the downstream value chain: case studies of current company practice, The Danish Institute for Human Rights, May 2024.

C Scope of environmental impacts

Companies, irrespective of their size and sector, can be involved in a wide range of environmental impacts through their own operations and value chains, potentially creating an environmental footprint that extends far beyond their own operations and beyond the borders of their home jurisdiction, including impacts of global environmental significance that may be exacerbating the triple planetary crisis.

The triple planetary crisis and the importance for businesses to address environmental impacts

Climate change. Climate change is a systemic threat to the social, economic and financial systems we all depend on, and we are already feeling the impacts. Increasingly severe extreme weather, droughts, floods and fires, are now part of our daily reality. The latest report by the Intergovernmental Panel on Climate Change (**"IPCC"**) indicates that current global greenhouse gas reduction commitments will lead to median global warming of 2.8ºC, while policies currently being implemented put the planet on track for 3.2ºC warming by 2100.[64] Unless we rapidly reduce global GHG emissions through a just and orderly transition, mounting climate hazards will have disastrous and irreversible socio-economic impacts – affecting all of us. The window of opportunity for achieving the climate objectives of the Paris Agreement to keep global warming to 1.5ºC is rapidly closing. While the energy sector is still the largest contributor to GHGs, other sectors also significantly contribute to GHG emissions. The whole private sector is therefore a pivotal player in the pursuit of limiting global temperature rise.

Biodiversity loss. The global rate of species extinction is tens to hundreds of times higher than it has averaged over the past 10 million years and is accelerating, threatening one million species with extinction within decades.[65] The ability of our ecosystem to reinvent itself is of fundamental importance for many companies, and biodiversity loss presents a medium-term existential threat to many business models.

Systems that depend on biodiversity to thrive, such as our global food system, can have major impacts on biodiversity, through land and sea use, direct exploitation of organisms, climate change, pollution and invasive alien species.[66] Businesses have a particularly important role to play in addressing biodiversity loss and have a responsibility to contribute to the successful implementation and achievement of the Global Biodiversity Framework ("**GBF**") targets.

64. AR6 Synthesis Report: Climate Change, IPCC, 2023.

65. See the Global Assessment Report on Biodiversity and Ecosystem Services, Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services ("IPBES"), 2019 and the UN Report: Nature's Dangerous Decline 'Unprecedented'; Species Extinction Rates 'Accelerating', United Nations Sustainable Development, 2019.

66. See Legal risks related to biodiversity loss in the seafood and agriculture sectors, ClientEarth, September 2023.

Target 15 notably requires businesses to "assess and disclose biodiversity dependencies, impacts and risks, and reduce negative impacts".[67] Research by the World Benchmarking Alliance shows that companies are already taking actions that contribute to the GBF, but not sufficiently and coherently enough to tackle this substantial challenge.[68]

Pollution. Air pollution. Which kills an estimated 7 million people every year, is one of the biggest environmental threats to human health, alongside climate change.[69] Air pollution is also fundamentally altering the Earth's climate and ecosystems globally. Many of the drivers of air pollution are also sources of greenhouse gas emissions (e.g. combustion of fossil fuels).[70] Pollutants of major public health concern include fine particulates ("**PM2.5**"), nitrogen oxide (**"NOx"**) and sulphur oxide (**"SOx"**).[71] Soil and water pollution also pose significant threats to both nature and human health. Certain industrial sectors contribute disproportionately to soil and water pollution. Industries involved in chemical manufacturing or processing, textiles and mining are often significant contributors due to the release of hazardous substances. The discharge of waste, often containing harmful chemicals, into rivers and soil can also lead to various kind of environmental degradation. Agriculture, especially intensive farming, also plays an important role. Widespread use of chemicals in agriculture, such as fertilisers and pesticides, has had detrimental effects on soil and water quality. Runoff from agricultural fields carries excess chemicals into water bodies and can also infiltrate the soil, affecting its fertility and posing risks to groundwater resources. The production, use and disposal of plastic also leads to soil and water pollution, and the proliferation of microplastics further compounds the issue. These microparticles can absorb and transport harmful pollutants by infiltrating both soil and water.

67. The Kunming-Montreal Global Biodiversity Framework ("GBF").

68. Nature Benchmark, World Benchmarking Alliance, October 2023.

69. Why does air matter?, UNEP.

70. Air pollution, WHO.

71. Air Pollution, Our World in Data; Europe's air quality status 2024, European Environmental Agency.

Given the seriousness of the triple planetary crisis, the term "environmental impact" as used for the purposes of due diligence should include all business-related impacts on the environment that exacerbate the triple planetary crisis.

While the UNGPs do not explicitly mention the environment in their human rights' due diligence framework, they establish that businesses have a responsibility to respect internationally recognised human rights, which includes protecting people from harms arising from environmental degradation. The 2023 revision of the OECD Guidelines defines adverse environmental impacts as "significant changes in the environment or biota which have harmful effects on the composition, resilience, productivity or carrying capacity of natural and managed ecosystems, or on the operation of socio-economic systems or on people".[72] It also includes a non-exhaustive list of examples of adverse environmental impacts that should be assessed through due diligence, whether or not they affect people, including: climate change, biodiversity loss, air, water, and soil pollution, degradation of land, marine and freshwater ecosystems, deforestation, and harmful generation and mismanagement of waste, including hazardous substances.[73]

1. CS3D

Under the CS3D, companies are required to conduct due diligence on their potential and actual adverse impacts on both human rights and the environment. **This legal analysis concerns adverse environmental impacts;** although as will be clear from what follows, these are in many instances intertwined with human rights impacts. These are defined under Article 3(b) as impacts on the environment resulting from the breach of the obligations and prohibitions listed in Part I, Section 1, Points 15 and 16 of the Annex to the CS3D, and in Part II of the Annex, taking into account national legislation linked to the provisions of the instruments listed therein.

Section 1 of Part I of the Annex refers to rights and prohibitions included in international human rights instruments. Points 15 and 16 of Section 1 refer to environmental degradation that has certain human impacts and the prohibition on using land, forests and waters in a way that entails certain human rights impacts.

Part II of the Annex describes prohibitions and obligations derived from certain international environmental instruments.

The following sections first assess environmental impacts with human rights implications that may fall within the scope of Part I, Section 1, Points 15 and 16, before looking at specific environmental impacts derived from international environmental instruments, irrespective of their implications on humans, under Part II.

1.1. Environmental impacts with human rights implications

The CS3D covers two types of situations in which human rights and adverse environmental impacts interact.

1.1.1. Point 15: environmental degradation or other impact on natural resources

Due diligence should first encompass adverse environmental impacts resulting from the breach of Part I, Section 1, Point 15:

> *15. The prohibition of causing any measurable environmental degradation, such as harmful soil change, water or air pollution, harmful emissions, excessive water consumption, degradation of land, or other impact on natural resources, such as deforestation, that:*

72. OECD Guidelines Commentary on Chapter VI, par. 68, p. 35.

73. OECD Guidelines Chapter VI, p. 33.

(a) substantially impairs the natural bases for the preservation and production of food;

(b) denies a person access to safe and clean drinking water;

(c) makes it difficult for a person to access sanitary facilities or destroys them;

(d) harms a person's health, safety, normal use of land or lawfully acquired possessions;

(e) substantially adversely affects ecosystem services through which an ecosystem contributes directly or indirectly to human wellbeing;

interpreted in line with Article 6(1) of the International Covenant on Civil and Political Rights and Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights.

Recognition of the right to a healthy environment

Point 15 recognises explicitly the inextricable and interdependent link between human rights and the environment.

On 28 July 2022, the UN General Assembly ("**UNGA**") recognised by overwhelming majority (161 in favour, none against, eight abstentions) "the right to a clean, healthy and sustainable environment as a human right".[74] In doing so, the UNGA affirmed "the importance of a clean, healthy and sustainable environment for the enjoyment of all human rights" (emphasis added).

The UNGA also recognised that climate change, pollution, the unsustainable management and use of natural resources, the unsound management of chemicals and waste, and the resulting loss of biodiversity and decline in ecosystem services all interfere with the enjoyment of a clean, healthy and sustainable environment. That environmental damage therefore has negative implications, both direct and indirect, for the effective enjoyment of all human rights. The UNGA further recognised that "environmental degradation, climate change, biodiversity loss, desertification and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to effectively enjoy all human rights".[75]

The UN Human Rights Committee provided guidance on the interpretation of the right to life contained in Article 6 of the International Covenant on Civil and Political Rights ("**ICCPR**") (explicitly referenced in the Annex) in its General Comment 36. It said there that:

Environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life […].[76]

The Committee on Economic, Social and Cultural Rights released a statement in 2018 explicitly linking environmental degradation caused by climate change to violations of (inter alia) Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights ("**ICESCR**").[77]

The pronouncements of these UN human rights treaty bodies and the UNGA resolution were adopted well before the adoption of the CS3D. All EU Member States voted in support of the UNGA resolution and are bound to act consistently with the interpretations of the UN human rights treaty bodies under international law.

When transposing the CS3D at national level, Member States should therefore **draw on the jurisprudence of the UN human rights treaty bodies and refer**

74. UNGA Resolution on The Human Right to a Clean, Healthy and Sustainable Environment, A/RES/76/300, 28 July 2022.

75. Ibid., p. 3.

76. General Comment No. 36 on Article 6: right to life, CESCR, CCPR/C/GC/36, September 2019.

77. Statement on Climate change and the International Covenant on Economic, Social and Cultural Rights, CESCR, October 2018.

specifically to the UNGA resolution on the right to a healthy environment in their national legislation.

Point 15 of Section 1, Part I of the Annex is also included in the definition of adverse human rights impacts.[78] The inclusion of Point 15 in the definition of both human rights and environmental impacts serves to reinforce the inextricable link – indeed the indivisibility – between the environment and human rights. Accordingly, companies conducting human rights due diligence should be aware of the international consensus that a clean, healthy and sustainable environment is not only a human right of its own, but is also essential to the enjoyment of many – if not all – other human rights. This means that, when conducting their due diligence, companies are obliged to investigate and consider (potential) adverse impacts on people that (could) arise from environmental harms, but also (potential) adverse impacts on the environment itself that (could) lead to impacts on people and their enjoyment of a wide range of human rights.

Nothing in the transposition - be it legislation or interpretative guidance - may restrict the scope of the crucial provision, as this would be in violation of the objective of the Directive. To gain a comprehensive understanding of the scope of Point 15, it is necessary to examine the wording in greater detail.

Any measurable environmental degradation or other impact on natural resources

What constitutes "any measurable environmental degradation [...] or other impact on natural resources" should be interpreted in broad terms. Indeed, the chapeau to Point 15 contains a non-exhaustive list of examples of environmental impacts ("such as"), which are very similar to the examples listed in Chapter VI of the OECD Guidelines.[79] In order to provide a complete overview of other environmental impacts that could be covered by Point 15, the CSRD categories provide a helpful framework (see below in sub-section 2).

When transposing the CS3D into national law, Member States should therefore **ensure a comprehensive coverage** of environmental degradation and other impacts that may affect human rights, **building on the wording in Point 15 and aligning national law as much as possible with the terminology used in the international standards and the CSRD/ESRS in order to increase legal clarity.**

Whether an environmental degradation or impact is "measurable" should be understood as any detectable change from the baseline conditions that can be compared.[80] Given the advanced and sophisticated nature of contemporary environmental science, any environmental degradation can be quantified, evaluated or estimated using data or metrics. This term is therefore superfluous, as it is difficult to identify an environmental degradation that would not be measurable. Furthermore, there seems to be no reason for its inclusion, given that even a "small" impact could be measured. It may create legal uncertainty for companies trying to understand which environmental degradation or impact is measurable and which one is not. It should therefore be removed when Member States transpose the Directive to increase legal clarity.

78. Article 3(1)(c) CS3D.

79. See OECD Guidelines Chapter VI on Environment, p. 33: "a) climate change; b) biodiversity loss; c) degradation of land, marine and freshwater ecosystems; d) deforestation; e) air, water and soil pollution; f) mismanagement of waste, including hazardous substances".

80. See for example Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (Environmental Liability Directive, "ELD"). Article 2(2) defines "damage" as "measurable adverse change in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly". The Commission also specified that "[m]easurable means that damage needs to be capable of quantification or estimation, and that the situation before and the situation after a damaging occurrence must be capable of being meaningfully compared". See the European Commission Guidelines providing a common understanding of the term 'environmental damage' under the ELD, 2021/C 118/01, April 2021.

Focus on harmful emissions: Does Point 15 require due diligence in relation to climate change?

The United Nations Secretary-General has stated that climate change is, quite simply, an existential threat for most life on the planet – including, and especially, the life of humankind.[81] The UN Special Rapporteur on Human Rights and the Environment has also consistently reiterated in its reports the urgent need for action to ensure a safe climate for humanity.[82] A recent European Environment Agency ("**EEA**") report also aims at raising awareness about the range of risks to human health associated with changes in water quantity and quality under the changing climate.[83]

The European Court of Human Rights ("**ECtHR**") has also found that "there are sufficiently reliable indications that anthropogenic climate change [...] poses a serious current and future threat to the enjoyment of human rights guaranteed under the Convention".[84] The ECtHR recently found Switzerland breached the European Convention on Human Rights ("**ECHR**") because of gaps in its domestic regulatory framework for reducing GHG emissions and by failing to meet GHG reduction targets.[85] In accordance with Article 51(1) and Article 52(3) of the Charter of Fundamental Rights, which has the same status in EU law as the Treaties, Member States must interpret and implement the CS3D in line with the ECHR and the ECtHR jurisprudence. Inasmuch as the CS3D is a key part of Member States' domestic regulatory framework for reducing GHG emissions – and so protecting human rights in the context of climate change – the recent judgement against Switzerland makes clear that Member States must transpose the CS3D in a way that is designed to ensure companies reduce their emissions to maintain a safe climate. The ECtHR has jurisdiction to rule on the acts and omissions of all EU Member States, including acts and omissions that result from the implementation of EU law.[86] The UN Human Rights Committee, interpreting Article 6(1) ICCPR (the provision cited in Point 15(e)) in the context of a case against New Zealand, has likewise found that "without robust national and international efforts, the effects of climate change... may expose individuals to a violation of their rights under articles 6 of 7 of the Covenant".[87] The UN Working Group on Business and Human Rights ("**UNWG**") has also stated clearly that "[t]he responsibilities of business enterprises under the Guiding Principles to respect human rights and not to cause, contribute to or be directly linked to human rights impacts arising from business activities, include the responsibility to act in regard to actual and

81. Climate Crisis Past Point of No Return, Secretary-General Says, Listing Global Threats at General Assembly Consultation on 'Our Common Agenda' Report, SG/SM/21173, 10 March 2022.

82. UNGA Safe Climate Report, A/74/161, 15 July 2019.

83. See Responding to climate change impacts on human health in Europe: focus on floods, droughts and water quality, EEA, May 2024.

84. ECtHR, Verein Klimaseniorinnen Schweiz and others v Switzerland, Judgment of 9 April 2024, par. 436.

85. Ibid., par. 573.

86. ECtHR, Aristimuño Mendizabal v France, Judgment of 17 January 2006, par. 79; M.S.S. v Belgium and Greece, Judgment of 21 January 2011, par. 340.

87. Human Rights Committee, Teitiota v New Zealand, Views of 23 September 2020, par. 9.11.

potential impacts related to climate change".[88] The UNGPs are the explicit basis for the CS3D and companies are directed to guidance "that illustrates how their activities may impact human rights" under the UNGPs.[89]

What follows is an explanation of how to read the CS3D to ensure transposition at national level in line with these human rights obligations:

The fact that climate change forms part of human rights due diligence is reflected in Point 15, Annex Part I, Section 1. Point 15 refers to the prohibition of causing any measurable environmental degradation, such as "harmful emissions" and "deforestation". Given that "water or air pollution" is listed separately, the "emissions" referred to clearly includes anthropogenic greenhouse gas emissions (including through deforestation), which lead to global warming and climate change, which are in turn having major impacts on the enjoyment of a wide range of human rights.[90]

Moreover, Recital 32 states that the obligations and prohibitions listed in the Annex should be interpreted and applied in line with international law, at which level climate change is unarguably recognised as a human rights impact. The adverse effects of climate change, such as extreme weather events, rising sea levels, and food scarcity, are already having a severe impact on people's rights to life, health, food, water, sanitation and security, engaging each of the paragraphs under Point 15.

Point 15 provides a prohibition of "causing" harmful emissions that deny or interfere with a person's rights to water, sanitation, health, safety, etc. The IPCC states that "every tonne of CO^2 emissions adds to global warming".[91] The UNWG concludes that business enterprises have responsibilities with respect to the impacts of climate change on human rights, noting the legal, scientific and political developments to date.[92]

Article 22 provides for an obligation to adopt and put into effect a climate transition plan (see below Section E). When it comes to GHG emissions and climate change, this complements – and by no means replaces – Point 15. Read together, these provisions mean that due diligence regarding harmful GHG emissions must include the adoption and implementation of a climate transition plan which specifies the steps that will be taken to identify (Article 9), prevent and mitigate impacts (Articles 10 and 11). The other elements of due diligence support the fulfilling of the Article 22 obligation: policy and system integration (Article 7), stakeholder engagement (Article 13), establishing a notification and complaints mechanism (Article 14), monitoring effectiveness (Article 15), public communication (Article 16).

88. Information Note on Climate Change and the UNGPs, Working Group on the issue of human rights and transnational corporations and other business enterprise, June 2023.

89. See Recitals (5), (14) and (37) CS3D.

90. Understanding Human Rights and Climate Change, Submission to COP21, ClientEarth, 2015.

91. Fig SPM.10 at D.1.1, Summary for Policymakers, IPCC.

92. Information Note on Climate Change and the UNGPs.

Impact on people

Paragraphs (a) to (d) of Point 15 refer to situations where environmental impacts lead to adverse impacts on people. According to the UNGP Interpretive Guide, an adverse impact occurs when an action removes or reduces the ability of an individual to enjoy his or her human rights, and a "potential" human rights impact is an adverse impact that may occur, but has not yet done so.[93]

In line with international human rights law, an environmental impact falls within the scope of Point 15 if the company **knew or ought to have known**[94] **the risk of interference with the human rights concerned, taking into account all relevant circumstances of the specific case**, including the nature and scope of the company's operations and chain of activities, the business sector, and the geographical and operational context.

There is an established body of jurisprudence, precedent and opinions in international human rights law on the principles and criteria used to inform that assessment. The ECtHR for example, has developed a body of case law in environmental matters, which is based mainly, but not exclusively, on the nexus between the environment, on the one hand, and, on the other, the right to life (Article 2 ECHR)[95] and the right to respect private and family life and home (Article 8 ECHR),[96] a concept which also covers mental and physical health.[97] In order for a matter to fall within the scope of a human right, it must be demonstrated that the interference is sufficiently serious or severe. According to the Court, the severity of a matter can be assessed in terms of both the damage to the environment and the consequences for the applicant's state of physical or mental health or private and family life. In Fadeyeva v. Russia,[98] the Court observed that the circumstantial evidence and presumptions were so closely aligned that it could be inferred that the applicant's prolonged exposure to the industrial emissions discharged by the steel plant was the cause of the deterioration in the applicant's state of health. The Court emphasised that the assessment of interference with human rights depends on factors like intensity, duration, and physical or mental effects of the environmental impact. This case demonstrates that the evaluation of environmental degradation's impact on human rights is relative and context-specific.

In order to establish the minimum level of (risk of) interference with human rights, legislative standards or "safe levels", where available, can be of help by providing clear benchmarks or indicators. If a legislative threshold is crossed, it can serve as a presumption of harm. For example, maximum permissible limits (MPLs) for air pollution provide a quantifiable indicator to assess when environmental degradation infringes on human rights. In such cases, once pollution exceeds these limits, it is considered at a high enough level to affect health, thereby engaging relevant human rights.

In the majority of cases, however, no such clear "safe levels" exist. For instance, there are no existing thresholds that determine when the deforestation rate and its impacts on biodiversity and ecosystem services should be considered substantial enough to interfere with human rights related to health, food, and clean water access, or the rights to culture and self-determination.

In other instances, the establishment of such thresholds is simply inappropriate. In the case of pollution caused by endocrine disrupting chemicals, for which it is not possible to derive a safe level of exposure, or for bioaccumulative chemicals, for which the impact on health manifests over time, merely setting maximum levels or thresholds[99] is ineffective at best, or even counterproductive as people and the environment will continue to be exposed to such chemicals. In other words, it is not the quantity that matters, but the timing of exposure.

93. The Corporate Responsibility to Respect Human Rights: An Interpretive Guide ("UNGP Interpretive Guide"), June 2012, pp. 5 and 7.

94. ECtHR, Osman v United Kingdom (No. 23452/94), Judgment of 28 October 1998, para. 116.

95. ECtHR, Öneryildiz v Turkey (No. 48939/99), Judgment of 30 November 2004, para. 90.

96. ECtHR, Locascia and Others v Italy (No. 35648/10), Judgment of 19 October 2023, paras. 120-134.

97. ECtHR, Bensaid v United Kingdom (No. 44599/98), Judgment of 6 February 2001, para. 46.

98. ECtHR, Fadeyeva v Russia (No. 55723/00), Judgment of 9 June 2005.

99. See for example Directive (EU) 2020/2184 of the European Parliament and of the Council of 16 December 2020 on the quality of water intended for human consumption (recast), which includes a limit of 0.5 µg/l for all PFAS. See also PFAS in food: EFSA assesses risks and sets tolerable intake, EFSA, September 2020. In September 2020, the European Food Safety Authority (EFSA) set a new safety threshold for the main PFAS: a group tolerable weekly intake (TWI) of 4.4 nanograms per kilogram of body weight per week.

In such cases, companies should rely on any relevant evidence seeking as much objectivity as possible, prioritising data from credible and internationally accepted scientific sources, to establish the minimum level of (risk of) interference with human rights. Moreover, where there is a scientific consensus about the severity of a particular environmental impact and that there is a reasonably foreseeable risk of interfering with human rights, companies should automatically conduct their due diligence obligations.[100] The UN Special Rapporteur on Human Rights and the Environment has published several thematic reports illustrating businesses' contribution to a wide range of environmental impacts affecting human rights.[101] Moreover, even in the absence of a clear abuse of human rights, it is important to think about environmental and human rights impacts not only in the short term but also in the long term, notably considering future generations, because environmental impacts can accumulate or have delayed adverse impacts over time.

Finally, as mentioned in Recital 32 second paragraph, it is important to note that Point 15 should be interpreted and applied in line with international law and general principles of Union environmental law, as set out in Article 191 TFEU. In particular, the precautionary and the prevention principles should guide the assessment of whether an environmental impact is potentially or actually interfering with human rights and should therefore be subject to due diligence obligations.

Two qualifiers were included to certain paragraphs in Point 15 during the drafting process (e.g. (a) *"substantially impairs",* and (e) *"substantially adversely affects",* emphasis added). These terms apply to impacts of food production and ecosystems, but not to harm to health, access to sanitary facilities, or access to water. The reason for including this qualifier solely for 15(a) and 15(e) is not clear.

In order to assess whether the damage to ecosystem services under Point 15(e) is "substantial", Recital 32 third paragraph provides that the following elements should be taken into account where relevant: "the baseline condition of the affected environment, whether the damage is long-lasting, medium term or short term, the spread of the damage, and the reversibility of the damage". Baseline conditions, durations of impacts, spatial extent and reversibility are common criteria for environmental impact assessment ("**EIA**") frameworks. For example, EU Directive 2014/52/EU on the assessment of the effects of certain public and private projects on the environment (the "**EIA Directive**") includes similar criteria for determining whether certain public and private projects should be subject to an EIA, including the expected onset, duration, frequency and reversibility of the impact and the magnitude and spatial extent of the impact (for example geographical area and size of the population likely to be affected).[102]

What "substantially" refers to in relation to Point 15(a), however, is not defined by the CS3D. **Given that human rights impacts already contain a threshold in themselves** – in so far as negative impacts on the environment that are considered "minor or insignificant"[103] might not be sufficient to amount to an impact on the right to food – **Member States should refrain from interpreting and translating the term "substantially" in a manner that imposes a higher threshold, and should instead remove this term entirely when transposing the CS3D into national law.**

100. See [Draft] EFRAG IG 1: Materiality assessment implementation guidance, December 2023, para. 84 and 107; OECD Due Diligence Guidance for Responsible Business Conduct, February 2018, Q 21, p. 63; See also the ELD, Annex I, stating that "Damage with a proven effect on human health must be classified as significant damage".

101. See the Thematic Reports by the UN Special Rapporteur on Human Rights and the Environment

102. See selection criteria regarding the type and characteristics of the potential impact in Annex III of Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment.

103. See Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, International Law Commission, 2001.

Relevant human rights treaty provisions

The closing words of Point 15 state that the issues listed in (a) to (e) must be "interpreted in line with" Article 6(1) ICCPR, which recognises the right to life, Article 11 of ICESCR, which recognises the right to adequate housing and includes the right to food, water and sanitation, and Article 12 ICESCR, which recognises the right to the highest attainable standard of physical and mental health. There is a significant body of international jurisprudence and General Comments of the UN treaty bodies for the ICCPR and ICESCR, unpacking the human rights recognised in Article 6(1) ICCPR and Articles 11 and 12 ICESCR. When interpreting the issues listed in Point 15(a) to (e) "in line with" those treaty provisions, regard should be had to the contemporary understanding of and meaning given to those provisions – and the rights they recognise – as reflected in the established body of jurisprudence and authoritative commentary. This also means that the understanding of "any measurable environmental degradation [...] or other impact on natural resources" should equally be guided by and consistent with the contemporary application of these fundamental human rights treaty provisions.

To gain a better understanding of the expected standard of conduct for companies in relation to Point 15, the normative content of each of the relevant human rights is described below and used to identify examples of environmental degradation or other impacts on natural resources that can interfere with these rights and that should be addressed by companies as part of their due diligence under the CS3D.

Table 2: Relevant human rights for interpretation of Point 15

Situations in Point 15 (a) to (e)	Relevant human rights
(a) substantially impairs the natural bases for the preservation and production of food	Right to food
(b) denies a person access to safe and clean drinking water	Rights to safe drinking water and sanitation
(c) makes it difficult for a person to access sanitary facilities or destroys them	
(d) harms a person's health, safety, normal use of land or lawfully acquired possessions	Rights to health, safety and property
(e) substantially adversely affects ecosystem services through which an ecosystem contributes directly or indirectly to human wellbeing	Right to a healthy environment

The right to food

Paragraph (a) of Point 15 refers to business activities which can interfere with the right to food, enshrined explicitly in Article 11 ICESCR: "the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. [...] *the fundamental right of everyone to be free from hunger"* (emphasis added). In addition, the right to food has been recognised implicitly through other rights, including the right to life (Article 6 ICCPR) and the right to enjoy physical and mental health (Article 12 ICESCR).

The right to adequate food and the right to be free from hunger encompass both physical and economic access to adequate food or means for its procurement[104] and should correspond to the cultural traditions of the peoples to which the person belongs.[105]

Business operations can negatively affect the right to food in many ways. Business operations can destroy sources of food by, for instance, polluting land, water and air with hazardous industrial or agricultural products, overexploiting natural resources or clearing lands and forests integral to food production for construction of mines, dams, highways, or industrial agriculture. When natural resources, such as water, seeds, land, forests, and fisheries, are degraded and have lower productive capacity due to business activities, people may see access to food impaired by food insecurity, higher food prices or decline in productivity. In extreme cases, e.g. when people are no longer able to feed themselves, they may face the risk of starvation, malnutrition, or resulting illness due to lack of access to adequate and safe food. These situations engage their right to an adequate standard of living and to be free from hunger (Articles 11(1) and (2) ICESCR), the right to enjoy the highest attainable standard of physical and mental health (Article 12 ICESCR) or even their right to life (Article 6 ICCPR).[106]

104. General Comment No. 12 on the right to adequate food, CESCR,E/C.12/1995/5, May 1999.

105. Fact Sheet No. 34: The Right to Adequate Food, OHCHR and FAO, April 2021.

106. See for example Human Rights Committee (HRC), Daniel Billy and others v Australia (Torres Strait Islanders Petition), Joint Opinion of UN HRC members Arif Bulkan, Marci V.J. Kran and Vasilka Sancing, par. 3, on foreseeable risks to the right to life from significant loss of food sources due to climate change impacts and land erosion.

The right to safe drinking water and the right to sanitation

Paragraphs (b) and (c) of Point 15 refer to business activities which can interfere with the right to safe drinking water or right to sanitation. Safe and clean drinking water and sanitation is recognised as a human right by the UN General Assembly, as an aspect of the right to an adequate standard of living under Article 11 ICESCR[107] and it is essential for the full enjoyment of the right to life, human dignity, and all human rights, including the right to health.[108]

The human right to safe drinking water entitles everyone to have equitable access to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use. The human right to sanitation entitles everyone to have physical and affordable access to sanitation, in all spheres of life, that is safe, hygienic, secure and socially and culturally acceptable and that provides privacy and ensures dignity.[109]

Businesses can affect the right to water and sanitation in several ways. For example, businesses can degrade aquatic ecosystems that include water sources for local communities through: toxic pollution, biological, organic or nutrient pollution, unsustainable growth of irrigation, overexploitation of aquifers, land and water grabbing, drainage and dewatering of wetlands, and infrastructure projects that affect the landscape or water table, such as hydro-electric projects, dams, canals and ports.

107. UNGA Resolution on the human right to water and sanitation, A/RES/64/292, July 2010 and UNGA Resolution on the human rights to safe drinking water and sanitation.

108. Fulfilling the human rights of those living in poverty and restoring the health of aquatic ecosystems: two converging challenges - Report of the Special Rapporteur on the human rights to safe drinking water and sanitation, Pedro Arrojo Agudo, A/HRC/54/32, July 2023.

109. UNGA Resolution on the human rights to safe drinking water and sanitation, A/RES/70/169, paras. 1-2, December 2015.

The rights to health, safety and property

Paragraph (d) of Point 15 refers to business activities whose adverse environmental impact may amount to an interference to the right to health, safety, and property.

The right to health is enshrined in Article 12 ICESCR, which recognises the right of everyone to the "enjoyment of the highest attainable standard of physical and mental health". It is a right that extends to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition, housing, and healthy occupational and environmental conditions.[110] It is therefore inextricably linked to the human rights explored above, including the rights to food, water and sanitation.

For example, companies may discharge pollutants into water bodies through industrial processes, mining operations, intensive livestock farming or improper waste disposal. Water contamination can lead to the presence of harmful substances such as heavy metals, pesticides, and industrial chemicals in drinking water sources, posing risks to human health. This is particularly dangerous for children, given their special vulnerability to contaminants.[111]

The right to safety is implicitly included in several international human rights treaties. For example, Article 6 of the ICCPR recognises the inherent right to life, which includes protection from harm or danger. In addition, the ICESCR includes provisions related to the right to the highest standard of physical and mental health (Article 12 ICESCR) and the right to an adequate standard of living (Article 11 ICESCR), which collectively contribute to the right to safety.

Business activities can affect the right to safety in several ways. For example, companies engaged in industrial activities often release pollutants into the air, water and soil. This pollution can contaminate local ecosystems and resources, leading to health hazards for nearby communities. Factories may also discharge toxic chemicals into water bodies, contaminating water sources used for drinking and bathing and jeopardising the safety of communities that rely on them.

110. General Comment No. 14 on the right to the highest attainable standard of health, CESCR, E/C.12/2000/4, August 2000.

111. See General Comment No. 24 on children's rights in the child justice system, CESCR, CRC/C/GC/24, September 2019, par. 24: "younger children are particularly susceptible to environmental hazards due to their unique activity patterns, behaviours and physiology. Exposure to toxic pollutants, even at low levels, during developmental windows of increased vulnerability can easily disrupt the maturational processes of the brain, organs and the immune system and cause disease and impairments during and beyond childhood, sometimes after a substantial latency period. The effects of environmental contaminants may even persist in future generations".

Companies involved in activities such as logging, mining, and agriculture may contribute to deforestation and habitat destruction, leading to environmental degradation and loss of biodiversity. Deforestation can increase the risk of landslides, soil erosion and flooding, which can threaten the safety of communities living in affected areas.

Linked to the rights to health and safety is the **right to life** (Article 6 ICCPR). This right concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity. Environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life. For example, large-scale industrial pollution caused by chemical manufacturing plants can interfere with the right to life. Chronic illnesses, birth defects, and other health problems attributable to environmental degradation compromise the right to life as enshrined in Article 6 ICCPR.

Finally, the concept of **lawfully acquired possessions** is closely linked to the broader principle of the **right to property**, a fundamental human right recognised in various international and regional human rights instruments, including the Universal Declaration of Human Rights ("**UDHR**") and ICCPR. The right to property encompasses rights to acquire, own, use and dispose of property, including possessions, land, and other assets. Lawfully acquired possessions are those assets or property that individuals or groups have obtained through legal means, in compliance with the right to property and other relevant legal frameworks. The **normal use of land** is closely linked to the above human rights, in particular the right to food, the right to private and family life and the right to live in a clean and healthy environment.

Environmental degradation caused by companies can impact the normal use of land or the right to property in several ways. For example, if individuals are unable to cultivate their land due to soil pollution or are deprived of access to safe drinking water for household use or agricultural irrigation due to contamination of water sources, this would undermine their ability to utilise their land and benefit from their property.

Ecosystem services and human well-being

Paragraph (e) of Point 15 broadly refers to business activities adversely impacting ecosystem services that directly or indirectly support human well-being.

While nature and thus ecosystems merit protection in and of themselves (see below sub-section 1.2), ecosystems are also vital because of the ecosystem services they provide. Ecosystem services are the tangible and intangible benefits people obtain from ecosystems and that they use in economic and other human activity.[112]

According to the Millennium Ecosystem Assessment ("**MEA**"), a major UN-sponsored effort to analyse the impact of human actions on ecosystems and human well-being, there are four major categories of ecosystem services: provisioning, regulating, cultural and supporting services. Due to the holistic nature of ecosystem services and their interactive behaviour, business activities often affect more than one service and can therefore impact human well-being in several ways, as shown in the graph below.[113]

112. See IPBES glossary: ecosystem services.

113. Millennium Ecosystem Assessment: Ecosystems and Human Well-being, 2005.

Figure 2: Links between ecosystem services and human well-being

Due to the broad interpretation of what constitutes human well-being, most of the environmental degradations that have an impact on people, as outlined in Point 15(a) to (d) (food, water, health, safety, use of land and property) are likely to qualify as well as environmental degradation that undermines the capacity of ecosystems to deliver ecosystem services supporting human well-being for the purpose of paragraph (e).

Paragraph (e) gives legal force to the principle that a healthy and diverse environment is a fundamental prerequisite for the full and proper enjoyment of human rights. **Paragraph (e) highlights the responsibility of companies to consider not only the environmental impact of their actions on individuals, but also on the economy and society as a whole**. Because human well-being is below most human rights thresholds, it makes it possible to cover all other situations that may not automatically or obviously fall under paragraphs (a) to (d). Examples include clean air and water, pollination, climate regulation, soil fertility – services that, when impacted, go beyond paragraphs (a) to (d). For example, the loss of pollination services due to environmental degradation is an impact that Point 15(e) is designed to address, focusing on the broader and often indirect ecosystem services essential for human wellbeing. The other paragraphs are more focused on direct and immediate impacts on specific human needs and resources.

It is important to note that biodiversity (the variability of organisms living in terrestrial, marine and aquatic ecosystems, as well as the ecological complexes they form[114]) plays a crucial role in maintaining the quality, quantity and resilience of ecosystem service flows, and it provides ecosystem services that humans rely upon now for survival and will inevitably rely upon into the future. The diversity of genes, species, and ecosystems provides a greater range of ecosystem services and higher overall quantity, quality and resilience of ecosystem services and improves the capacity of ecosystems to function effectively. A change in the state of biodiversity can lead to changes in ecosystem services. This, in turn, can have an impact on the beneficiaries of those ecosystem services.[115]

The table below provides concrete examples of situations falling under Annex Part I, Section 1, Point 15, where companies' environmental impacts can affect human rights and ecosystem services supporting human well-being.

114. IPBES glossary: biodiversity.

115. On this, see the Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, David R. Boyd, Human rights depend on a healthy biosphere, 15 July 2020.

Table 3: Examples of environmental impacts falling under Point 15

Examples of business practices	Environmental degradation and other impacts on natural resources	Impacts on human rights and ecosystems services
An aquaculture company operates farms in mangrove-rich areas, leading to their destruction. Mangrove forests are critical marine ecosystems found in tropical and subtropical latitudes. They provide habitat for fish and are local allies in the fight against climate change, providing protection from flooding and coastal erosion.[116]	• Climate change: emission of greenhouse gases; destruction of sinks and reservoirs of greenhouse gases • Biodiversity loss: marine ecosystem degradation and habitats destruction	• Regulating services: climate regulation and water purification • Provisioning services: habitats of locally consumed fish • Rights to food, security, clean water and life of local communities
A fish farm raises fish in an area of high biodiversity value. Fish farming involves a high density of fish in a limited space. Biological waste (fish faeces) and uneaten feed pass through the cages, falling to the seabed. This sedimentation of organic matter, together with the use of chemicals, generates anaerobic environments and eutrophication of the seabed, which affects other resources of the sea and local communities that fish or harvest seafood (clams, mussels, crabs etc), in the affected area, which may be contaminated.[117]	• Biodiversity loss: marine ecosystem degradation and habitat destruction; invasive alien species • Pollution: use of chemicals and substances of concerns, including persistent organic pollutants; plastics and microplastics; waste and wastewater disposal.	• Regulating services: carbon sequestration; water filtration and purification; sediment stabilisation; habitat provision • Provisioning services: food • Rights to food, health, water • Right to culture
An agricultural company draws large quantities of water from an aquifer to irrigate its crops, reducing the amount of water in the local communities' shallow wells, and causing some to dry up.118 Note that the most water-intensive crops are cotton, rice, sugarcane, soya and wheat.[119]	• Biodiversity loss: extensive use of groundwater and surface water	• Regulating services: water regulation • Provisioning services: fresh water • Right to water, food, health, property

116. The hidden cost of farmed shrimp from Ecuador, ClientEarth, July 2023.

117. See Farmed Salmon | Industries, WWF.

118. See for example Groundwater levels are dropping fast all over the world, The New Scientist, January 2024; California's Farmers Are Pumping Too Much Water From Their Wells, NPR, July 2021.

119. Water usage in agriculture, Agremo, March 2022.

Examples of business practices	Environmental degradation and other impacts on natural resources	Impacts on human rights and ecosystems services
An agricultural company relies on the use of chemical herbicides and pesticides in its operations, which leads to a decrease in pollination and, in turn, to poor quality and quantity of crops.[120]	• Biodiversity loss: impact on species (decline of bee populations) • Pollution of soil and water	• Regulating services: pollination • Provisioning services: food • Right to food, water, health
An agricultural commodities trader purchases crops that have been grown on land which has recently been illegally deforested or converted.[121]	• Biodiversity loss: deforestation and loss of native ecosystem • Climate change: deforestation and forest degradation is the second largest source of greenhouse gas emissions globally	• Regulating services: climate and water regulation • Provisioning services: food, fresh water, medicine • Right to water, food, health, property, clean environment
A petrochemical plant releases hazardous substances into the environment through spills, leaks and improper waste disposal, contaminating drinking water, people and food sources.	• Climate change: emission of greenhouse gases • Pollution of soil and water	• Regulating services: water purification • Provisioning services: food, fresh water, • Rights to food, water, health
A manufacture releases toxic chemicals into rivers and waterways during its production process. This pollution includes heavy metals, chemicals, and other toxic substances leading to contaminated drinking water and agricultural lands, leading to health hazards and loss of crops.[122]	• Biodiversity loss: freshwater-use change and degradation of freshwater ecosystems • Pollution of water: use of chemicals and substances of concern, including persistent organic pollutants	• Right to health, food, water, clean environment

120. See Legal risks related to biodiversity loss in the seafood and agriculture sectors, ClientEarth, September 2023, p. 14.

121. See for example Agricultural giant Cargill faces legal complaint over deforestation and human rights failings in Brazil, ClientEarth, May 2023.

122. A critical review of hazardous waste generation from textile industries and associated ecological impacts, ScienceDirect, January 2023.

1.1.2. Point 16: Environmental and human rights impacts due to eviction, land grabbing or natural resource appropriation

Due diligence should further encompass adverse environmental impacts resulting from the breach of Annex Part I, Section 1, Point 16:

> *16. The right of individuals, groupings and communities to lands and resources and the right not to be deprived of means of subsistence, which entails the prohibition to unlawfully evict or take land, forests and waters when acquiring, developing or otherwise using land, forests and waters, including by deforestation, the use of which secures the livelihood of a person, interpreted in line with Article 1 and 27 of the International Covenant on Civil and Political Rights and Article 1, 2 and 11 of the International Covenant on Economic, Social and Cultural Rights.*

Recognition of collective rights over lands, forests and resources

Similarly to Point 15, Point 16 emphasises the inextricable link between environmental harm and human rights abuses. Point 16 builds upon Point 15 by explicitly linking environmental destruction to the abuse of both individual and collective rights to lands and resources, including forests and waters, and the right to their own means of subsistence. In other words, Point 16 acknowledges that, when individuals, groups and local communities are deprived of their lands, resources and means of subsistence to make way for commercial activities, environmental impacts also often occur, and these impacts fall under the CS3D.

Many remaining areas of environmental importance, such as forests, savannas and mangroves, are held by and home to Indigenous Peoples and/or local communities who hold collective and traditional land and property rights. These communities are often forced off their land to make way for its conversion to commercial use, including for mining, logging and agriculture, typically with devastating environmental impacts.[123] These are the very communities that, according to the IPCC, Food and Agriculture Organisation ("**FAO**")[124], and Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services ("**IPBES**"), when given control over their lands, prove to be the most effective at protecting forests and other ecosystems, and thereby mitigating climate change.[125] By associating means of subsistence to lands, forests and waters, Point 16 highlights that the livelihoods of many people and communities are dependent on nature.

Eviction and taking of land, forests and waters

Point 16 protects the rights of individuals, groups and communities to their land and resources and prohibits depriving people of the means of subsistence, including by unlawfully evicting them from or taking their lands. It recognises that companies often "unlawfully" acquire land, forests and waters for economic activities, that is, without having the legal right to use or occupy the land.[126] For example, the practice of "land-grabbing" is commonplace. This is the process by which a person or entity that has no legal tenure over land takes control of that land for the purposes of speculation, extraction, resource control or commodification at the expense of other legitimate interests, such as peasant farmers, agroecology, land stewardship, food sovereignty and human rights.[127]

123. See for example Beef, Banks and the Brazilian Amazon, Global Witness, December 2020.

124. See for example Indigenous peoples are key to protecting wildlife and rural livelihoods, FAO, 2017 and Forest governance by indigenous and tribal peoples. An opportunity for climate action in Latin America and the Caribbean, FAO, 2021.

125. See Chapter 12: Central and South America | Climate Change 2022: Impacts, Adaptation and Vulnerability, AR6, IPCC, 2022; Global Assessment Report on Biodiversity and Ecosystem Services, IPBES.

126. For more information about the different ways a person who entity can have rights over land, see Defending Your Right to Use Your Land, Action 4 Justice.

127. See for example Brazil's 'land-grabbers law' threatens Amazonia, Mongabay, May 2020.

This reference to "unlawful" should not be interpreted as limiting the rights under Point 16 to only instances of land grabbing or the unlawful eviction of individuals or groups from the areas or natural resources on which they depend for their subsistence. The right not to be deprived of subsistence under international law and for the purposes of Point 16, includes all forms of eviction (unlawful and lawful) where it jeopardises human rights.

Groups and communities

The notion of "groupings and communities" must be interpreted to include Indigenous Peoples, distinct cultural and ethnic groups and local communities that self-identify based on their observance of shared customary norms and practices, and the special rights to land and resources that such groups and communities have under international law, including in the context of the right to self-determination.[128] This recognition of Indigenous Peoples and other customary, ethnic or traditional communities as rights holders under Point 16 is also explicitly acknowledged under Recital 33, which states that "companies should pay special attention to any particular adverse impacts on individuals who may be at heightened risk due to marginalisation, vulnerability or other circumstances, individually or as members of certain groups or communities, including Indigenous Peoples, as protected under the United Nations Declaration on the Rights of Indigenous Peoples, including in relation to Free, Prior and Informed Consent (FPIC)."

Recognising the crucial role of the rights of indigenous and tribal peoples to FPIC and self-determination in realising and protecting the land and resource rights in Point 16, Member States should clarify that the notion of "groups and communities" includes indigenous people and add an explicit reference to their right to self-determination and FPIC, including to Articles 3, 10, 26 and 32 of UNDRIP.

Relevant human rights treaty provisions

Point 16 states that the obligation not to deprive individuals, groups and communities of the means of subsistence, particularly as it relates to their use of land, forests and water, should be "interpreted in line with" specific human rights: the right to self-determination (Article 1 ICCPR and Article 1 ICESCR), the right to culture (Article 27 of ICCPR) and the right to an adequate standard of living (Article 11 ICESCR). This highlights the collective impact, specifically referencing human rights standards aimed at protecting vulnerable groups, such as Article 27 of the ICCPR, which safeguards the right to culture, religion and language. The normative content of these rights is explained below and should guide the interpretation and application of Point 16 "in line with" these fundamental rights.

128. UN Declaration on the Rights of Indigenous People ("UNDRIP"), inter alia, Articles 3, 5, 26 and 32; Indigenous and Tribal Peoples Convention, 1989 (No. 169), Articles 13 to 15; HRC, Poma Poma v Peru, Communication no. 1457/2006, CCPR/C/95/D/1457/2006, April 2009; HRC, Billy v Australia, CCPR/C/135/D/3624/2019, 22 September 2022; General Comment No. 24 on State obligations in the context of business activities, CESCR, E/C.12/GC/2423, June 2017 ; General Comment No. 26 on land and economic, social and cultural rights, CESCR, E/C.12/GC/26, December 2022; General Comment No. 7 on forced evictions, CESCR, 16 May 1997; General Recommendation No. 23 on the Rights of Indigenous Peoples, CERD, 1997; CERD, Lars-Anders Ågren et al. v. Sweden, CERD/C/102/D/54/2013, Decision of 18 November 2020; General Recommendation No. 39 on the Rights of Indigenous Women and Girls, CEDAW Committee, CEDAW/C/GC/39, October 2022; CEDAW Committee, Matson v Canada, Communication No. 68/2014, CEDAW/C/81/D/68/2014, 11 March 2022.

The right to self-determination

Through reference to the collective right to self-determination, Point 16 adds an explicit recognition of collective rights over lands, forests and resources which must be protected against environmental harms such as deforestation, overexploitation of resources, land grabs and others.

The right to self-determination is enshrined in Article 1 of both the ICCPR and ICESCR. This is a collective right which includes peoples' right, as a group, to determine their political status and pursue their own economic, social and cultural development. The right to self-determination is a universal right, and Point 16 recognises that, for many groups and communities around the world, land, water and natural resources are key to meeting their social, economic and cultural needs.[129]

This is particularly the case for many Indigenous Peoples for whom the right to pursue their political, economic, social and cultural development can only be fulfilled where they have a land or territory in which to exercise their self-determination.[130] At the same time, "[t]he right to self-determination provides a basis for collectively claiming control over the natural wealth and resources necessary for livelihood and subsistence."[131] In other words, the exercise and enjoyment of the right to self-determination for Indigenous Peoples is often both contingent upon and instrumental to their access, ownership, security and enjoyment of traditional and customary lands, territories and resources.

In addition, the right to self-determination has been interpreted as giving rise to the collective dimension of relevant provisions of the ICCPR and ICECSR, such as the right to culture (Article 27 ICCPR) which is further described below.[132] Relevant provisions of the ICCPR and ICECSR (e.g., Article 27 ICCPR and Article 2 ICESCR) have been interpreted in light of the right to self-determination in the context of Indigenous Peoples' collective rights to land and resources and FPIC.[133]

The right of Indigenous Peoples articulated in the United Nations Declaration on the Rights of Indigenous Peoples ("**UNDRIP**") (mentioned in Recital 33, cited above) to give, modify, withhold or withdraw their FPIC to interventions, decisions and activities that may affect the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired (Articles 10, 11.2, 19 and 29.2 UNDRIP) is an essential component of the right of Indigenous Peoples to self-determination. Recital 33 confirms that the right to FPIC and other special rights of Indigenous Peoples recognised in the UNDRIP are "additional standards" that companies may need to consider in their due diligence where risks of adverse impacts on Indigenous Peoples or other similar "groupings or communities" exist, including heightened risks due to their marginalisation, vulnerability or other circumstances.

129. See General Comment No. 21 on the right of everyone to take part in cultural life, CESCR, E/C.12/GC/21, December 2009, para. 2, emphasising the interdependence of the right to take part in cultural life with other rights enshrined in the Covenant, including explicitly the right to self-determination (Article 1) and the right to an adequate standard of living (Article 11), the normative content of which are described in more detail below. It is worth noting that both self-determination and prohibition of racial discrimination are widely considered to be jus cogens: see the study prepared by Héctor Gros Espiell, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on The right to self-determination : implementation of United Nations resolutions, E/CN.4/Sub.2/405/Rev.1, 1980, paras. 70ff; Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens), International Law Commission, A/77/10, 2022, Conclusion 23 and Annex.

130. See General Comment No. 26 on Land and Economic, Social and Cultural Rights, CESCR, E/C.12/GC/26, December 2022, para. 11.

131. Land and Human Rights: Standards and Applications, OHCHR, December 2015, p. 57.

132. HCR, Klemetti Käkkäläjärvi et al. v. Finland, CCPR/C/124/D/2950/2017, 2 November 2018, para. 9.9.

133. For example HRC; Concluding observations on the seventh periodic report of Norway, CCPR/C/NOR/CO/7, April 2018, para. 36; HRC, Concluding observations on the fourth periodic report of the Bolivarian Republic of Venezuela, CCPR/C/VEN/CO/4, August 2015, para. 21; CESCR, Concluding observations on the third periodic report of Guatemala, E/C.12/GTM/CO/3, December 2014, para. 7.

The right to culture

The human rights covered under Point 16 must be interpreted in line with Article 27 ICCPR, which recognises the right to culture. Much like the right to self-determination, the rights to land, resources and subsistence have an obvious cultural dimension. Indeed, "[t]he cultural life of many communities is closely related to land."[134]

For example, ways of life and livelihoods related to small-scale agriculture, fisheries, or hunting, cultural rituals related to the natural environment and use of medicines from specific local plants, all rely on access to specific natural environments, resources, land and waters. For some communities, the relationship with a specific area of land or natural environment is central to their cultural identity.[135]

The UN Committee on Economic, Social and Cultural Rights ("**CESCR**") recognises this link between culture and the natural environment. It states that, "to take part in" cultural life includes the right "to follow a way of life associated with the use of cultural goods and resources such as land, water, biodiversity, language or specific institutions, and to benefit from the [sic] cultural heritage".[136] The link between land, the natural environment and cultural rights has also been widely recognised in jurisprudence,[137] most recently by the UN Human Rights Committee.[138]

The cultural significance of land and the natural environment is often especially important for Indigenous Peoples and other local communities with traditional lifestyles.[139] So too, the overlap between the right to culture and the collective right to self-determination is particularly pronounced for Indigenous Peoples. The CESCR has emphasised this point, noting "[t]he strong communal dimension of indigenous peoples' cultural life" which is "indispensable to their existence, well-being and full development and includes the right to the land, territories and resources".[140] Indigenous Peoples' ability to exercise their right to culture in relation to their ancestral lands, resources and waters depends on their ability to access those lands, resources and waters, including as a means of subsistence.[141]

134. Land and Human Rights: Standards and Applications, p. 60.

135. Ibid., p.60 and General Comment No. 26, para. 10.

136. General Comment No. 21, para 15(b).

137. See notably the African Commission on Human and Peoples' Rights, Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya, communication No. 276/03, Decision, forty-sixth ordinary session, 11–25 November 2005, para. 241 ; Inter-American Court of Human Rights, Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgment, 31 August 2001, paras. 148–149 and 151, and Yakye Axa Indigenous Community v. Paraguay, Judgment, 17 June 2005, paras. 131–132 ; Human Rights Chamber for Bosnia and Herzegovina, The Islamic Community in Bosnia and Herzegovina v. The Republika Srpska, Case No. CH/96/29, Decision, 11 June 1999, paras. 182 and 187.

138. See Billy v Australia, para. 8.14; Australia violated Torres Strait Islanders' rights to enjoy culture and family life, UN Committee finds, September 2022.

139. General Comment No. 26, para. 10.

140. General Comment No. 21, para. 36.

141. Ibid.

The right to an adequate standard of living

The right to an adequate standard of living, which includes adequate food, clothing and housing, is enshrined in Article 11(1) ICESCR.

Adequate food - Point 16, as interpreted in line with the right to an adequate standard of living, expands on Point 15 by showing, through reference to Article 11 of the ICESCR, the link between communities' access to and use of land, resources, waters and forests, and their right to food. When interpreting Point 16 in line with the right to food, it is important to note that "secure and equitable access to, use of and control over land for individuals and communities can be essential to eradicate hunger and poverty and to guarantee the right to an adequate standard of living."[142] In rural areas, in particular, where "land users are deprived of the land they use for productive purposes, their right to adequate food might be endangered."[143]

Adequate housing - The CESCR has identified several factors for determining the adequacy of housing.[144] It is easy to imagine different ways in which business can negatively impact the right to housing as it relates to the rights to lands and resources referred to in Point 16. For example, where Indigenous communities are forced off their land to make way for mining, industrial agriculture, energy or infrastructure projects, and moved to urban slums, they may not have access to the traditional methods of food production, natural resources or safe drinking water that they enjoyed in their rural environment. Another scenario may be the use of harmful chemicals in mining, or pesticides in agriculture seeping into the earth and local water systems, threatening local communities' right to health and therefore their right to adequate housing.

The table below shows examples of business practices where the eviction or taking of land, forests, and waters, including by deforestation, and other activities that impact lands, forests, and waters, can lead to environmental impacts affecting human rights of individuals, groups and communities under Annex Part I, Section 1, Point 16. These impacts are also likely to be covered by Point 15. Indeed, an environmental impact on people stemming from (a) to (e) under Point 15 may also lead to an abuse of the rights to lands and resources, and deprive people of their means of subsistence.

142. General Comment No. 26, para. 6.

143. Ibid.

144. General comment No. 4: The right to adequate housing.

Table 4: Examples of environmental impacts falling under Points 16

Examples of business practices	Environmental impacts	Relevant human rights
An aquaculture company has intensive fish farming operations in a coastal area inhabited by Indigenous communities. The aquaculture activities involve large-scale fish farming in net pens, which generate significant pollution from fish waste, uneaten feed, and chemicals used to control diseases and parasites. The environmental degradation caused by aquaculture operations, such as water pollution and habitat destruction, disrupts traditional fishing practices relied upon by Indigenous communities for sustenance and cultural identities. Indigenous fishermen find it increasingly difficult to catch fish using traditional methods, which impacts their cultural practices, knowledge transmission, and a sense of connection to their ancestral lands and waters.	• Biodiversity loss: marine ecosystems degradation and habitats destruction • Pollution: use of chemicals and substances of concerns, including persistent organic pollutants; plastics and microplastics; waste and wastewater disposal	• Right to self-determination, including their right to freely dispose of their economic resources • Right to culture
An industrial waste facility is located near a local farming community. The facility burns and buries waste. The smoke is full of heavy metals and other pollutants and blows over the community's rice fields, vegetable gardens and homes, dropping ash over the area. When it rains, the ash is washed into drains and streams and soaks into the soil. Contamination from waste that is buried leaches into the ground and contaminates the watershed. The community members suffer respiratory and skin conditions and other health problems. Their crops are contaminated, and yields decline, nor are they able to sell their rice or vegetables at local markets because of fears of contamination. Their water supply is contaminated, and they must buy bottled water for drinking, cooking and washing. They can no longer use their land for farming and many farmers are left without a livelihood.	• Pollution of air, soil and water: waste and wastewater disposal	• Right to an adequate standard of living, incl. health, food, adequate housing
A multinational agribusiness company acquires vast areas of land in a rural area to establish extensive monoculture plantations for export crops such as soy, palm oil, or sugarcane, which require excessive water usage. This acquisition often involves the displacement of smallholder farmers and Indigenous communities.	• Biodiversity: land-use change, soil degradation, deforestation, destruction of habitats, depletion of water resources	• Right to land and resources • Right to self-determination, including the right not to be deprived of means of subsistence • Right to culture
A large industrial fishing company engages in overfishing in the coastal waters traditionally used by small-scale fishing communities for subsistence fishing.	• Biodiversity: depletion of fish stocks, destruction of marine ecosystems	• Right to marine resources • Right to self-determination • Right to culture

1.2. Environmental obligations and prohibitions derived from international environmental instruments

In addition to environmental impacts linked to human rights impacts, environmental impacts also include those that result from the breach of sixteen specific environmental obligations and prohibitions derived from international environmental conventions listed in the Annex Part II. These are listed below.

1. The obligation to avoid or minimise adverse impacts on biological diversity, *interpreted in line with Article 10(b) of the 1992 Convention on Biological Diversity and applicable law in the relevant jurisdiction, including the obligations of the Cartagena Protocol on the development, handling, transport, use, transfer and release of living modified organisms and of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity of 12 October 2014;*

2. The prohibition to import, export, re-export or introduce from the sea any *specimen included in the Appendices I to III of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) of 3 March 1973 without a permit, interpreted in line with Articles III, IV and V of the Convention;*

3. The prohibition of the manufacture, import and export of mercury-added products *listed in Annex A Part I of the Minamata Convention on Mercury of 10 October 2013 (Minamata Convention), interpreted in line with Article 4(1) of the Convention;*

4. The prohibition of the use of mercury or mercury compounds in the manufacturing processes *listed in Annex B Part I of the Minamata Convention after the phase-out date specified in the Convention for the individual processes, interpreted in line with Article 5(2) of the Convention;*

5. The prohibition of the unlawful treatment of mercury waste, *interpreted in line with Article 11(3) of the Minamata Convention and Article 13 of Regulation (EU) 2017/852 of the European Parliament and of the Council76;*

6. The prohibition of the production and use of chemicals *listed in Annex A of the Stockholm Convention of 22 May 2001 on Persistent Organic Pollutants (POPs Convention), interpreted in line with Article 3(1)(a), point (i) of the Convention and Regulation (EU) 2019/1021 of the European Parliament and of the Council77;*

7. The prohibition of the unlawful handling, collection, storage and disposal of waste, *interpreted in line with Article 6(1)(d), points (i) and (ii) of the POPs Convention and Article 7 of Regulation (EU) 2019/1021;*

8. The prohibition of importing or exporting a chemical listed in Annex III of the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (UNEP/FAO) of 10 September 1998, interpreted in line with Articles 10(1), 11(1)(b) and 11(2) of the Convention and indication by the importing or exporting Party to the Convention in line with the Prior Informed Consent (PIC) Procedure;

9. The prohibition of the unlawful production, consumption, import and export of controlled substances *in Annexes A, B, C and E of the Montreal Protocol on substances that deplete the Ozone Layer to the Vienna Convention for the protection of the Ozone Layer, interpreted in line with Article 4B of the Montreal Protocol and licensing provisions under applicable law in relevant jurisdiction;*

10. The prohibition of exports of hazardous or other waste, *interpreted in line with Article 1(1) and (2) of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal of 22 March 1989 (Basel Convention) and Regulation (EC) No 1013/2006 of the European Parliament and of the Council78:*

- *(a) to a party to the Convention that has prohibited the import of such hazardous and other wastes, interpreted in line with Article 4(1)(b) of the Basel Convention;*
- *(b) to a state of import that does not consent in writing to the specific import, in the case where that state of import has not prohibited the import of such hazardous wastes, interpreted in line with Article 4(1)(c) of the Basel Convention;*
- *(c) to a non-party to the Basel Convention, interpreted in line with Article 4(5) of the Basel Convention;*
- *(d) to a state of import if such hazardous wastes or other wastes are not managed in an environmentally sound manner in that state or elsewhere, interpreted in line with Article 4(8) the first sentence of the Basel Convention;*

11. The prohibition of the export of hazardous wastes from countries *listed in Annex VII to the Basel Convention to countries not listed in Annex VII for operations listed in Annex IV to the Basel Convention, interpreted in line with Article 4A of the Basel Convention and Article 34 and 36 of Regulation (EC) No 1013/2006;*

12. The prohibition of the import of hazardous wastes *and other wastes from a non-party that has not ratified to the Basel Convention, interpreted in line with Article 4(5) of the Basel Convention;*

13. The obligation to avoid or minimise adverse impacts on the properties delineated as natural heritage *as defined in Article 2 of the Convention Concerning the Protection of the World Cultural and Natural Heritage of 16 November 1972 (the World Heritage Convention), interpreted in line with Article 5(d) of the World Heritage Convention and applicable law in the relevant jurisdiction;*

14 .The obligation to avoid or minimise adverse impacts on wetlands *as defined in Article 1 of the Convention on Wetlands of International Importance especially as Waterfowl Habitat of 2 February 1971 (Ramsar Convention), interpreted in line with Article 4(1) of the Ramsar Convention and applicable law in the relevant jurisdiction;*

15. The obligation to prevent the pollution from ships, *interpreted in line with the International Convention for the Prevention of Pollution from Ships of 2 November 1973, as amended by the Protocol of 1978 (MARPOL 73/78). This includes:*

- *(a) the prohibition to discharge into the sea: (i) oil or oily mixtures as defined in Regulation 1 of Annex I of MARPOL 73/78, interpreted in line with Regulations 9 to 11 of Annex I of MARPOL 73/78; (ii) noxious liquid substances as defined in Regulation 1(6) of Annex II of MARPOL 73/78, interpreted in line with Regulations 5 and 6 of Annex II of MARPOL 73/78; and (iii) sewage as defined in Regulation 1(3) of Annex IV of MARPOL 73/78, interpreted in line with Regulations 8 and 9 of Annex IV of MARPOL 73/78;*
- *(b) the prohition of unlawful pollution by harmful substances carried by sea in packaged form as defined in Regulation 1 of Annex III of MARPOL 73/78, interpreted in line with Regulations 1 to 7 of Annex III of MARPOL 73/78; and*
- *(c) the prohibition of unlawful pollution by garbage from ships as defined in Regulation 1 of Annex V of MARPOL 73/78, interpreted in line with Regulations 3 to 6 of Annex V of MARPOL 73/78;*

16. The obligation to prevent, reduce and control pollution of the marine environment by dumping, *interpreted in line with Article 210 of the United Nations Convention on the Law of the Sea of 10 December 1982 (UNCLOS) and applicable law in the relevant jurisdiction.*

The conventions and provisions listed in Part II of the CS3D Annex are assessed below and grouped according to the triple planetary crisis: climate change, biodiversity loss and pollution. However, it should be noted that the list of conventions in Annex Part is far from complete or comprehensive, and there are some significant omissions. These omissions are also noted below, and accompanied by specific transposition recommendations for Member States.

1.2.1. Climate change

In relation to climate change, Annex Part on refers to the **Vienna Convention for the Protection of the Ozone Layer and its Montreal Protocol, which** aims to protect human health and the environment against the effects of ozone depletion by phasing out the production and consumption of certain ozone depleting substances (**"ODS"**). Because ODS are also potent greenhouse gases, the phase-out is also critical for mitigating climate change. These substances are commonly used in various industrial processes for refrigeration, air conditioning, aerosols, foam-blowing agents, and solvents. Annex Part II Point 9 contains a prohibition of unlawful production, consumption, import and export of ODS listed in Annexes A, B, C and E to the Montreal Protocol (i.e. CFCs, Halons, CTC, TCA, BCM, MB, HBFCs and HCFCs), interpreted in line with Article 4B of the Montreal Protocol. Article 4B requires contracting parties to set up a licensing system for the import and export of new, used, recycled and reclaimed ODS listed in these annexes.

Annex Part II Point 9 fails to refer to the obligation to reduce the consumption and production of hydrofluorocarbons ("**HFCs**") pursuant to Article 2J and Annex F of the Montreal Protocol. HFCs are the most common alternatives to hydrochlorofluorocarbons ("**HCFCs**"). Although they are non-ozone depleting substances, they have high global warming potentials.

The UN Framework Convention on Climate Change ("UNFCCC") and the Paris Agreement are glaringly absent from Part II of the CS3D Annex. The Paris Agreement sets a clear, internationally-agreed and legally-binding average global temperature objective under a well-established political process, to which all EU Member States as well as the European Union have committed themselves. While there is a dedicated article on climate transition plans that references the Paris Agreement (see Section E) and Annex Part I Point 15 covers greenhouse gas emissions (see above sub-section 1.1.1), the absence of the Paris Agreement from the list of relevant environmental conventions and associated obligations and prohibitions relevant for a company's human rights and environmental due diligence is surprising. This omission is arguably inconsistent with the the Commission's own recognition that "[t]he behaviour of companies across all sectors of the economy is key to succeed in the Union's transition to a climate-neutral and green economy in line with the European Green Deal"[145] and the acknowledgement in Recital 73 that the CS3D "is an important legislative tool to ensure corporate transition to a sustainable economy, including to reduce the existential harms and costs of climate change, to ensure alignment with 'global net zero' by 2050 [...] and to stop greenwashing, disinformation and fossil fuel expansion worldwide in order to achieve international and European climate objectives."

In terms of international environmental instruments, the Paris Agreement is perhaps the best example of an international instrument that has been adopted and developed by private sector initiatives into concrete business practices. Recital 10 of the CS3D also acknowledges the central role of the private sector to achieve the objectives of the UNFCCC and the Paris Agreement. This should not be limited only to the development of transition plans under Article 22 and human rights based climate due diligence, but should explicitly include positive obligations to identify, assess and mitigate adverse impacts on climate change as such.

The **United Nations Convention on the Law of the Sea ("UNCLOS")** is also important in relation to climate change impacts, including ocean warming and sea level rise, and pollution of the marine environment.

145. Commission Proposal for a Directive of the European Parliament and the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, 23 February 2022.

As recently recognised by the International Tribunal for the Law of the Sea ("**ITLOS**") in its Advisory Opinion,[146] anthropogenic GHG emissions into the atmosphere constitute "pollution" of the marine environment within the meaning of Article 1, paragraph 1, subparagraph 4, of the Convention. In terms of specific sources of pollution, marine pollution from anthropogenic GHG emissions can be characterised as pollution from land-based sources (Article 207), pollution from vessels (Article 211), or pollution from or through the atmosphere (Article 212). However, Annex Part II Point 16 refers exclusively to Article 210 (pollution by dumping), which is not sufficient to cover GHG emissions.

Conclusion

Climate change impacts under Annex Part II are strictly limited to the prohibition of unlawful production, consumption, import and export of certain ODS. Member States should address the gaps and ensure an effective coverage of relevant international conventions and provisions related to climate change by introducing the following complementary references in Annex Part II, in line with Article 4(2) of the CS3D:

- **Articles 2(1)(a), 4(1), 4(2) and 5(1) of the Paris Agreement** in order to resolve the inconsistency created by the failure to include the Paris Agreement and the UNFCCC;
- **Article 2J and Annex F of the Montreal Protocol,** to ensure HFCs and their global warming potentials are also addressed;
- **Articles 207, 211 and 212 of UNCLOS,** in order to cover climate change impacts on the marine environment.

1.2.2. Biodiversity loss and ecosystem degradation

The Convention on Biological Biodiversity ("CBD") is the most important international agreement aiming at the conservation of biological diversity and the sustainable use of its components and equitable sharing of genetic resources.[147] Annex Part II Point 1 refers to the obligation to avoid or minimise adverse impacts on biological diversity, interpreted in line with Article 10(b) of the CBD. Article 10 is about the "sustainable use of components of biological diversity", with paragraph (b) requiring each Party to take the necessary measures to avoid or minimise adverse impacts on biological diversity. The "use" of components of biological resources includes gathering, harvesting or hunting animals and plants, including fishing and logging, converting a forest to grazing land, draining a wetland for a road, exploiting seabed for minerals, and pumping freshwater to produce crops.148

The obligation to avoid or minimise adverse impacts on biological diversity under the CS3D should therefore be understood as covering a wide range of situations where companies, through their use of biological resources, adversely impact habitats, species and ecosystems. For example, this would include situations where an agriculture company clears land for crop production (e.g. a monoculture palm oil plantation), thereby destroying native habitats and affecting native species like orangutans. The operations of seafood, mining and infrastructure development companies also often lead to habitat destruction and harm surrounding and nearby ecosystems.

146. ITLOS, Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, AO No. 31, 21 May 2024.

147. Article 1 Convention on Biological Diversity ("CBD").

148. Guide on the Convention on Biological Diversity, IUCN, 1994, p. 57.

The conservation of biological diversity is the other important objective of the CBD. However, by solely referring to Article 10(b) on sustainable use, that objective is not referred to in the Annex Part II.

In relation to wildlife, the **Convention on International Trade in Endangered Species ("CITES")** aims to ensure that international trade (import and export) in listed animals and plants does not threaten the survival of the relevant species in the wild. This is primarily achieved through a system of permits and certificates. Point 2 of Part II of the CS3D Annex refers to the prohibition of importing and exporting any CITES specimen without a CITES permit, as regulated by Articles III, IV and V.

This obligation may be directly relevant for industries that use exotic animal materials, such as crocodile skins, python leather and fur, in their products, such as the luxury goods, fashion and cosmetic industries. Such products are often sourced from countries where they are protected under CITES and may be obtained through illegal or unregulated wildlife poaching and trafficking that impacts endangered species.

In relation to marine ecosystems, **UNCLOS** establishes a legal framework for all marine and maritime activities. UNCLOS contains specific provisions regulating the use of marine resources and promoting the conservation of living resources and the preservation of the marine environment.[149] However, Annex Part II Point 16 only refers to the obligation to prevent, reduce and control pollution of the marine environment specifically by "dumping", interpreted in line with Article 210 of UNCLOS (see next sub-section 1.2.3). The narrow focus on marine pollution caused by dumping under UNCLOS fails to effectively encapsulate the overarching goal of this all-encompassing international treaty that governs the utilisation and preservation of our planet's oceans and their resources.

In relation to freshwater ecosystems, Annex Part II Point 14 refers to the obligation to avoid or minimise adverse impacts on wetlands as defined in Article 1 of the **Convention on Wetlands of International Importance ("the Ramsar Convention"),** interpreted in line with Article 4(1) of the Convention, which requires its contracting parties to promote the conservation of wetlands, whether they are included in the Ramsar list or not. The objective of the Ramsar Convention is the conservation and wise use of all wetlands through local and national actions and international cooperation. Wetlands are broadly defined in Article 1.1. as: "areas of marsh, fen, peatland or water, whether natural or artificial, permanent or temporary, with water that is static or flowing, fresh, brackish or salt, including areas of marine water the depth of which at low tide does not exceed six metres".[150] Wetlands are indispensable for the countless benefits and ecosystem services that they provide humanity, ranging from freshwater and food to flood control, groundwater recharge, and climate change mitigation.

There are numerous examples of business activities affecting wetlands.[151] The construction and infrastructure sectors (including private housing, commercial buildings, roads, industrial development and energy infrastructures such as hydropower projects, dams and power plants) are among the most significant contributors to the degradation and conversion of wetlands. This conversion often results in the alteration or destruction of habitats and the contamination of surface and ground water and other nearby ecosystems. The agricultural sector can also have a detrimental impact on the conservation of wetlands, such as through the practice of draining wetlands for the cultivation of crops or livestock grazing. The mining and extractive industry, through excavation, pollution and the destruction of habitats, also has the potential to disrupt wetland ecosystems. Mining operations in close proximity to wetlands

149. Part XII UNCLOS specifically deals with the protection and preservation of the marine environment.

150. What are wetlands? Ramsar Information Paper no. 1, January 2007.

151. What's driving wetland loss and degradation?, Anne A. van Dam, M. Siobhan Fennessy, C. Max Finlayson, in Ramsar Wetlands, Elsevier, August 2023.

can also result in the release of chemicals into water bodies, which can have a detrimental impact on the fauna and flora of the wetlands, such as through the overflowing, bursting or leeching of tailing dams and waste ponds into surface and groundwater systems. Similarly, logging and forestry practices such as clear-cutting of forests in close proximity to wetlands can alter hydrological patterns, disturb wetland areas and lead to soil erosion and sediment runoff.

Finally, Annex Part II Point 13 refers to the obligation to avoid or minimise adverse impacts on natural heritage sites as defined in Article 2 of the Convention Concerning the Protection of the World Cultural and Natural Heritage ("the World Heritage Convention"), interpreted in line with Article 5(d) of the World Heritage Convention. According to Article 2, natural heritage sites include, in general terms: 1) places that hold outstanding universal value from either an aesthetic or scientific perspective; 2) areas that constitute the habitat of threatened species of animals and plants, which are of exceptional value from a scientific or conservation standpoint; and 3) areas of outstanding universal value from the point of view of science, conservation or natural beauty. Article 5(d) refers to the adoption of appropriate measures for the identification, protection, conservation, presentation and rehabilitation of cultural and natural heritage. Business operations can adversely affect sites of important scientific, social or environmental value through a range of direct and indirect impacts.

For example, increased tourism and infrastructure development, but also other infrastructure development such as dams, roads or power plants, can have a major impact on World Heritage Sites by altering landscapes, ecosystems and through forms of degradation that create significant cumulative impacts.

Other relevant international agreements in the field of water ecosystems protection, in particular **the Convention on the Protection and Use of Transboundary Watercourses and International Lakes ("the Water Convention")** that aims to protect and ensure the quantity, quality and sustainable use of transboundary surface water and groundwater resources, are not part of Part II of the CS3D Annex. Access to clean water is one of the most critical issues of the 21st century.[152]

As nearly all business operations and value chains rely on access to water, they have an important role to play in addressing global water challenges. At the extreme end of the spectrum, the agri-food sector is estimated to account for 70% of global water consumption.[153] The oil, gas and mining sectors are also very exposed to risks associated with water use and water scarcity; some of the most water-stressed regions in the world are also major producers of oil, gas and critical minerals.

Conclusion

Biodiversity loss impacts under the CS3D include impacts on the sustainable use of biological diversity, wetlands, and natural heritage sites, as well as those resulting from the prohibited import and export of endangered species. In order to ensure an adequate coverage of all relevant international conventions and provisions related to impacts on biodiversity and ecosystems, Member States should introduce the following complementary references in Annex Part II, in line with Article 4(2) of the CS3D:

- **Article 8(d) and Article 8(f) of the CDB,** in order to promote proactive improvement of degraded ecosystems by companies, which is key to avoid ecosystem collapse and maximise ecosystemic contributions in the fight against climate change;
- **Article 192 of UNCLOS,** which encompasses both the protection and preservation of the marine environment from pollution, as well as the conservation of marine living resources;[154]

152. Water scarcity is one of the greatest challenges of our time, World Economic Forum, March 2019; Billions of people will lack access to safe water, sanitation and hygiene in 2030 unless progress quadruples – warn WHO, UNICE, WHO, 2021; The water crisis is worsening. Researchers must tackle it together, Nature, Jan ary 2023.

153. Chart: Globally, 70% of Freshwater is Used for Agriculture. World Bank, March 2017.

154. ITLOS, The Republic of Philippines v. The People's Republic of China, PCA case No. 2013-19, Award on Jurisdiction and Admissibility, 29 October 2015, par. 70.

- **Article 2 of the Water Convention,** in order to explicitly address the need to prevent, control and reduce the impacts of companies on transboundary surface water and groundwater resources.

1.2.3. Pollution of air, soil and water

In relation to marine pollution, Annex Part II Point 15 refers to **UNCLOS.** However, as already mentioned above, the reference to UNCLOS is limited to the obligation to prevent, reduce and control pollution of the marine environment by dumping (Article 210). UNCLOS defines dumping as: (i) any deliberate disposal of wastes or other matter from vessels, aircraft, platforms or other man-made structures at sea; (ii) any deliberate disposal of vessels, aircraft, platforms or other man-made structures at sea.[155] Annex Part II fails to cover other marine pollution sources, including from land-based sources,[156] seabed activities, vessels and pollution from or through the atmosphere.[157] This is not in line with the broad interpretation UNCLOS demands of the notion of pollution of the marine environment: "the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities".[158]

In addition, Annex Part II Point 16 refers to the obligation to prevent pollution from ships interpreted in line with the **International Convention for the Prevention of Pollution from Ships ("MARPOL"),** the main international convention covering prevention of pollution of the marine environment by ships from operational or accidental causes. This includes the prohibition for ships to discharge oil, noxious liquid substances[159], sewage and garbage, including plastics, into the sea.[160] It also refers to the obligation to prevent pollution by harmful chemical substances carried by sea in packaged form.[161]

In relation more specifically to chemical pollution, Annex Part II refers to several prohibitions under substance-specific international instruments.

Mercury: Annex Part II Points 3, 4 and 5 refer to the prohibition on the manufacture, import and export of mercury-added products, the use of mercury compounds in manufacturing processes, and the unlawful treatment of mercury waste under **the Minamata Convention on Mercury** (Articles 4(1), 5(2) and 11(3)). The Minamata Convention aims to protect human health and the environment from the release of mercury and mercury compounds into the air, water and soil. Mercury is a highly toxic heavy metal that, once released, can remain in the environment for thousands of years and can travel long distances. Pollution by mercury is mainly caused by artisanal and small-scale gold mining (i.e. carried out by individuals or small groups using relatively simple and low-cost techniques), coal-fired power plants, waste incineration of batteries and electronic waste, and chemical manufacturing. The primary source of human exposure to mercury is seafood. When marine

155. Article 1(5)(a) and (b) UNCLOS.

156. Article 194 (3)(a) and Article 207 UNCLOS. Pollution from land-based sources would include greenhouse gases contributing to climate change, see Legal Analysis on the Request for an Advisory Opinion from the International Tribunal for the Law of the Sea, ClientEarth, March 2023.

157. See Articles 194(3)(a) and (b), 207, 211 and 212 UNCLOS.

157. Article 1(4) UNCLOS.

159. As defined in Regulation 1 of Annex I of MARPOL 73/78 and Regulation 1(6) of Annex II of MARPOL 73/78.

160. Under MARPOL Annex V, garbage includes all kinds of food, domestic and operational waste, all plastics (including fishing gears), cargo residues, incinerator ashes, and animal carcasses generated during the normal operation of the ship and liable to be disposed of continuously or periodically. See the Simplified overview of the discharge provisions under MARPOL Annex V

161. As defined in Regulation I of Annex III of MARPOL 73/78.

animals take in mercury it tends to stay in their bodies and accumulate over time. In Europe alone, over 1.8 million children are estimated to be born each year with mercury levels above the recommended safe limits.[162]

Persistent organic pollutants ("POPs"): Annex Part II Points 6 and 7 refer to the prohibition on the production, use, handling, collection, storage and disposal of waste of POPs covered by **the Stockholm Convention** (Article 3(1)(a)(i) and Article (6(1)(d)(i) and ii)). The Stockholm Convention aims to protect human health and the environment from the release of POPs. POPs are chemicals that pose a serious threat to the health of humans and the environment due to their ability to persist into the environment for long periods of time and their tendency to accumulate in living beings. They are able to cross international boundaries, some of them having been found in the most remote places on Earth far from where they were used and released. Chemical substances that have been identified as POPs include: pesticides (such as dichlorodiphenyltrichloroethane, an insecticide); industrial chemicals (such as polychlorinated biphenyls, which were widely used in electrical equipment); or unintentional by-products formed during industrial processes, degradation or combustion (such as dioxins and furans).[163] The Stockholm Convention does not ban all problematic POPs: about 30 substances are banned, while a few others are restricted or listed as chemicals for which the states must adopt measures to minimise release. Notably, it only covers a few per- and polyfluoroalkyl substances (**"PFAS"**), a family of more than 14,000 synthetic fluorinated chemical compounds according to the latest counts,[164] such as PFOS, PFOA, PFHxS.[165] Whilst the CS3D was in its final stages of being negotiated, public attention turned significantly to PFAS, which have been found in the blood of almost every European, often above safety levels, triggering important environmental and safety concerns.[166] The fact that thousands of them remain out of the Stockholm Conventions' scope means that today, many PFAS continue to be manufactured, placed on the market and used to produce "high-performance" plastics, paints and varnishes, pesticides, a number of consumer products including waterproof textiles, and other chemicals. People are mainly exposed to PFAS through drinking water, food and food packaging, dust, as well as consumer products such as creams and cosmetics, or PFAS-coated textiles.

Hazardous chemicals: Annex Part II Point 8 refers to the prohibition on the import and export of hazardous chemicals without prior informed consent ("**PIC**") under **the Rotterdam Convention** (Articles 10(1), 11(1)(b) and 11(2)). The Rotterdam Convention aims to promote shared responsibility and cooperative efforts among Parties in the international trade of certain hazardous chemicals in order to protect human health and the environment from potential harm and to contribute to their environmentally sound use by facilitating information exchange. It regulates the import and export of 52 hazardous chemicals and pesticides and requires any of the chemicals that it lists to have received an importer's prior consent before they can be exported. The Rotterdam Convention however does not cover all hazardous chemicals. For example, it does not cover bisphenols, a group of chemical compounds that are used to produce polymers and resins that go into making plastic materials. These chemicals are widely recognised as endocrine disruptors and identified by the EU as a "substance of very high concern".[167]

162. Mercury: a persistent threat to the environment and people's health, EEA.

163. The POPs, Stockholm Convention; Understanding POPs, ECHA.

164. See the Zürich II Statement on Per- and Polyfluoroalkyl Substances (PFASs): Scientific and Regulatory Needs, Environmental Science & Technology Letters, American Chemical Society, April 2024.

165. For the PFASs listed under the Stockholm Convention, see the Stockholm Convention Overview; On understanding PFAS, see Per- and Polyfluoroalkyl Substances (PFASs), UNEP, and Per- and polyfluoroalkyl substances (PFA), ECHA.

166. Cross-cutting story 3: PFAS, EEA; « Polluants éternels » : explorez la carte d'Europe de la contamination par les PFAS, Le Monde, February 2023.

167. See Bisphenols, ECHA; EU Court delivers final blow to plastics industry on BPA, ClientEarth, March 2023; CJEU, PlasticsEurope v European Chemicals Agency (ECHA), Case C-119/21 P, Judgement of 9 March 2023.

Hazardous waste: Annex Part II Points 10, 11 and 12 refer to the prohibition on the import and export of hazardous wastes and other wastes under **the Basel Convention.** The Basel Convention aims at minimising the cross-border movement of hazardous waste, ensuring the environmentally sound disposal of hazardous waste close to the point of origin, and reducing the amount of hazardous waste produced. While regulated waste trade is an important component of a circular economy, it should only come after opportunities for waste prevention, which should be the very first step in sustainable production processes, have been exhausted. This is recognized in the EU's Waste Hierarchy.[168] However, Points 10, 11 and 12 fail to refer to the objectives of promoting sound waste management and minimising waste generation to protect human health and the environment from adverse effects of hazardous waste - which are also key objectives of the Convention.

The table 5 below provides a summary of the scope, main provisions, or key pillars of the aforementioned international conventions.

Table 5: Overview of the Minamata, Stockholm, Rotterdam and Basel Convention

	Minamata	Stockholm	Rotterdam	Basel
Scope	• Right to food	• Persistent organic pollutants (POPs), most frequently found in pesticides and industrial chemicals	• Pesticides and industrial chemicals that have been banned or severely restricted for health and environmental reasons by the Parties (incl. POPs)	• Hazardous wastes that are explosive, flammable, reactive, poisonous, infectious, corrosive, (eco)toxic; as well as other wastes (including household and plastic waste) (incl. POPs)
Pillars/key provisions	• Restrictions on mining and trade (Article 3) • Phase-out and phase-down of mercury use in products and processes (Articles 4, 5 and 6, Annexes A and B) • Regulation of artisanal and small scale gold mining (Article 7, Annex C) • Control measures on emissions and releases (Articles 8 and 9, Annex D) • Storage, waste and contaminated sites (Articles 10, 11 and 12)	• Prohibition and/or elimination (Article 3; Annex A) • Restriction (Article 3; Annex B) • Reduction or elimination (Article 5; Annex C)	• Prior Informed Consent (PIC) procedure for export/import (Annex III) • Exchange of information on a broad range of potentially hazardous chemical	• Minimization of waste generation (Article 4) • Environmentally sound management of wastes (Article 4) • Controlling of trans-boundary movements of wastes (conditions and PIC procedure, Article 6) • Preventing and combat-ing illegal traffic (Article 9)
EU Regulation	• Mercury Regulation (Regulation (EU) 2017/852)	• POPs Regulation (Regulation (EU) 2019/1021)	• PIC Regulation (Regulation (EU) 649/2012)	• Waste Shipment Regulation (Regulation (EU) 2024/1157). Transitionally, parts of Regulation (EC) 1013/2006 may continue to apply until May 2027

168. See Article 4 of the Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives ("Waste Framework Directive").

Finally, it is important to note that Part II of the CS3D Annex does not refer to international commitments in the field of air pollution control, notably **the UNECE Convention on Long-range Transboundary Air Pollution ("LRTAP"),** the most important agreement in the area of air pollution, which aims at gradually reducing and preventing air pollution, including long-range transboundary air pollution. Over the years, the number of substances covered by the LRTAP Convention and its protocols has been gradually extended, notably to ground-level ozone, POPs, heavy metals and particulate matter. This omission creates loopholes and it is unfortunate that the CS3D does not translate those obligations for the purpose of defining its environmental scope.

Conclusion

The impact on air, soil and water pollution under Annex Part II is limited to pollution of the marine environment by dumping and by ships, the prohibited production, use, import and export and unlawful disposal of mercury and certain POPs, the prohibited import and export of certain hazardous chemicals and pesticides without PIC, and the prohibited import and export of hazardous wastes. However, a number of chemicals that are increasingly the focus of EU authorities remain outside the scope of existing international conventions and therefore outside the scope of the Annex.[169] Member States should ensure that companies are held responsible for these substances throughout their chain of activities and meet the overwhelming expectation of citizens that these widely publicised substances are covered.[170] In addition, in order to ensure an adequate coverage of all relevant international conventions and provisions related pollution, Member States should introduce at least the following additional references in Annex Part II, in line with Article 4(2) of the CS3D:

- **Article 207, 211 and 212 of UNCLOS,** in order to cover other marine pollution sources caused by companies;
- **Article 4(2)(a) of the Basel Convention**, in order to minimise the generation of waste by companies in the first place and align more closely with EU legislation.

169. See notably the European Commission Restrictions Roadmap under the Chemicals Strategy for Sustainability, April 2022, which lists some of the chemicals that should be regulated in the coming years. See also the SIN List of very hazardous chemicals used in a wide variety of products and manufacturing processes around the globe. The SIN List is developed by non-profit ChemSec, in close collaboration with scientists and technical experts. The list is based on credible, publicly available information from existing databases and scientific studies. Inclusion on the SIN List is based on the same criteria as the EU's legislative framework for chemicals — REACH. Therefore, a substance being put on the SIN List is a strong signal that it will be placed on the REACH Candidate List, facing strict regulation in the EU. As an additional dimension, the production of POPs (Persistent Organic Pollutants) listed in the Stockholm Convention, PIC (Prior Informed Consent) substances listed in the Rotterdam Convention, and Highly Hazardous Pesticides, HHP, as identified by the Pesticide Action Network, have been included.

170. See notably the Ban PFA Manifesto and PFAS Movement.

2. CSRD

Companies in scope of the CSRD are required to disclose information necessary to understand their actual and potential adverse impacts on sustainability matters and how sustainability matters affect the company (double materiality). Article 29b of the Accounting Directive provides that the delegated act on the ESRS will specify the information that companies will have to disclose in relation to: (i) climate change mitigation, including as regards scope 1, scope 2 and, where relevant, scope 3 greenhouse gas emissions; (ii) climate change adaptation; (iii) water and marine resources; (iv) resource use and the circular economy; (v) pollution; (vi) biodiversity and ecosystems

ESRS 1, Application Requirement (AR) 16 stipulates that, when conducting a materiality assessment, the undertaking must consider the list of sustainability matters, as outlined in the topical ESRS (see Table 6 below).[171] The use of this list is not intended to replace the process of determining material matters. Rather, it is a tool to support the undertaking's materiality assessment. The level of granularity of the matters to be considered ranges from topic to sub-topic level and, in some cases, to sub-sub-topic level.

ESRS 1, section 3.4, specifies that the materiality assessment of impacts is based on severity and likelihood, severity being determined by the following criteria criteria:

- ***(a) scale:*** *how grave the negative impact is or how beneficial the positive impact is for people or the environment;*
- ***(b) scope:*** *how widespread the negative or positive impacts are. In the case of environmental impacts, the scope may be understood as the extent of environmental damage or a geographical perimeter. In the case of impacts on people, the scope may be understood as the number of people adversely affected; and*
- ***(c) irremediable character:*** *whether and to what extent the negative impacts could be remediated, i.e., restoring the environment or affected people to their prior state.*[172]

3. Commentary

The human rights and environment integrated approach through the inclusion of Points 15 and 16 of Annex Part I in Article 3(b), is welcomed. This inclusion underscores the interconnectedness between environmental degradation and human rights abuses, potentially addressing a wide range of scenarios where environmental impacts intersect with human rights, significantly expanding the scope of environmental impacts.

Just as human rights deserve protection in and of themselves, so too does the environment. Environmental impacts should be avoided and addressed regardless of whether there is an immediate or obvious effect on the human rights of an identified individual or group of people. Even in the absence of a clear abuse of human rights, it is important to think about environmental and human rights impacts not only in the short term but also in the long term, notably considering future generations, because environmental impacts can accumulate or have delayed adverse impacts over time.

However, the approach chosen in Article 3(b) to define those environmental impacts without direct human rights implications only by reference to a list of prohibitions and obligations derived from international environmental conventions (Part II of the CS3D Annex) is narrow and incomplete.

The international environmental legal framework is sectorial and fragmented. Not all environmental impacts that a company can cause or contribute to are (yet) covered by international conventions. There is, for example, no binding international instrument on

171. ESRS 1, AR 16. AR have the same authority as other parts of the ESRS, and are therefore mandatory (as per ESRS 1, para. 16).
172. ESRS 1, par. 45 in conjunction with AR 10.

Table 6: Sustainability matters covered in topical ESRS

Topic	Sub-topic
Climate change (ESRS 1)	• Climate change adaptation • Climate change mitigation • Energy
Pollution (ESRS 2)	• Pollution of air • Pollution of water • Pollution of soil • Pollution of living organisms and food resources • Substances of concerns • Substances of very high concerns • Microplastics
Water and marine resources (ESRS E3)	• Water • Marine resources
Biodiversity and ecosystem (ESRS E4)	• Direct impact drivers of biodiversity loss • Impacts on the state of species • Impacts on the extent and condition of ecosystems • Impacts and dependencies on ecosystem service
Circular economy (ESRS E5)	• Resources inflows, including resource use • Resource outflows related to products and services • Waste

plastic pollution (negotiation for such an instrument was ongoing at the time of drafting the CS3D), nor for the conservation, improvement and rehabilitation of soil. Some important environmental problems are therefore not addressed at all.

The list of conventions and provisions is far from complete. Important environmental agreements are missing from Part II of the CS3D Annex (the most obvious example concerns the Paris Agreement). With regard to the agreements mentioned in Part II of the CS3D Annex, the above demonstrates they are referred to only in an incomplete manner.

This approach not only fails to properly capture companies' complete environmental footprint, but it also creates an uneven playing field by exempting companies and sectors whose most significant impacts may occur in areas not covered by conventions from the requirement to address their environmental impacts.

The CS3D also fails to align with the approach taken under the CSRD. According to the ESRS, due diligence is meant to feed into the materiality assessment.[173] A broad list of environmental impacts aligned with the CSRD would have helped companies reduce their administrative burden to comply with the

173. ESRS 1, paras. 58-60

obligations under both frameworks. Furthermore, all large companies falling within the scope of the CSRD will be required to report on their material impacts prior to the CS3D's implementation. This represents a missed opportunity, as it would have meant that they would already be prepared for the identification of impacts under the CS3D.

The table below compares the scope of environmental impacts covered under the OECD Guidelines, CSRD and CS3D. It shows that the approach chosen in Part II of the CS3D Annex captures a very narrow set of environmental impacts in relation to climate change, pollution and waste (see in grey).

Table 7: Comparison of environmental impacts covered by the OECD Guidelines, CSRD and CS3D

Impacts under OECD Guidelines	Impacts under CSRD	Impacts under CS3D (Annex Part II)
Climate change	✓ ESRS E1 Climate change: climate adaptation; mitigation; energy	✗ Ozone Depleting Substances
Biodiversity loss **Degradation of land, marine and freshwater ecosystems** **Deforestation**	✓ ESRS E4 Biodiversity and ecosystem, including: land-use change, fresh-water use change and sea-use change; direct exploitation, invasive alien species; impacts on the states of species; impacts on the extent and conditions of ecosystems; Impacts and dependencies on ecosystem services	Impacts on the sustainable use of biological diversity, wetlands, endangered species, and natural heritage sites
	✓ ESRS E3 Water and marine resources: Water consumption, withdrawals, discharges and extraction of marine resources	
Air, water and soil pollution	✓ ESRS E2 Pollution of air, water, soil, living organisms and food resources	✗ Pollution of the marine environment by dumping and by ships
	✓ Substances of concern and very high concerns	✗ • Mercury • Certain PoPs • Certain hazardous chemicals
	✓ Microplastics	
Harmful generation and mismanagement of waste including hazardous substances	✓ ESRS E5 Circular economy: resources inflows and outflows; waste	✗ Hazardous waste

✓ Environmental impacts covered.

✗ Limited environmental impacts covered.

This approach also creates legal uncertainty and is not fit for purpose. It does not make it easy for companies to understand what is expected from them. The majority of the obligations and prohibitions outlined in Part II of the CS3D Annex are derived from specific provisions that essentially require contracting states to prohibit a certain activity (production, use, import, exports) with regard to certain substances, products or species (Points 2 to 13). Others are derived from States' obligations to adopt regulations or take measures to protect the environment (Points 1, and 13 to 16).

The duty to conduct due diligence applies to both actual and potential adverse impacts.[174] Hence, companies cannot interpret the scope of the environmental impacts as limited to actions which have been found to breach or contravene specific provisions of international treaties to which Member States are parties, as they would not be able to fulfil their duties regarding potential environmental impacts. While for a number of prohibitions listed in Part II of the CS3D Annex, it might be relatively easy to identify whether a company has conducted or is about to conduct a prohibited activity (Points 2 to 13), it is not the case for the other obligations (Points 1, and 13 to 16).

It is important to recall that due diligence is primarily a duty of conduct which aims at promoting compliance with certain substantive norms even with regard to actions of third parties and events that take place somewhere in the value chain beyond the obliged undertaking's own operations. However, referencing substantive environmental norms for the purpose of determining the material scope of corporate due diligence does not imply that the undertakings subject to the due diligence obligation are themselves directly bound to the referenced substantive norms. Instead, these norms establish the environmental scope, the perimeter within which companies are required to comply with their due diligence obligations and standard of conduct laid down in CS3D Articles 7 to 16.

Similarly, the requirements to take in account national legislation linked to provisions of instruments listed in Part II of the CS3D Annex or to interpret certain prohibitions and obligations in line with the applicable law in the relevant jurisdiction should not be interpreted as requiring a "breach" of national laws linked to the international instrument in order for the environmental impact in question to fall in the scope of the CS3D. Such an interpretation would further narrow the scope of Part II of the CS3D Annex, which is already constrained by the limited number of prohibitions and obligations derived from international agreements. It would also go against the purpose of due diligence, in particular the prevention of potential impacts.

The UNGPs Interpretive Guide explicitly states that "the responsibility to respect human rights is not limited to compliance with domestic law provisions". It exists in addition to legal compliance, establishing a global standard of expected conduct applicable to all businesses in all situations.[175] In other words, due diligence is not about whether a company has breached national law, but about whether a company has properly conducted its due diligence. What matters is what the company does about the impact: it is an obligation of conduct.

Reference to national law is therefore only intended to provide guidance on the expected business conduct, especially where certain national legislation implementing international instruments provides for more detailed conduct or greater environmental protection. As stated in the commentary of the OECD Guidelines, in Chapter VI on environmental due diligence, "Some international agreements contain collective government objectives and may not provide detailed prescriptions regarding the responsibilities of individual enterprises in relation to such objectives. In such cases, relevant regulatory frameworks, national policy and widely recognised standards of

174. See Article 5(1)(b) and (c), Articles 8 to 11 CS3D

175. UNGP Interpretive Guide, Q7, p. 13

environmental management and safeguards, and scientific evidence are important references."[176]

To conclude, compared to the categories of environmental impacts under the OECD Guidelines and the CSRD, the coverage of environmental impacts under the CS3D is more limited and fragmented. In the above sections, we have unpacked and analysed each element of the definition of environmental impacts under the CS3D. **While the CS3D has the potential to provide a relatively comprehensive framework** for addressing business environmental impacts on the triple planetary crisis, **the approach chosen and the intricate nature of the provision to define environmental impacts might lead to varied interpretations** by companies when conducting their due diligence, **potentially resulting in a narrow application and leaving significant environmental impacts unaddressed.**

Recommendations for transposition

The complexity of the CS3D underscores the need for Member States to adopt a comprehensive and clear approach when transposing the definition of environmental impacts into national law. To ensure that the CS3D appropriately fulfils its objective of protecting human rights and the environment and aligns with international frameworks, Member States must consider the following in transposition:

- **Recommendation n°5: Ensuring an integrated approach to human rights and environment by recognising the connection between human rights and environmental protection.** Point 15 should be further strengthened by explicitly including the right to a healthy environment in addition to the rights already referred to (rights to life; the enjoyment of the highest attainable standard of physical and mental health; an adequate standard of living; adequate food; safe drinking water and sanitation; housing; and cultural rights). It is recommended that the terms "measurable" and "substantially" be removed from the text, as the aforementioned analysis demonstrates that there is no compelling reason for their inclusion in order to enhance clarity. The notion of "groups and communities" in Point 16 should be clarified to explicitly include indigenous people and add an explicit reference to their right to self-determination and FPIC, including to Articles 3, 10, 26 and 32 of UNDRIP.

- **Recommendation n°6: Ensuring a comprehensive coverage of environmental impacts.**
  Option A - By defining impacts on the environment primarily through a comprehensive list of environmental impacts. The definition should include a list of adverse environmental impacts including biodiversity loss and ecosystem degradation, air, water and soil pollution (including through chemicals, hazardous substances and production of waste), and climate change (including greenhouse gas emissions). The definition should ensure it covers, at a minimum, the categories already covered by existing frameworks (OECD Guidelines, CSRD, EU Taxonomy, EU Batteries' Regulation). This would provide alignment across EU legislation and with international standards. It would also offer a good and clear understanding of what a company will be expected to identify, assess, prevent, mitigate and account for in terms of adverse environmental impacts.

  Option B - By ensuring the list of environmental conventions is complete and referring to their overall objectives instead of specific provisions. In case referring to specific provisions, Member States should ensure that all relevant provisions are covered (see above sub-section 1.2).

176. OECD Guidelines, Commentary on Chapter IV, par. 66, p. 35.

The table below illustrates the range of environmental impacts and impacts drivers that should be covered by an adequate and comprehensive definition of environmental impacts as well as the relevant international legal frameworks that should be referred to, where relevant, to serve as benchmarks for understanding and specifying environmental impacts and expectations.

Table 8: Overview of environmental impacts and relevant international legal frameworks

Environmental impacts	Impact drivers	Relevant international legal framework and their overarching objectives
Climate change (ESRS 1)	• Generation/emission of Greenhouse Gas and Ozone Depleting Substances	• The UN Framework Convention on Climate Change (UNFCCC) and the Paris Agreement: aims to limit the temperature increase to 1.5 °C above pre-industrial levels • The Vienna Convention for the Protection of the Ozone Layer: aims to protect human health and the environment against adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer • The Montreal Protocol on Substances that Deplete the Ozone Layer: aims to protect the Earth's ozone layer by phasing out the chemicals that deplete it • The UN Convention on the Law of the Sea (UNCLOS): establishes a legal framework for all marine and maritime activities
	• Destruction of sinks and reservoirs of greenhouse gases	• UNFCCC and Paris Agreement
Biodiversity loss	• Land-use change and degradation of land, including deforestation	• The Convention on Biological Diversity (CDB): aims at the conservation of biodiversity and the sustainable use and equitable sharing of genetic resources • The Ramsar Convention on Wetlands: ensures the conservation and wise use of all wetlands through local and national actions and international cooperation • The Convention on the Protection and Use of Transboundary Watercourses and International Lakes (the Water Convention): aims to protect and ensure the quantity, quality, and sustainable use of transboundary water resources • The Convention on International Trade of Endangered Species (CITES): ensures that international trade (import and export) in specimens of animals and plants included in its annexes does not threaten the survival of the species in the wild • The Bonn Convention on Migratory Species: aims to conserve terrestrial, aquatic and avian migratory species throughout their range
	• Freshwater-use change and degradation of freshwater ecosystems	
	• Degradation of marine ecosystems	
	• Habitats destruction	
	• Excessive water consumption and water withdrawals	
	• Overexploitation and extraction of natural resources	
	• Impacts on the state of species	
	• Invasive alien specifies	

Environmental impacts	Impact drivers	Relevant international legal framework and their overarching objectives
Pollution of air, soil and water	• Emissions or release of chemicals and substances of concerns	• The UNECE Geneva Convention on Long-range Transboundary Air Pollution (LRTAP): aims to reduce and prevent air pollution, including long-range transboundary air pollution • UNCLOS • The International Convention for the Prevention of Pollution from Ships (MARPOL): aims to prevent the pollution of the marine environment by ships from operational or accidental causes • The Minamata Convention on Mercury: aims to protect human health and the environment from the release of mercury and mercury com-pounds into the air, water and soil • The Stockholm Convention on POPs: aims to protect of human health and the environment from the release of persistent organic pollutants (POPs) • The Rotterdam Convention on PIC: promotes shared responsibility and cooperative efforts among Parties in the international trade of cer-tain hazardous chemicals in order to protect human health and the envi-ronment from potential harm and to contribute to their environmentally sound use, by facilitating information exchange
	• Generation and use of plastics and microplastics	• There is currently no multilateral agreement addressing the generation and use of plastics and microplastics. Negotiations on an international instrument to address plastic pollution were initiated in 2022, under the auspices of the United Nations Environmental Assembly
	• Waste and wastewater disposal	• The Basel Convention: aims to minimise the cross-border movement of hazardous waste, ensuring the environmentally sound disposal of hazardous waste close to the point of origin, reducing the amount of hazardous waste produced

D Due diligence obligations

Under the UNGPs and OECD Guidelines, due diligence comprises an ongoing risk and impact management process including six steps: integration, identification, prevention and mitigation, monitoring, communication and remediation.

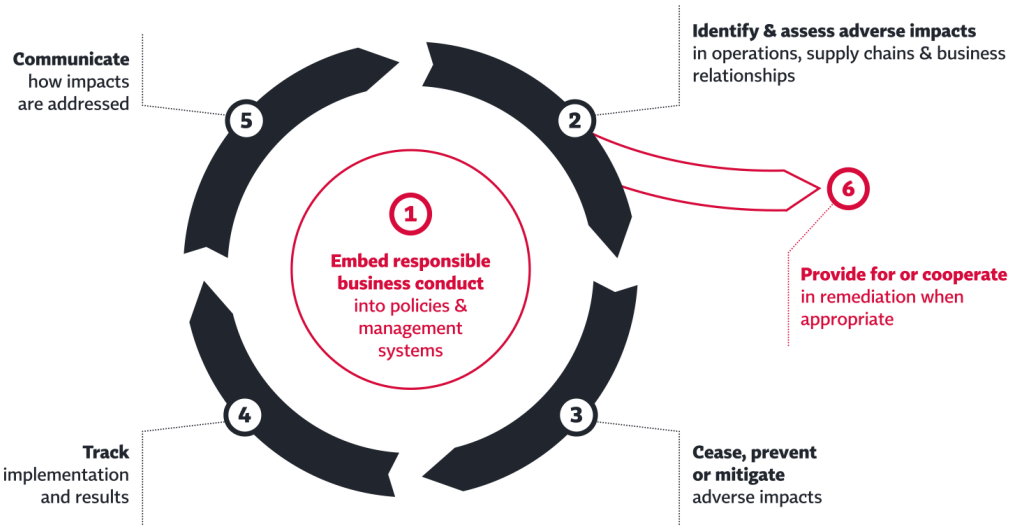
1. Due diligence steps under the CS3D

Companies are required to take due diligence steps as laid down in Articles 7 to 16:

- Integrate a due diligence policy into company policies and risk management system.[177]
- Identify and assess actual or potential negative impacts on human rights and the environment arising from their own operations, those of their subsidiaries and those of their business partners where related to their chain of activities.178 This includes (a) the mapping of their own operations, those of their subsidiaries and those of their business partners where related to their chain of activities in order to identify general areas where adverse impacts are most likely to occur and to be most severe, and (b) an in-depth assessment based on this mapping (Article 8(2)).179 It also clarifies that companies can use resources, including independent reports and information gathered through the notification and complaints procedures, when identifying and assessing impacts.[180]
- Prioritise. If necessary, the company should prioritise measures, based on the severity of impacts (scale, scope, irremediability) and their likelihood.[181]
- Take appropriate measures to prevent or mitigate potential impacts,[182] and bring to an end actual impacts or at least minimise their extent,[183] depending on the level of involvement of the company in the adverse impacts (caused, jointly caused, caused only by the business partners in the chain of activities).
- Remediate harm occurred.[184]
- Monitor progress and effectiveness of the due diligence policy and measures.[185]
- Communicate through annual statements (for companies covered by CSRD, within CSRD reporting).[186]
- Meaningfully engage with stakeholders throughout the entire due diligence process.[187]
- These steps are based on and reflect the 6-step framework of the OECD Guidelines[188] which is reproduced in Figure 1 below.

177. Article 7 CS3D.
178. Article 8(1) CS3D.
179. Article 8(2) CS3D.
180. Article 8(3) CS3D.
181. Article 9 CS3D.
182. Article 10 CS3D.
183. Article 11 CS3D.
184. Article 12 CS3D.
185. Article 15 CS3D.
186. Article 16 CS3D.
187. Article 13 CS3D.
188. OECD Guidelines, Commentary on Chapter II, par. 15, p.18.

Figure 3: The OECD 6-step due diligence process



Source: Graphic by Frank Bold based on the original from OECD, more at mneguidelines.oecd.org

2. Commentary

Regarding the transposition of those key articles that define the due diligence duties of companies, Article 8(1) and (2), Article 10(1) and Article 11(1), require Member States not to introduce provisions diverging from those laid down in the respective Articles in their national laws. The CS3D thus harmonises the key elements of the standard of conduct for the entire EU market.

The objective of this briefing is not to provide a comprehensive analysis, commentary and recommendations on the due diligence obligations set forth in Articles 5 to 16 of the CS3D. However, it is important to highlight certain key concepts that require further elaboration in order to facilitate a better understanding of environmental due diligence.

Risk-based approach

In line with international standards on due diligence, the CS3D encourages a risk-based approach to due diligence.[189] This means that companies should focus their attention where it is actually needed. Companies should focus on their most severe and likely potential and adverse impacts in their value chains (or chain of activities), regardless of where in the value chain or how many "tiers" away there are. The OECD itself recently clarified that the risk-based approach to due diligence "means prioritising their most severe risks and impacts – regardless of where they sit in the value chain".[190]

In line with the OECD Guidelines, Article 8(2) of the CS3D also requires "taking into account relevant risk factors".[191] Article 3(1)(u) and Recital 41 clarify that these refer to facts, situations or circumstances, related to the severity and likelihood of impacts, and include "company-level risk factors, such as whether the business partner is not a company covered by this Directive; business operation risk factors; geographic and contextual risk factors, such as the level of law enforcement with respect to the type of adverse impacts; product and service risk factors; and sectoral risk factors."

189. Articles 5 and 7 CS3D.

190. See the OECD Background note on Regulatory Developments concerning Due Diligence for Responsible Conduct, Translating a risk-based due diligence approach into law, 2022, p. 4.

191. Ibid.

Prioritisation

Prioritisation is a key characteristic of a risk-based approach to due diligence. In line with the UNGPs and OECD, Article 9 and Recital 44 provide that where a company cannot prevent or address all the identified impacts at the same time and to the full extent, it should prioritise the impacts based on the severity and likelihood.

Article 3(1)(v) and Recital 44 clarify that "the severity of an adverse impact should be assessed based on the scale, scope or irremediable character of the adverse impact, taking into account the gravity of the impact, including the number of individuals that are or will be affected [scale], the extent to which the environment is or may be damaged or otherwise affected [scope], its irreversibility and the limits on the ability to restore affected individuals or the environment to a situation equivalent to their situation prior to the impact within a reasonable period of time [irremediable character]."

However, dealing with most severe impacts first does not imply that other impacts should not be addressed. Prioritisation is about "sequencing" a company's response in the event that all impacts cannot be addressed simultaneously. A company remains accountable for addressing all its actual and potential impacts. In that sense, Article 9(3) also specifies that "Once the most severe and likely adverse impacts are addressed in reasonable time, the company should address less severe and less likely adverse impacts."

In line with international standards, severity is the predominant factor but the likelihood, or "probability" in UNGPs language, may be relevant in helping prioritise the order in which potential impacts are addressed. Indeed, if an adverse impact is potential rather than actual, standard approaches to risk management suggest that the probability of it occurring becomes a primary factor, alongside its severity.

Finally, and importantly, Recital 44 makes clear that the level of involvement of the company in the adverse impact, the company's influence on (actual or potential) or its proximity to its business partners should not factor into the prioritisation of impacts.

Appropriate measures

The other key characteristic of a risk-based approach to due diligence concerns the requirement for companies to take appropriate measures to fulfil their due diligence. In line with the OECD Guidelines and the UNGPs, Articles 8(1), 10(1) and 11(1) of the CS3D require companies to take appropriate measures to fulfil their due diligence duty. These are defined in Article 3(1)(o) as "measures that are capable of achieving the objectives of due diligence, by effectively addressing adverse impacts in a manner commensurate to the degree of severity and the likelihood of the adverse impact, and reasonably available to the company, taking into account the circumstances of the specific case, including the nature and extent of the adverse impact and relevant risk factors". Articles 10(1) and 11(1) further clarify that to determine appropriate measures, companies must take into account (a) the level of involvement of the company in the adverse impact, (b) whether it may occur or has occurred in the operations of a subsidiary, direct business partner or indirect business partner, and (c) the leverage, or ability of the company to influence the business partner that is causing or contributing to the impact.

To provide companies with legal clarity and certainty, Articles 10(2) and Article 11(2) of the CS3D sets out the actions companies should be expected to take for addressing their potential and actual adverse impacts: develop and implement a preventive or corrective action plan; seek to obtain contractual assurances that are designed to ensure that the responsibilities are shaped appropriately by the company and the business partners; make financial or non-financial investments adjustments or upgrades; adapt business plans, overall strategies and operations, including purchasing practices; make necessary modifications of, or improvements to their design and distribution practices. The CS3D also underlines that terminating business relationships is a measure of last resort.

The United Nations Development Programme ("**UNDP**") and UNWG list a number of practical examples of appropriate measures to prevent and address land, air and water pollution, climate change and biodiversity loss.[192]

192. See the UNDP and UNWG Draft Human Rights Due Diligence and the Environment: A guide for business, 2023, Box 14, p. 57.

Involvement framework

According to Articles 8, 10, 11 and 12, different types of involvement in adverse human rights and environmental impacts require different responses.[193] This is known in CS3D as the "level of involvement", in line with international standards, and determines what action the company is required to take to address the impact. To avoid confusion with existing terms in certain national laws, the CS3D uses different terminology than the international standards. However, the CS3D itself clarifies that the content of the categories is the same.[194] Therefore, the possible levels of involvement under the CS3D are the following:

- **Causation:** The company's actions or omissions are sufficient to result in adverse impacts.[195] This is known as "causation" under the UN and OECD standards.

- **Joint causation:** The company's actions or omissions cause the impact in combination with those of other entities, or cause, facilitate or incentivise other entities to cause the impact.[196] This is not limited to equal causation. All actions or omissions that cause an impact in combination with the acts or omissions of others constitute joint causation, and a company may cause an impact jointly with an indirect business partner.[197] Such a situation is referred to as "contribution" under the UN and OECD standards.

- **Causation only by the business partners in the chain of activities:** The adverse impact is related to the company's operations, products or services by a business relationship.[198] Known as "direct linkage" in the UN and OECD standards. Importantly, a company can move from being directly linked to an adverse human rights impact to contributing to ("causing jointly" in CS3D) that impact if it does not take action to prevent or mitigate it, including by undertaking human rights due diligence.[199]

The level of involvement with the impact determines "what" the company should do (what results it should aim for). Meanwhile, aspects pertaining to the relationship to the business partner – such as a business partner's proximity to the company or the influence wielded over a business partner – are relevant when determining "how" (what measures a company is expected to take when working towards the result).[200] Figure 2 below illustrates the relationship between the level of involvement and requirements under the CS3D.

193. See also Recitals (45) and (53) CS3D.

194. See Recital (45) CS3D.

195. UNGP Interpretive Guide, p.15; OECD Due Diligence Guidance for Responsible Business Conduct ("OECD Guidance"), 2018, p. 70.

196. Ibid.

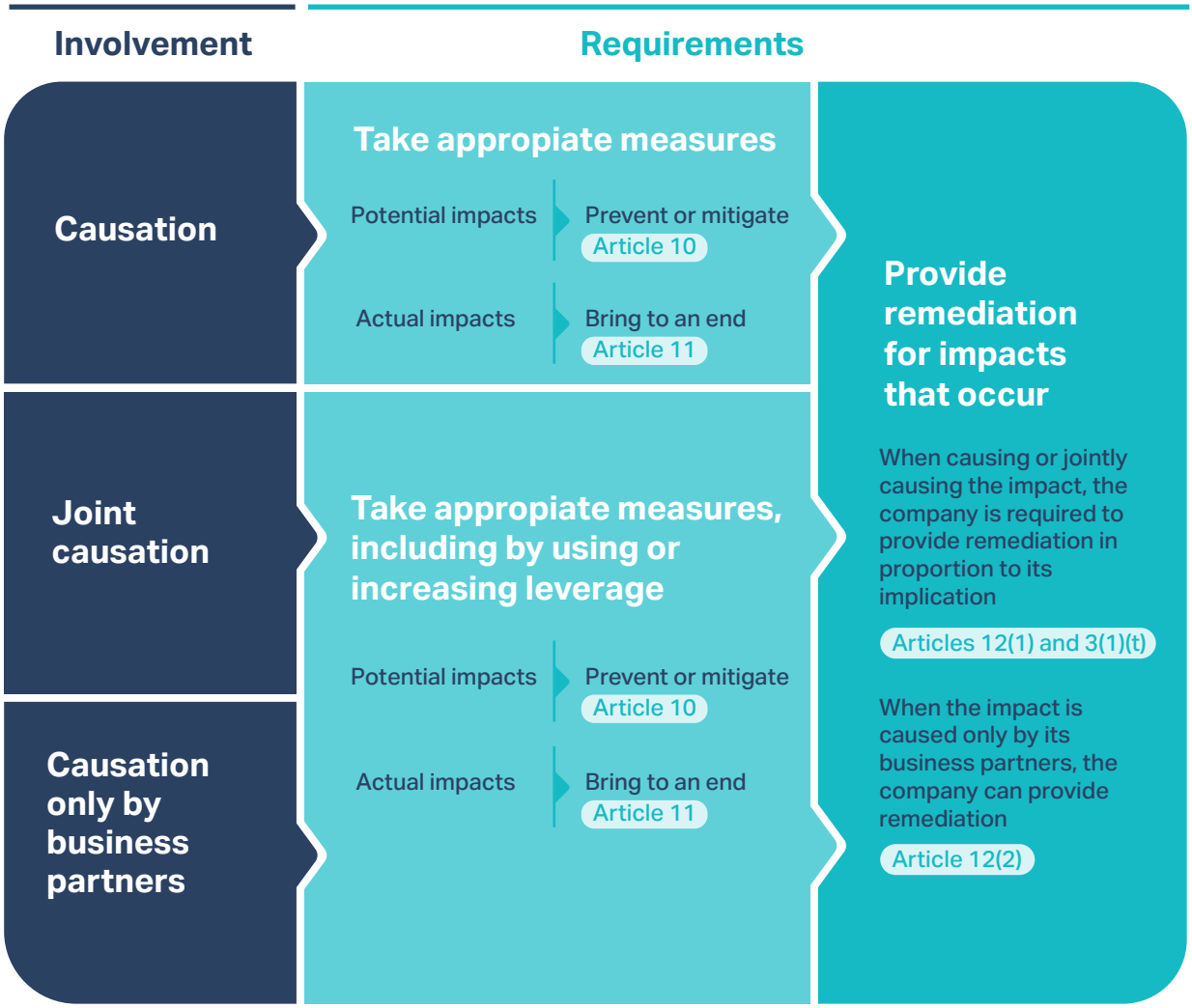
197. Recital (45) CS3D.

198. UNGP Interpretive Guide, p. 15; OECD Guidelines, Commentary on Chapter II, par. 16, p. 17.

199. See UN Special Rapporteurs Communications to Saudi Arabia, Japan, France, USA, and the UK, and 13 financial institutions concerning Saudi Aramco's business activities in the fossil fuel sector, June 2023.

200. See, to this effect, Articles 10(1) and 11(1) CS3D.

Figure 4: Level of involvement and associated requirements under CS3D



Stakeholder engagement

Stakeholder engagement is a key element of the due diligence process and – if done in a meaningful way – leads to more informed and preventive actions. As mentioned in Article 13, it is especially relevant for the identification of potential and actual impacts, when developing a prevention and corrective action plan, in case of termination or suspension of a business relationship, and when monitoring the appropriateness of measures taken. Companies can seek support in multi-stakeholder initiatives for this, provided they meet the requirements of Article 13.

Stakeholder engagement means drawing on external expertise, including local experts, civil society organisations, trade unions, and community-based groups, and especially those rights-holders who are directly affected as their lives and livelihoods depend on the land, water, air (e.g., being and/or working outside), climate (e.g., being/working outside or inside with no cooling systems), and biodiversity, as well those who are entitled to the lands, territories, and resources (with or without official titles), in the geographical locations of a company's own activities and in the chain of activities.

From an environmental perspective, it is important to consult (potentially) affected stakeholders located as far as (potential) adverse impacts resulting from land, water, air pollution, (mal)adaptation to climate change, and biodiversity loss reach. This engagement may help companies to verify and complement quantitative scientific data with qualitative data on lived experiences.[201]

In cases in which it is impossible to directly consult (potentially) affected stakeholders (for instance such engagement endangers the stakeholders' security), companies should consult experts that can provide credible insights into the potential or actual impacts.[202]

Communicating – reporting under the CSRD

In essence, communication is a crucial component of the due diligence process, as it enables the company to build trust, demonstrate good faith, and provide transparency around its actions and decisions. It is essential for the company to account for how it identifies and addresses actual or potential adverse impacts, and to communicate this information accordingly. The company should ensure that the communicated information is accessible and sufficient for the intended audiences, such as stakeholders, investors, and consumers. Article 16(1) sets out the obligation to report annually on the "matters covered by this Directive" and refers to the ESRS for specifying this obligation.

Article 16(2) of the CS3D exempts those companies covered by the CSRD from reporting, which is the majority of all companies in scope. For non-CSRD companies, the CS3D establishes that the Commission shall adopt a delegated act specifying the "content and criteria" of reporting and that this should include "sufficiently detailed information on the description of due diligence, actual and potential adverse impacts identified, and appropriate measures taken with respect to those impacts".[203]

Thus, generally speaking, companies must report on their implementation of the CS3D via the sustainability reporting as set out by the CSRD disclosures.[204] There is no duplication of reporting requirements. Analysis shows that the vast majority of disclosures that would be relevant for the CS3D can be fitted into the CSRD disclosure requirements.[205] However, companies must disclose in a sufficient level of detail: Recital 63 asks for information on how companies implement their due diligence as per the CS3D, therefore blanket references would be insufficient.

201. Draft Human Rights Due Diligence and the Environment, p. 31, see also the list of potentially affected stakeholders in Box 3, p. 20.

202. Article 13(4) CS3D.

203. Article 16(3) CS3D.

204. See also Recital (63) CS3D.

205. Corporate environmental reporting: Compatibility of Due Diligence laws and the European Sustainability Reporting Standards (ESRS), German Environment Agency, April 2024.

E Climate transition plan obligation

Article 22 of the CS3D obliges companies to reduce their GHG emissions via a climate transition plan. The tool of transition planning was not something unknown. It was emerging from company practice in response to the Paris Agreement and the climate crisis more generally speaking and is already referenced in other corporate sustainability reporting requirements.[206] A transition plan sets out how a company will adapt its business model and strategy and reduce its emissions consistently with the global transition pathways necessary to limit global warming to 1.5°C in line with the Paris Agreement, as the world transitions towards a net-zero economy.

1. CS3D transition plan obligation

In terms of its application, **all companies in scope** of the CS3D have to comply with the obligation in Article 22. It is important to note that this includes **financial institutions** in scope of the CS3D, as defined in Article 3(1)(a)(iii). The co-legislators clarify that climate transition plans are mandatory for large banks, asset managers and the like.

Regarding the **parent-subsidiary** relation, Recital 21 clarifies that in case the parent adopts a climate transition plan, the subsidiary should comply with the parent's plan, taking into account its business model and strategy.

1.1. Adoption and implementation of transition plans

The formulation of the duty in Article 22 is twofold: companies have a duty to "adopt and put into effect" a transition plan according to paragraph 1. To begin with, the **duty to adopt** implies that there is a formal internal approval of the plan by administrative, management or supervisory bodies of the company. This is almost inevitable, as the plan describes how a company ensures that its business model and strategy are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5°C. The duty to adopt such a plan should also be read in accordance with the Article 22(1)(d), that explicitly calls for a description of the role of the administrative, management and supervisory bodies regarding the transition plans.

Secondly, the CS3D requires companies to **put into effect** said plans, which is adding to the adoption a duty directed towards implementation. The duty to put into effect a transition plan has to be read in accordance with the overall Article 22, and particularly Article 22(1)(c) that defines "investments and funding supporting the implementation of the transition plan" (emphasis added) as one key element of its design. Recital 73 supports this by stating that the "plan should develop implementing actions to achieve the company's climate targets". Article 22 moreover sets out necessary elements of implementation: decarbonisation levers, key actions, potential changes in product and service portfolios and adoption of new technologies, investments and funding, oversight by administrative, management and supervisory bodies.

This implementation duty is phrased as an **obligation of means** and led to a clarifying remark in Recital 73: "Such requirements should be understood as an obligation of means and not of results. Being an obligation of means, due account should be given to the progress companies make, and the complexity and evolving nature of climate transitioning. While companies should strive to achieve the greenhouse

206. Compare direct and indirect references in CSRD, ESRS, CS3D and SFDR, as well as in Directive (EU) 2024/1619 of the European Parliament and of the Council of 31 May 2024 amending Directive 2013/36/EU as regards supervisory powers, sanctions, third-country branches, and environmental, social and governance risks ("Capital Requirements Directive"), and agreed amendments to Directive 2009/138/EC (the Solvency II Directive, on the taking-up and pursuit of the business of Insurance and Reinsurance), which are pending formal confirmation by the Council of the EU.

gas emission reduction targets contained in their plans, specific circumstances may lead to companies not being able to reach these targets, where this is no longer reasonable."

In other words, companies have to adopt and implement a transition plan that puts their business model and strategy on track with the Paris Agreement and the EU climate goals, but companies have to decide themselves how to best get there. This reading is further underlined by the operative wording on "**best efforts**": The "best efforts" element is in relation to the goal (ensuring 1.5°C compatibility). This reiterates that there is a requirement to implement the plan, while recognizing that 1.5°C is not the result of any individual company's actions. The obligation to ensure compatibility of the business model and strategy with 1.5°C "through best efforts" also implies that companies should act in good faith. "Best efforts" obligations fall high in the hierarchy of obligations (higher than reasonable efforts), implying that companies must explore all feasible routes to compatibility, and that considerations of commercial detriment and economic feasibility may be outweighed. Considerations of economic feasibility are but one element directors have to consider with regards to the success of the company. Systemic risks of global warming may lead to economic and societal collapse and can thus be incompatible with any prospects of a success for the company.

This second part of the overall duty is one of the main added values and clarification in relation to the CSRD: companies do not just have to report a credible plan as per ESRS E1,[207] but they are obliged to take action to implement it and monitor the actions they take on a yearly basis. This is particularly important given the current stage of corporate climate action, with many pledges coupled with insufficient execution. This will allow investors, public authorities and other interested parties to assess whether companies are taking plausible actions to ensure that they contribute to limiting global warming to 1.5 °C.

1.2. Demonstrating compatibility with politically agreed goals to limit global warming

Article 22 refers to the Paris Agreement as the latest international reference, and the 2050 and intermediate targets set out in the European Climate Law. To recap, these are a reduction of 55% by 2030, a proposed 90% reduction target for 2040, and achieving climate neutrality by 2050. Recital 11 refers to the EU 2050 and 2030 targets and emphasises that "[b]oth these commitments require changing the way in which companies produce and procure".

To fulfil their transition plan obligation, companies have to explain how their plan and actions will enable them to be **compatible** with goals set in the Paris Agreement and the EU climate targets.[208] They should describe a plausible scenario or pathway to demonstrate how their business model and strategy is compatible with the set goals.
This means that companies must set an objective of achieving net-zero GHG emissions (scopes 1–3) by 2050 at the latest, depending on sector, and consistent with a 1.5°C pathway.

Companies must take a prudent and precautionary approach to the best available science, and assumptions and methodological choices must be reasonable and supported by evidence. In particular, the underlying scenario or pathway adopted as the basis for alignment should itself be aligned with the 1.5°C temperature goal. Scenarios are constantly being further developed and improved in accordance with the latest climate science, hence the requirement to update the transition plans on a yearly basis. While companies have some discretion in deciding how to pivot their business model and strategy towards a 1.5°C trajectory, the CS3D obliges them to respect the political goals as such. A transition plan that demonstrates compatibility with a 3°C scenario is non-compliant with the obligation set out in Article 22, as it would merely describe climate policies, without contributing to climate transition.

207. ESRS E1 specifies the CSRD disclosure obligations with regard to impacts on climate change. See Briefing: Overview and Frequently Asked Questions, Frank Bold, 2022, pp. 7-8.

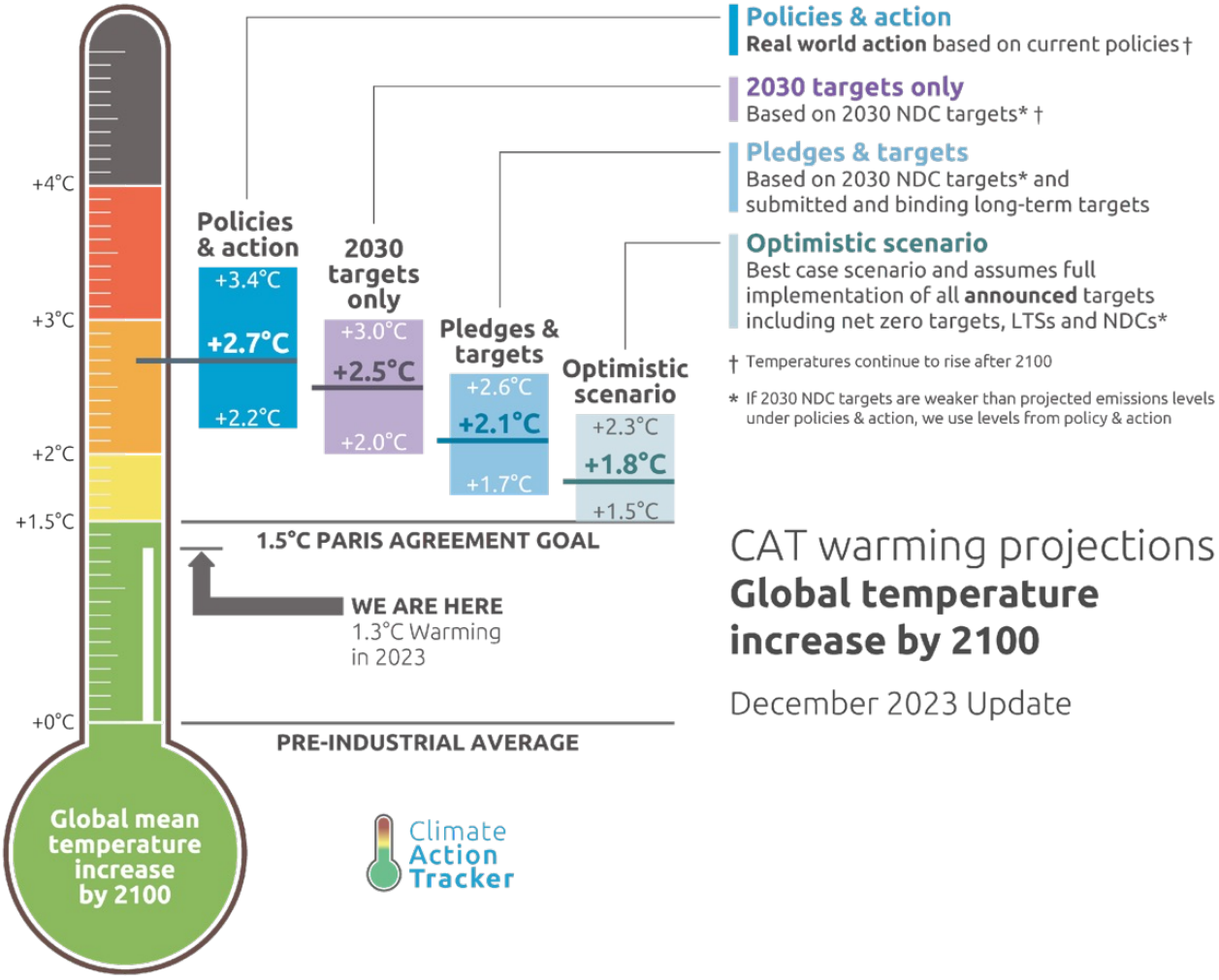
208. See also Recital (10) CS3D.

Limiting global warming to 1.5 °C and well below 2 °C is a shared responsibility question. The CS3D addresses the individual obligations in the overall effort concerning climate change mitigation. Thus, a company should not be distracted by assessing whether the rest of the world is delivering. There is nothing in Article 22 that permits such reading.

It is important that a company can demonstrate, at the individual level, a plausible compatibility of its business model and strategy with the agreed goals by States.

Climate transition plans must also tackle a company's **fossil-fuel exposure**, where it has such exposure. To clarify the wording of this reference in Article 22(1), Recital 73 adds that the climate transition plan "should address, where relevant, the exposure of the company to coal-, oil- and gas-related activities".

Figure 5: Projected temperature increases according to government policies and commitments



1.3. Design of the plan

Article 22(1)(a) to (d) requires **four key elements** that are essential for climate transition plans to comply with the obligation: targets, decarbonisation levers and key actions, an explanation and quantification of the investments and funding, and a description of the role of the administrative, management and supervisory bodies. All four elements are based on existing CSRD requirements.

The final wording on **targets** clarifies that target setting is the starting point, the crux of any climate transition plan. Targets cannot be decoupled from transition plans, an understanding that has also been confirmed by the updated OECD Guidelines, the UN High-Level Expert Group, and the Race To Zero Campaign and its interpretation guide.[209] Article 22(1)(a) clarifies that targets have to be time-bound, set for 2030 and in five-year steps up to 2050 and be based on conclusive scientific evidence, which is defined in Recital 73 as "meaning evidence with independent scientific validation that is consistent with the limiting of global warming to 1,5 °C as defined by the Intergovernmental Panel on Climate Change (IPCC) and taking into account the recommendations of the European Scientific Advisory Board on Climate Change".

The CS3D furthermore clarifies that companies should prioritise **absolute emission reduction targets** for **scopes 1 to 3.** This is in line with the ESRS, which require that targets related to the reduction of impacts in absolute terms are prioritised over relative ones.[210] The inclusion of scope 3 is clarified in the disclosure requirement for climate targets within the climate standard: "GHG emission reduction targets shall be disclosed for Scope 1, 2, and 3 GHG emissions, either separately or combined. [...] The undertaking shall explain how the consistency of these targets with its GHG inventory boundaries is ensured (as required by Disclosure Requirement E1-6). The GHG emission reduction targets shall be gross targets, meaning that the undertaking shall not include GHG removals, carbon credits or avoided emissions as a means of achieving the GHG emission reduction targets".[211] Additionally, Disclosure Requirement E1-6 on GHG inventories underlines that "[f]or many undertakings, Scope 3 GHG emissions may be the main component of their GHG inventory and are an important driver of the undertaking's transition risks".[212] In practice, accounting for scope 3 emissions will be key for most companies when setting emission reduction targets.

Article 22 refers to scopes 1 to 3 and to products and services portfolio in line with the CSRD understanding of the **value chain**[213] and does not reference a limited understanding as per the concept of "chain of activities" in CS3D. For financial institutions, this means they have to address financed emissions within their CS3D mandated plan. According to the CSRD requirements, the ESRS also requires companies to carry out a

209. Integrity Matters: Net Zero Commitments by Businesses, Financial Institutions, Cities and Regions, High-Level Expert Group on the Net Zero Emissions Commitments of Non-State Entities ("UN HLEG"), November 2022, pp. 17-18; and Interpretation Guide, Race to Zero Expert Peer Review Group, June 2022.

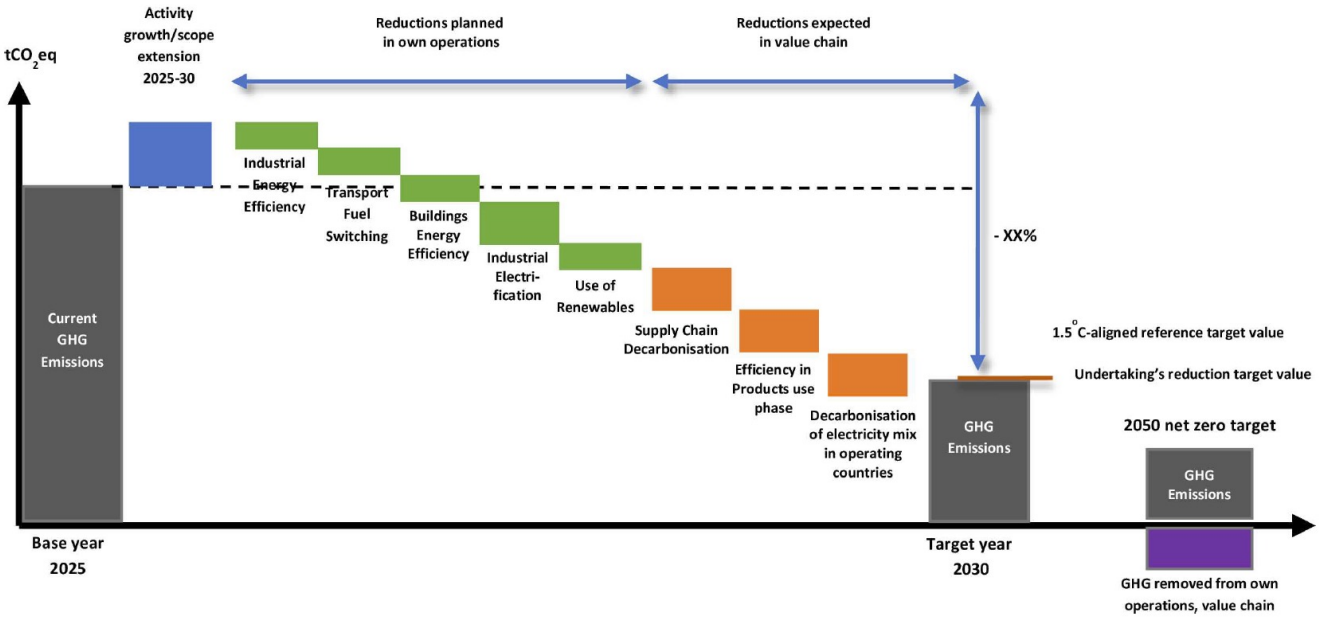
210. ESRS 2, AR 24: ""When disclosing targets related to the prevention or mitigation of environmental impacts, the undertaking shall prioritise targets related to the reduction of the impacts in absolute terms rather than in relative terms [···]." AR have the same authority as other parts of the ESRS, and are therefore mandatory (ESRS 1, para. 16). ESRS 2 AR 24 specifies the way in which the Minimum Disclosures Requirements on Targets (MDR-T) are to be fulfilled. As per ESRS 2, par. 70, the information requirements in MDR-T and its AR must be applied together with the topical disclosures related to targets (in the case of GHG targets, ESRS E1-4). Regarding absolute targets in the context of transition plans, the UN HLEG (see n209) notes in p.17 that "Non-state actors must have short-, medium- and long-term absolute emissions reduction targets and, where appropriate, relative emissions reduction targets[···]." Likewise, the Race to Zero Expert Peer Review Group clarifies that absolute targets are the default, whereas intensity ones may of relevance in specific circumstances (such as when a company's activities are central to decarbonisation), see point 7.a: " In most cases, absolute emissions targets are necessary for ensuring real-world reductions. However, there are certain areas in which intensity-based metrics are also appropriate, such as for sectors for which absolute growth is needed to drive decarbonization (e.g. renewable energy)".

211. ESRS E1-4, para. 34(b).

212. ESRS E1-6 para. 45(c).

213. Article 19a(2)(f) Accounting Directive.

Figure 6: Example of mapping the pathway for targets and decarbonisation levers



Source: Commission Delegated Regulation (EU) 2023/2772 of 31 July 2023 supplementing Directive 2013/34/EU of the European Parliament and of the Council as regards sustainability reporting standards, ESRS E1 AR 31.

qualitative assessment of the potential locked-in GHG emissions from their key assets and products and to explain if and how these emissions may jeopardise the achievement of the GHG emission reduction targets set out in its climate transition plan.[214]

As a second mandatory element, companies have to describe the main **decarbonisation levers** they identify, meaning types of mitigation actions such as energy efficiency, electrification, fuel switching, use of renewable energy, products change, or supply-chain decarbonisation.[215] They need to outline **key actions** planned, including changes in the product and service portfolio and the adoption of new technologies in the company's own operations, or the upstream and/or downstream value chain.[216] Recital 73 of the CS3D stresses the importance of these actions regarding the duty to put climate transition plans into effect: "The plan should develop implementing actions to achieve the company's climate targets". The ESRS contain an example on how to present targets in combination with the decarbonisation levers necessary to achieve them,[217] reproduced above in **Figure 6.**

The two remaining key elements concern the **explanation and quantification of the investments and funding** supporting the implementation of the transition plan for climate change mitigation,[218] in line with Article 19a(2)(a)(iii) of the Accounting Directive, and a description of the **role of the administrative, management and supervisory bodies** with regard to the transition plan,[219] in line with Article 19a(2)(c) of the Accounting Directive, which also refers to the necessary expertise in those bodies.

Lastly, CS3D requires companies to **update** their climate transition plan every 12 months and **explain the progress** they have made towards achieving the targets.[220]

214. ESRS E1-1, para. 16(d).
215. ESRS E1-4, par. 34(f).
216. Article 22(1)(b) CS3D.
217. ESRS E1 AR 31.
218. Article 21(1)(c) CS3D.
219. Article 22(1)(d) CS3D.
220. Article 22(3) CS3D.

2. Presumption of compliance in relation to CSRD

The text of Article 22 of the CS3D is heavily based on the wording of the CSRD. The general lines in which the CS3D sets out the obligation on climate transition planning are thus closely aligned with the CSRD as regards the content requirements. Recital 73 of the CS3D importantly explains this reasoning: "While the adoption obligation will be considered to have been met, companies should still abide by their obligation to put that transition plan for climate change mitigation into effect and to update it every 12 months to assess progress made towards its targets."

In simple terms this means that companies which are complying with the CSRD disclosure obligations and follow the ESRS E1 requirements on climate transition planning have complied with their duty to adopt such a plan under Article 22(1) of the CS3D. Practically speaking, companies should make sure that their CSRD-based plans comply with all elements of the design of the plan according to Article 22(1).

In analogy, this also applies to companies that are included in the climate transition plan of their parent.

They still have an additional obligation to **put these plans into effect and update them annually** describing their process according to Article 22(1) and (3) of the CS3D. The adoption, CS3D-compliant design and updating of the plan are all under public supervision according to Article 25(1) of the CS3D.[221] The CS3D picks up the key elements from the CSRD and the ESRS E1 that relate to the behaviour required by companies to do climate transition planning. It is important to note that the ESRS E1 provides the details to the different disclosures required for sustainability reporting. To be clear, the CS3D is not setting an additional disclosure obligation regarding climate transition plans. Those obligations are covered fully by the CSRD and specified in the ESRS. For the small number of companies that are in the scope of the CS3D, but do not fall under the CSRD, the Commission is empowered to draft a Delegated Act as per Article 34 of the CS3D to set reporting requirements.

3. Commentary

The CS3D makes it very clear from the beginning[222] that it should be understood as "an important legislative tool to ensure corporate transition to a sustainable economy, including to reduce the existential harms and costs of climate change, to ensure alignment with 'global net zero' by 2050, to avoid any misleading claims regarding such alignment and to stop greenwashing, disinformation and fossil fuels expansion worldwide in order to achieve international and European climate objectives".[223] This understanding is in line with the updated OECD Guidelines that have clarified how companies should address impacts on climate[224] and the UNWG Note on climate and the UNGPs,[225] and it builds on and complements the climate-related disclosures in CSRD.

The approach the CS3D takes to defining corporate obligations in relation to impacts on climate differs from other social and environmental impacts. In February 2022, the EU Commission set the scene by proposing a draft law that did not include the Paris Agreement amongst the international conventions referenced in Part II of the CS3D Annex. Instead, it proposed an obligation for companies to adopt climate transition plans. Climate was set on a separate track. However, the Directive includes obligations

221. Directive on Corporate Sustainability Due Diligence - Frequently asked questions, European Commission, July 2024, section 6.4.
222. See Article 1(1)(c) CS3D.
223. Recital (73) CS3D.
224. OECD Guidelines, Commentary on Chapter VI, paras. 77 to 79.
225. Information Note on Climate Change and the UNGPs, Working Group on the issue of human rights and transnational corporations. and other business enterprise, June 2023.

to take appropriate measures on the human rights impacts related to greenhouse gas emissions (see Section C, sub-section 1.1.1 above).

In practice, transition planning relates to only part of the steps required by due diligence, such as the identification of potential and actual impacts and the monitoring of the appropriateness of action taken. Nonetheless, it is a more forward-looking planning tool that makes companies set emission reduction targets and focus on reducing their emissions and thereby their negative climate impacts.

Within the three years after entry into force of CS3D, the Commission is obliged to prepare practical **guidance** on Article 22.[226] As the European Financial Reporting Advisory Group ("**EFRAG**") is also preparing guidance in the context of the CSRD and the ESRS, these processes should be coordinated so that they ideally lead to coherent implementation.

The link to corporate governance

During the negotiation of the CS3D, the co-legislators discussed whether to include an obligation for companies to link parts of directors' variable **remuneration** (or incentives more generally) to the fulfilment of a company's transition plan. Initially, the reasoning was connected to the obligation of directors to oversee the climate transition plan and to make best use of company internal accountability. The CSRD in fact makes that link and asks companies to disclose "information about the existence of incentive schemes linked to sustainability matters which are offered to members of the administrative, management and supervisory bodies".[227]

Including sustainability considerations in the remuneration packages of directors could have increased the influence of the CS3D on the behaviour of directors to effectively address climate mitigation. Unfortunately, this provision was taken out in the very last moments to find an agreement in the EU Council at the beginning of March 2024.

Recommendations for transposition

To ensure that the CS3D appropriately fulfils its objective of protecting human rights and the environment and aligns with international frameworks, Member States must consider the following in transposition:

- **Recommendation n°7: Ensuring that Article 22 is fully transposed,** including the clear instructions for the design of a climate transition plan in Article 22(1)(a)-(d). This will provide a common framework for the design of climate transition plans under the CS3D across the EU market.
- **Recommendation n°8: Improving the wording on targets in coherence with the ESRS E1** and clearly state that targets have to be GHG-emission reduction targets for scopes 1-3.
- **Recommendation n°9: Considering including a provision that links the achievements of the climate transition plan to a part of any variable remuneration of the company's directors**, as suggested by the EU Commission proposal.

226. Article 19(2)(b) CS3D.

227. Article 19a(2)(e) Accounting Directive, including the specification, for climate aspects, in ESRS E1 par. 13: " The undertaking shall disclose whether and how climate-related considerations are factored into the remuneration of members of the administrative, management and supervisory bodies, including if their performance has been assessed against the GHG emission reduction targets [⋯]".

F Enforcement mechanisms under the CS3D

Legislation is only as good as its implementation. To promote compliance by companies, ensure the achievement of the Directive's objective, and secure access to remedy for victims of human rights abuses, Member States should carefully consider the transposition of provisions regarding both public and private enforcement mechanisms. While the international standards laid out in the UNGPs and OECD Guidelines do not directly generate liability on companies, governments are expected to put in place enforcement mechanisms promoting adherence to said standards.[228] The CS3D provides for two complementary enforcement mechanisms. National-level supervisory authorities will oversee the implementation by companies of all due diligence steps, as well as the adoption and design of climate transition plans. Additionally, companies may be found liable under civil law for damage arising from the failure to take appropriate measures to address actual or potential impacts.

1. Administrative supervisory authorities

Given the ultimately *ex post* nature of civil liability, it is essential that supervisory authorities take a broad and proactive approach to public enforcement. Such an approach will ensure that the Directive fulfils its objective of preventing environmental degradation and contributing to more sustainable business practices.

The sections below unpack the different elements Member States must consider to comply with their obligations under Articles 24 to 27 of the CS3D.

1.1. Designation of supervisory authorities

Article 24 creates a legal obligation on EU Member States to designate one or more authorities in charge of monitoring compliance with the obligations laid down in national provisions adopted pursuant to Articles 7 to 16 (due diligence) and Article 22 (transition plans). Member States must inform the Commission of the names and contact details of the supervisory authorities designated by 26 July 2026.[229] The Commission will publish a list of competent authorities on its website.

For an EU company, the competent supervisory authority shall be that of the Member State in which the company has its registered office.[230] For a non-EU company, the competent authority will be that of the Member State in which that company has a branch or, if it does not have a branch or has branches in several Member States, where the company generated most of its net turnover.[231]

When a parent company fulfils the obligations resulting from this Directive on behalf of its subsidiaries in accordance with Article 6, the competent supervisory authority of the parent company shall cooperate with the one competent for supervising the subsidiary's compliance with its obligations.[232]

228. See for instance Recommendation on the Role of Government in Promoting Responsible Business Conduct, OECD, OECD/LEGAL/0486, December 2022, recommendations II.1 and VI. Regarding the UNGPs, see Principles 2, 3, 25 and 26 and their commentaries.
229. Article 24(7) CS3D.
230. Article 24(2) CS3D.
231. Article 24(3) CS3D.
232. Article 24(4) CS3D.

1.2. Functional and institutional independence

Article 24(9) specifies criteria which Member States must ensure their competent authorities satisfy: the independence, impartiality and transparency of the supervisory authorities and their staff. In particular, Member States shall ensure that the authority is "legally and functionally independent, free from external influence whether direct or indirect", from public or private actors, "including from the companies falling within the scope of this Directive or other market interests, that its staff and the persons responsible for its management are free of conflicts of interest and that they refrain from any action incompatible with their duties".[233]

These are common and essential requirements for national agencies responsible for the implementation and/or enforcement of EU legislation.[234]

In other terms, supervisory authorities must carry out their regulatory tasks without being exposed to any external influence or instruction and take their own decisions autonomously and solely in the public interest (functionally independent).[235] Authorities must also be legally independent, i.e. be a separate legal entity without institutional or organisational links to other bodies that would risk directly or indirectly influencing the authority's performance of its regulatory functions.

In practice, this means that the regulatory framework in each Member State must not only provide that the competent authority enjoys formal and actual independence in the performance of its functions, but also that its governance, powers and access to resources do not directly or indirectly compromise that independence. In this regard, structural safeguards should be enacted to ensure that any government supervision or oversight of a competent authority (e.g. regarding its decision-making procedures, budget, staff, resources or management) does not compromise its functional independence.

1.3. Accountability and transparency of supervisory authorities

Importantly, while competent authorities must be functionally independent, some form of government supervision may be needed to hold a competent authority accountable for the proper performance of its regulatory functions. In this regard, Member States should ensure that the decisions, actions and omissions of their competent authorities are subject to an effective right of appeal to an independent administrative or judicial body:

- Member States shall ensure that each natural or legal person has the right to an effective judicial remedy against a legally binding decision by a supervisory authority concerning them, in accordance with national law.[236]

233. Article 24(9) CS3D.

234. See for example: Article 26(1) of the European Data Governance Regulation (Regulation (EU) 2022/868) which requires that designated national competent authorities are "legally distinct from, and functionally independent of, any data intermediation services provider or recognised data altruism organisation"; Article 57(4) of the Directive on Common Rules for the Internal Market for Electricity (Directive (EU) 2019/944) which requires that designated national regulatory authorities are "legally distinct and functionally independent from other public or private entities" when carrying out the regulatory tasks conferred upon them by that Directive and related legislation; Article 39(4) of the Directive on Common Rules for the Internal Market in Natural Gas (Directive 2009/73/EC) which requires that designated national authorities are "legally distinct and functionally independent from any other public or private entity" when carrying out the regulatory tasks conferred on them under that Directive and related legislation; Article 22 of the Railway Safety Directive (Directive (EU) 2016/798) which requires that designated national investigative bodies are "functionally independent from the national safety authority, from the [European Union Agency for Railways] and from any regulator of railways."

235. CJEU, Case 718/18 European Commission v Federal Republic of Germany, Judgment of 2 September 2021, par. 109.

236. Article 25(7) CS3D.

- Member States shall also ensure that the persons submitting the substantiated concern and having, in accordance with national law, a legitimate interest in the matter, have access to a court or other independent and impartial public body competent to review the procedural and substantive legality of the decisions, acts or failure to act of the supervisory authority (see sub-section 1.7 below).[237] In order to be consistent with their obligations under Article 9(4) of the Aarhus Convention, Member States should also ensure that any such procedure is fair, equitable, timely and not prohibitively expensive and provides adequate and effective remedies, including injunctive relief where appropriate.

In addition to review mechanisms that ensure the accountability of public authorities, the Directive also contains provisions aimed at guaranteeing the transparency of their action. Members States shall ensure that supervisory authorities:

- publish and make accessible online an **annual report** on their activities under this Directive;[238]
- keep records of the **investigations,** in particular information about their nature and result, as well as records of any enforcement action;[239]
- publish any **decision containing penalties** related to the infringements of the national provisions adopted pursuant to this Directive, make it publicly available for at least five years and send it to the European Network of Supervisory Authorities.[240]

Disclosure of information by public authorities is also a powerful tool to incentivise companies to comply with the Directive. To capitalise on these potential benefits, national laws should provide for the publication of any decision finding a case of non-compliance and ordering remedial actions - rather than simply those decisions imposing pecuniary penalties, as currently provided under Article 27(5). Such publication should also not be limited to most serious breaches only, as currently provided in Recital 75. In addition, in order to further enhance transparency and guarantee predictability, Member States should specify the information that annual reports under Article 24(10) should contain, including in particular the number and results of the investigations carried out, and, in case of non-compliance, the corrective action taken and the penalties imposed.

1.4. Adequate resources

According to Recital 75 and Article 25(1) Member States should ensure that the supervisory authorities have the necessary human and financial resources for the effective performance of its tasks and exercise of its powers.[241] Adequate resources are also a precondition to ensuring that competent authorities enjoy functional independence and are able to exercise the powers and take the actions required of them under the CS3D.

While the concept of "adequate resources to carry out the tasks assigned to them" is not further defined in the CS3D, clarity can be drawn from the 2018 CJEU judgement in European Commission v Republic of Poland,[242] where the Court held that, while a requirement of "organisational independence" did not prohibit the relevant agency being supported by government staff or budgets or require the agency to have a separate budget from the relevant government ministry, it was nevertheless:

237. Article 26(6) CS3D.
238. Article 24(10) CS3D.
239. Article 25(8) CS3D.
240. Article 27(5) CS3D.
241. See also Recital (75) CS3D.
242. CJEU, Case C-530/16 European Commission v Republic of Poland, Judgment of 13 June 2018.

> ***imperative that access to such resources be guaranteed*** *[...] under clear rules that may not be amended by the [responsible minister] alone... [and] that* ***independent access for that body to the financial resources that must be granted to it for carrying out its tasks are guaranteed.*** *(paras. 99-100, emphasis added)*

Resourcing must not only be sufficient, but that it must also be stable and secure such that a competent authority's access to resources is not conditional or subject to external influence or intervention. For example, resources must anticipate the minimum number and the volume of checks (including on spot and field audits) depending on the number of companies subject to the competent authority.

Finally, providing adequate resources also requires ensuring the adequate knowledge, experience and technical expertise of the staff.

1.5. Adequate powers

Investigative powers

Article 25(1) requires Member States to ensure supervisory authorities have adequate powers to carry out the tasks assigned to them. In that regard, supervisory authorities shall be "empowered" to require companies to provide information and carry out investigations related to compliance with the obligations set out in Articles 7 to 16.

A supervisory authority "may" initiate an investigation on its own motion or following substantiated concern submitted by third parties communicated to it pursuant to Article 26, where it considers that it has sufficient information indicating a possible breach by a company of the obligations set out in Articles 7 to 16.[243] To avoid an arbitrary application of the CS3D and ensure a level-playing field in terms of enforcement as well as fair competition across the EU, national laws transposing the CS3D should impose an obligation for supervisory authorities to initiate an investigation where it considers that it has sufficient information indicating a possible breach by a company of the obligations under the CS3D, rather than providing a mere option.

In relation to Article 22 specifically, supervising authorities shall be required "at least" (Recital 73) to monitor the adoption and design of climate transition plan and their updates, in accordance with the requirements laid down in Article 22(1).[244] Limiting the supervision only to the adoption and content of transition plans risks making transition plans a purely greenwashing instrument, while also undermining the obligation to put the plan into effect. Therefore, when transposing the CS3D into national laws, Member States should consider clarifying that the powers of the supervisory authority include the implementation of transition plans, not only the adoption and design of those plans.

Supervisory authorities shall also have the power to conduct inspections.[245] This would include spot checks and field audits, and should be carried out with prior warning to the company, except where prior notification hinders the effectiveness of the inspection. In practice, this exception will often apply, as scheduling checks are likely to undermine the ability of supervisory authorities to reliably check company performance and identify and gather evidence of non-compliance. To avoid depletion of evidence, Member States should therefore reverse the logic of Article 25(3), making inspection without prior warning the rule rather than the exception.

The national law providing for the supervisory authority's investigative prerogatives should include, at the very least, the powers to conduct on-site inspection, to obtain the compulsory communication of information and documents (including, if necessary under the national legal framework of the Member State, by allowing the supervisory authority to request from a court an order to communicate such information or document), to hear persons

243. Article 25(2) CS3D.

244. Article 25(1) CS3D.

245. Article 25(3) CS3D, see also Recital (75).

belonging to the company and any other relevant stakeholders or participants in the value chain, and to obtain opinions from experts in all fields relevant to the conduct of an investigation (eg climate, sector-specific expertise, economics, etc.).

Where, as part of its investigation, a supervisory authority wishes to carry out an inspection on the territory of a Member State other than its own, it shall seek assistance from the supervisory authority in that Member State pursuant to Article 28(3). Where a supervisory authority needs to conduct investigations in other non-EU countries, it will need to seek cooperation from the authorities in the third country.

Remedial action

In case of failure to comply with due diligence obligations, supervisory authorities shall have the power to require a company to take remedial action, if such action is possible. Remedial action does not prevent the authority also imposing penalties or the triggering of civil liability in case of damages, in accordance with Articles 27 and 29.[246]

Supervisory authorities shall be empowered to order at least:

- (i) the cessation of infringements of the national provisions adopted pursuant to this Directive by performing an action or ceasing a conduct;
- (ii) the abstention from any repetition of the relevant conduct; and
- (iii) where appropriate, to provide remediation proportionate to the infringement and necessary to bring it to an end.[247]

Supervisory authorities shall also have the power to impose penalties (see next sub-section 1.6) and to adopt interim measures in case of imminent risk of severe and irreparable harm.

The national law transposing the CS3D should provide clearly that the supervisory authority must make use of the powers listed in Article 25(5) when a non-compliant company fails to adopt the remedial action under Article 25(4) or when such action was impossible.

1.6. Penalties

The establishment of a robust and comprehensive national enforcement architecture is a precondition for the effective enforcement of any law. As EU law is mostly enforced at national level, Article 27 obliges Member States to lay down national rules establishing a penalty regime applicable to instances of non-compliance.

While Member States retain significant discretion as to the design of those rules (and their subsequent implementation), the CS3D requires that, at a minimum, they shall include the following penalties: (a) pecuniary penalties (turnover-based fines); (b) a public statement indicating the company responsible and the nature of the infringement if the company fails to comply with the decision imposing a pecuniary penalty within the applicable time limit (naming and shaming).

Member States may introduce other types of penalties that support or reinforce the minimum enforcement mechanisms set forth therein. In order to further dissuade companies from not complying with the CS3D, this list should include other forms of penalties such as the temporary exclusion from public procurement processes and from access to public funding, including tendering procedures, grants and

246. Article 25(4) CS3D.

247. Article 25(5) CS3D.

concessions. This is the approach taken, for example, under Section 22 of the German due diligence law.[248] Similarly, Member States should consider introducing a temporary prohibition from making specific goods available on the market or providing certain services in the event of a serious or recurrent infringement relating to particular goods or services.

The penalties provided for must be effective, proportionate and dissuasive. These concepts are common requirements for sanctions required under EU law and the CJEU has clarified these concepts in numerous cases.[249]

In deciding whether to impose penalties and, if so, in determining their nature and appropriate level, due account shall be taken of:

(a) the nature, gravity and duration of the infringement, and the severity of the impacts resulting from that infringement;

(b) any investments made and any targeted support provided pursuant to Articles 10 and 11;

(c) any collaboration with other entities to address the impacts concerned;

(d) where relevant, the extent to which prioritisation decisions were made in accordance with Article 9;

(e) any relevant previous infringements by the company of national provisions adopted pursuant to this Directive found by a final decision;

(f) the extent to which the company carried out any remedial action with regard to the concerned subject-matter;

(g) the financial benefits gained from or losses avoided by the company due to the infringement;

(h) any other aggravating or mitigating factors applicable to the circumstances of the case concerned.

The maximum pecuniary penalty shall be no less than 5% of the net worldwide turnover of the company in the financial year preceding the fining decision. Member States shall ensure that, with regard to companies referred to in Article 2(1), point (b) and Article 2(2), point (b), pecuniary penalties are calculated on the basis of the consolidated turnover reported by the ultimate parent company.

1.7. Substantiated concerns

Article 26 requires Member States to ensure that natural and legal persons are entitled to submit substantiated concerns through easily accessible channels to any supervisory authority when they have reasons to believe, on the basis of objective circumstances, that a company is failing to comply with the national provisions adopted pursuant to this Directive.

Supervisory authorities must assess substantiated concerns in a timely manner and, where appropriate, exercise their powers as outlined in Article 25.[250] They must also inform "as soon as possible" the person of the outcome of the assessment and provide a rationale for it. The supervisory authority must also inform the individuals who submitted the substantiated concern and have a legitimate interest in the matter of their decision to accept or refuse any request for action, as well as a description of the further steps and measures, and practical information on access to administrative and judicial review procedures.[251] Such vague time references for the

248. Act on Corporate Due Diligence Obligations for the Prevention of Human Rights Violations in Supply Chains (Gesetz über die unternehmerischen Sorgfaltspflichten zur Vermeidung von Menschenrechtsverletzungen in Lieferketten), Section 22. THe Federal Ministry of Labour and Social Affairs makes available an English translation of the law.

249. See for example: CJEU, Case C-418/11 Texdata Software Judgment of 26 September 2013, para. 50; CJEU, Case C-382/09 Stils Met, Judgment of 7 October 2010, para. 44; CJEU Case C-40/04 Yonemoto, Judgment of 8 September 2005, para. 59; CJEU, Case C-382/92 Commission v United Kingdom, Judgment of 8 June 1994, para. 55.

250. Article 26(4) CS3D.

251. Article 26(5) CS3D.

handling substantiated concerns and communicating their outcomes to submitters may lead to unduly long timeframes. National law should provide for a specific period of time within which the supervisory authority must assess the substantiated concerns and inform the submitter of the result of the assessment and its follow-up action pursuant to Article 26(4) and (5) (as opposed to a mere reference in national law to an "appropriate period of time" or "as soon as possible").

As noted above, persons submitting a substantiated concern must have access to administrative or judicial review of the legality of the decisions, acts or failure to act of the supervisory authority. National law should confirm that persons having submitted a substantiated concern have a legitimate interest in its appropriate examination and follow-up, and should therefore be provided with confirmation of their submission and information about how the substantiated concerns will be handled as well as access to a court or other impartial public body reviewing the decisions of the supervisory authority under Articles 26(5) and (6).

National law should also provide that persons submitting substantiated concerns shall have access to Court pursuant to Article 26(6), should the supervisory authority fail to assess the substantiated concerns within a specific period of time, which should be considered as a "failure to act" under that provision.

Finally, the supervisory authorities should provide clear and publicly available (through Internet) guidance on the procedures of submitting substantiated concerns, including information about the format of the submission and whom the substantiated concerns should be addressed to (including all relevant contact details and email addresses). This information should be publicly available (in different languages) and easy to find.

1.8. Commentary

To ensure that the Directive effectively prevents environmental impacts and promotes sustainable business practices, supervisory authorities must adopt a broad and proactive enforcement approach. This necessitates, as a first step, that all obligations set forth in the Directive are subjected to rigorous enforcement. Furthermore, it is imperative to ensure the effectiveness of investigations by clearly defining the investigative powers of supervisory authorities.

The procedure for substantiated concerns represents a crucial instrument for enabling rightsholders and other stakeholders to oversee companies' compliance with the CS3D and to voice their concerns. However, for it to be fully effective and not merely a mere formality, it must be coupled with robust procedural guarantees and obligations. These include the requirement for supervisory authorities to be bound by clearly defined timeframes and to automatically investigate cases brought to them where there is sufficient information indicating a possible breach of due diligence obligations. It is also imperative that supervisory authorities can be held accountable for their decisions, actions, and omissions, notably by ensuring that all legal or natural persons who have submitted a substantiated concern are granted access to a court competent to review the supervisory authorities' decisions. Transparency and disclosure about the activities of supervisory authorities is essential in this regard, which can be achieved through the publication of all findings of non-compliance and orders for remedial action (providing additional incentives for companies to comply).

Ultimately, the effectiveness of enforcement is contingent upon the approach adopted by the supervisory authorities. A passive approach to monitoring the implementation of the Directive by companies is insufficient. It is important that supervisory authorities do not rely on their monitoring power solely on an ad hoc, reactive basis when they obtain information relating to a potential breach of the Directive. Instead, the supervisory authority should make use of its monitoring prerogatives to ensure that, with time, it covers a significant part of the companies falling under its jurisdiction, with a view to closing any potential gaps in compliance with the CS3D that would not be otherwise reported or brought to the attention of the supervisory authority. To this end, the supervisory authority should establish annual plans selecting the companies to be investigated. These plans should be established following a risk-based approach. Risk criteria shall be identified based on an analysis of risks of non-compliance with the Directive, prioritising companies for investigation on the basis of factors such as the prevalence and severity of impacts in the company's sector and past non-compliances.

Recommendations for transposition

To ensure that the Directive fulfils its objective of preventing environmental degradation and contributing to more sustainable business practices, Member States should consider the following when transposing the CS3D into national law:

- **Recommendation n°10: Ensuring that all obligations under the Directive are subject to some type of enforcement** by empowering supervisory authorities to require information and carry out investigations under Article 25(1) regarding the putting into effect of transition plans. While companies do not have control over all aspects determining the achievement of the targets within their plan, this is already acknowledged by the formulation of the duty to implement transition plans as a "best efforts" obligation. Excluding the duty to put transition plans into effect from any enforcement would undermine the purpose of the provision and the added value of the Directive relative to reporting frameworks.

- **Recommendation n°11: Maximising the effectiveness of substantiated concerns** by requiring supervisory authorities to provide an answer within clearly defined timelines and providing all legal or natural persons having submitted a concern access to a court competent to review the supervisory authorities' decisions by establishing that all submitters have a legitimate interest under Article 26(6).

- **Recommendation n°12: Guaranteeing the effectiveness of investigations** by specifying the investigatory powers of supervisory authorities - including at least the powers to conduct on-site inspections, to obtain the compulsory communication of information and documents, to hear persons related to the case, and to obtain opinions from experts relevant to the investigation. Where a substantiated concern provides a supervisory authority with sufficient information indicating a possible non-compliance, the authority should be required to open an investigation (rather than retaining discretion). Member States should also consider making inspections without prior warning the rule, rather than the exception.

- **Recommendation n°13: Incentivising companies to comply by publishing all findings of non-compliance and orders for remedial action** (Article 25(4)), in addition to imposed sanctions (Article 27(5)). Moreover, supervisory authorities should be required (rather than allowed) to impose sanctions whenever remedial action is not taken. To empower supervisory authorities with a smart toolbox of measures, penalties beyond pecuniary penalties should be available to them, in particular the temporary exclusion of sanctioned companies from public procurement processes and access to public funding, as well as - for severe or repeated non-compliances - the prohibition of trading goods or services on the market.

- **Recommendation n°14: Requiring supervisory authorities to establish annual monitoring and investigation plans,** prioritising companies for investigation on the basis of factors such as the prevalence and severity of impacts in the company's sector and past non-compliances. Plans should also monitor the implementation of obligations not directly covered by the provisions on civil liability.

2. Civil liability regime and access to justice measures

2.1. General description

The Directive provides for the civil liability of companies that have failed to comply with their due diligence obligations. Article 29(1) provides remedy to victims who have incurred damage resulting from such non-compliance, by allowing them to claim compensation.

Victims of a company's breach of its due diligence obligation can be both legal and natural persons, whether or not they are established in, or have the nationality of, a Member State.

They can claim compensation if three conditions are cumulatively met:

(i) A failure by a company subject to the Directive to comply with its due diligence obligations under Articles 10 and 11 to take appropriate measures to prevent (or, where prevention is impossible or immediately impossible, adequately mitigate) a potential adverse impact or to bring to an end (or, where this is immediately impossible, to minimise the extent of) an actual adverse impact, if that adverse impact has been, or should have been, identified and assessed pursuant to Article 8 and prioritised pursuant to Article 9. Several remarks should be made here:

- Although only Articles 10 and 11 are expressly mentioned in Article 29, non-compliance will include the situation where a company **failed to identify and assess and/or prioritise** an adverse impact pursuant to Articles 8 and 9, with the consequence that it omitted to prevent, mitigate, bring to an end or minimise the extent of this adverse impact.[252]

- This failure to comply with due diligence obligations need not be intentional to trigger the company's civil liability and can also result from **negligence** by the company.

- Since the due diligence obligations set out in the Directive are **obligations of means** only, companies may be held liable only if they fail to take the "appropriate measures" envisaged in the due diligence obligations. This is made clear in Recital 19. This means that there will not necessarily be liability if the result sought by the due diligence is not achieved (for example, a potential adverse impact has become actual or an actual adverse impact was not brought to an end or minimised in its extent), unless it can be shown that this is due to the company omitting to take the appropriate measures required from Articles 8 to 11.

- The civil liability regime under the Directive only concerns the non-compliance with due diligence obligations. According to Articles 1(1)(b) and 29(1), it does not extend to the failure by a company to adopt and put into effect a **transition plan for climate change** mitigation pursuant to Article 22. However, transition plans remain within the scope of the administrative enforcement of the Directive by supervisory authorities and Article 27 on penalties, such that companies may nonetheless be administratively or criminally liable for not complying with their obligations under Article 22.

(ii) A damage incurred by the victim: As a result of the company's failure to comply with its due diligence obligations, a damage was caused to the natural or legal person's "legal interests that are protected under national law". The reference to "legal interests that are protected under national law" refers to the categories of damages that can be compensated through civil liability, which typology depends on the national regimes of civil liability of each Member State. Recital 79 indeed specifies that "damage caused to a person's protected legal interests should be understood in accordance with national law, for example death, physical or psychological injury, deprivation of personal liberty, loss of human dignity or damage to a person's property."

252. See for example Recital (80) CS3D.

(iii) A causal link between the lack of compliance and the damage: The damage incurred by the victim must be the result of the failure by the company to comply with its due diligence obligations. Two remarks should be made here:

- This causal link means that the following **chain of cause and effects** must be established to trigger the civil liability of a company: **(1)** a breach of one or more due diligence obligations (a failure to take appropriate measures to prevent or mitigate a potential adverse impact of to bring to an end, or minimise the extent of, an actual adverse impact) effectively leads to **(2)** the occurrence and/or continuation of an (unmitigated or unminimised) actual adverse impact on the environment resulting from the breach of a prohibition or obligation listed in the Annex of the Directive, which in turn directly results in **(3)** the damage claimed by the victim.

- The damage must be the **direct** consequence of the adverse impact that was not prevented, mitigated, brought to an end or which extent was not minimised. The civil liability regime provided by the Directive does not encompass the compensation of damages resulting indirectly from the adverse impact. This is what Article 29(1)(a) provides when it states the requirement that "the right, prohibition or obligation listed in the Annex of this Directive [the breach of which is resulting in the adverse impact that should have been addressed through due diligence] is aimed at protecting the [victim]". Recital 79 clarifies this as meaning that "derivative damage (caused indirectly to other persons who are not the victims of adverse impacts and who are not protected by the rights, prohibitions or obligations listed in the Annex to this Directive) is not covered" by the civil liability regime established by Article 29.

The Directive **excludes certain types of defences,** on which a company cannot rely to escape civil liability:

- Companies who have relied on industry or multi-stakeholder initiatives or independent third-party verification (pursuant to Articles 10(2)(a) and (5), 10(3)(b) and (6) and 20(4)-(5)) or contractual clauses (pursuant to Articles 10(2)(b) and (4), 10(3)(c) and (5), and 18) to conduct their due diligence can nevertheless be held liable if these measures are not considered appropriate to address the adverse impact.[253] This aims to avoid any attempt by companies to "delegate" their responsibilities under the Directive to other actors of the value chain or third parties through contractual practices.

- The absence of submission of a notification or complaint by a victim to the company pursuant to the procedure under Article 14 is not an obstacle to the admissibility of a civil liability claim against that company.[254]

- Decisions of supervisory authorities regarding a company's compliance with its due diligence obligations are not binding on a court having to adjudicate a civil liability claim.255 This means that a supervisory authority's decision that a company has not breached its due diligence obligations will not be an obstacle to a court finding that this company has not complied with these obligations and is liable to compensate the victim.

- Similarly, a company taking remedial actions, including remediation, pursuant to a decision of a supervisory authority does not preclude this company from being held civilly liable to compensate the damage incurred by a victim of a breach of due diligence obligations.[256]

Conversely, Article 29(1) last sentence provides an exclusion of the civil liability of a non-compliant company **when the damage was caused exclusively by a business partner in its chain of activities.** This will be the case where, despite a company's violation of its due diligence obligations, its activities

253. Article 29(4) CS3D.
254. Article 14(7) CS3D.
255. Article 25(9) CS3D.
256. Article 25(4) CS3D.

and those of its subsidiaries did not (i) on their own, result in the adverse impact that led to damage, (ii) in combination with the activities of a business partner, cause the adverse impact, and (iii) cause, facilitate or incentivise a business partner to cause the adverse impact. According to Recital 79, this is the situation where, within the meaning of the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, an enterprise does not 'cause' or 'contribute to' an adverse impact that is only 'directly linked' to the enterprise's operations, products or services through a 'business relationship'.

If the conditions above are met, a company can be held liable to **fully compensate the damage** incurred by the victim. Article 29(2) excludes overcompensation, for example by means of punitive damages.

The Directive envisages several situations where **more than one person may be civilly liable:**

- The fact that a company subject to the Directive is held liable for damages under Article 29 does not as such exclude the potential civil liability of its subsidiaries or of any direct and indirect business partners in its chain of activities, if the latter have committed or participated in a wrongdoing (whether or not it constitutes a breach of the due diligence obligations under the Directive) that led to the victim incurring those damages.[257]

- In the situation where the damage was caused jointly by the company and its subsidiaries or business partners, they are liable jointly and severally.[258]

- Where the EU-established subsidiary of an ultimate holding parent company fulfils the due diligence obligations on behalf of the latter pursuant to Article 2(3), the ultimate parent company remains jointly liable with this subsidiary for a failure to comply with its obligations.

- Where a parent company fulfils the due diligence obligations on behalf of a subsidiary pursuant to Article 6, this is without prejudice to this subsidiary's civil liability under the Directive. The subsidiary can be held liable for damage that occurred, irrespective of whether the due diligence obligations were carried out by the subsidiary itself or by the parent company on its behalf.[259]

Article 29(3) sets out the **minimum procedural guarantees** for civil liability actions which Member States must transpose in their national laws. In a nutshell, this includes:

- **limitation period** of at least five years;

- the guarantee that **costs of proceedings** are not prohibitively expensive;

- the possibility for claimants to seek **injunctive measures,** definitive or provisional, to cease infringements of the due diligence obligations, including through summary proceedings;

- the ability for a victim to **authorise a third party** (a trade union, a non-governmental organisation or a human rights' institution) based in a Member State to bring an action for damages on their behalf;

- the possibility to seek an order compelling a company to **disclose evidence** in its control, including confidential information, upon a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of a claim for damages.

257. Article 29(5) CS3D.

258. Article 29(5) CS3D.

259. Article 6 and Recital (22) CS3D.

Finally, Article 29(7) imposes Member States to ensure that the provisions of national law transposing its civil liability regime are of **overriding mandatory application** in cases where the law applicable to claims to that effect is not the national law of a Member State, as could be the case in accordance with Regulation (EC) No 864/2007 of 11 July 2007 (the 'Rome 2' Regulation) when the damage occurs in a third country.[260]

2.2. Commentary

Article 29 is an essential step toward empowering victims of environmental damages by allowing them to obtain compensation for the damages caused as a result of a company's violation of its due diligence obligations under the Directive.

While Article 29 presents significant opportunities to bring civil claims to obtain such compensation, a restricted transposition of this provision could entail several limitations to the remedial of the consequences of environmental damages, including by hindering the efforts of environmental defenders and environmental non-governmental organisations ("**ENGOs**") in protecting the environment and affected communities. **Six potential limitations – and strategies for addressing them during transposition – have been identified with regard to the following areas: the coverage of pure environmental damages; the liability of companies for the actions of their business partners; access to justice for victims located outside the EU; the burden of proof; the types of remedies available; and the liability of non-EU companies**.

First of all, the Directive envisages civil liability claims not in respect of adverse environmental impacts themselves, but only regarding the damage incurred by natural or legal persons that result from such impacts. This means that a harm caused to the environment that qualifies as an adverse environmental impact under the Directive (which occurrence or continuation has been enabled by a company's breach of its due diligence obligations), but does not lead to a damage for a natural or legal person within the meaning of Article 29, will not give rise to civil liability. This is due to the very nature of civil liability, which aims at compensating the harms incurred by persons, as opposed to harms caused to the environment but to no one specifically. In practice, this means that adverse environmental impacts covered by the Directive could effectively remain unrepaired.

One way that national law can avoid such a gap is to grant the possibility for non-governmental organisations, whose statutory object is to defend the collective interest of protecting the environment, to bring civil liability claims for damages caused to that collective interest. This will be possible provided that:

- the requirements in Article 29(1)(a) and (b) of the Directive that "the right, prohibition or obligation listed in the Annex to this Directive is aimed at protecting the natural or legal person" and that the damage is caused "to the natural or legal person's legal interests that are protected under national law" are not transposed restrictively in a way that excludes ENGOs' status of victims of damages caused to the collective interest which their statutory object is to protect; and

- ENGOs are entitled to bring civil liability claims not only in a situation where they have been authorised to act on behalf of a victim under Article 29(3)(d), but also in order to obtain compensation for damage which they have themselves incurred due to their statutory object to defend a collective environmental interest. The possibility for non-governmental organisations and trade unions to bring actions for damages to the collective interests that they represent, already exists in national civil liability regimes.

Second, a traditional hurdle that victims face when seeking compensation for their damage resulting from environmental harms caused by business activities is to find a responsible entity that is both solvent and subject to the relevant laws and jurisdictions that can provide for compensation. This is due to the manner

260. See also Recital (90) CS3D.

in which a business has structured its corporate group (making use of the concept of 'corporate veil') or its value chains, which can effectively result in harmful activities being immune to victims' legitimate claims for damages.

As explained above, the civil liability regime in the Directive partially lifts this obstacle in two ways. First, parent companies can be held liable for damages resulting from breaches of their due diligence obligations with respect to adverse environmental impacts arising from the operations of their subsidiaries only. Secondly, Article 29(4) does not allow companies to delegate their responsibility to their direct or indirect business partners in their value chains through contractual arrangements (if they are not considered 'appropriate measures' to address the adverse impact).

Nevertheless, important limitations remain. By excluding a company's civil liability for damages caused exclusively by a business partner, Article 29(1) leaves a wide gap for victims' damages resulting from a breach of the due diligence obligations of companies subject to the Directive, with respect to the adverse environmental impacts arising from their value chains. These companies, only by virtue of the way in which they have structured their value chains, will remain shielded from claims by victims of the harmful consequences linked with their business.

Such a shortfall could however be redressed. While Member States may not wish to introduce a vicarious liability regime in their national law (that would hold companies' liable for damages resulting from adverse impacts exclusively caused by the activities of their business partners), they can nevertheless provide for the possibility for a victim to seek compensation for a loss of chance. This would make a company liable to compensate a percentage only of the damage resulting from the adverse impact caused by a business partner, calculated on the basis of the probabilities that this damage could have been avoided had the company properly performed its due diligence obligations.

Third, Article 29(3)(d) allows ENGOs to act on behalf of victims, enhancing their ability to represent affected communities, especially those without the means to pursue legal action independently. However, the possibility for a victim to authorise non-governmental organisations to act on their behalf under Article 29(3)(d) is limited to those "based in a Member State". Such a limitation constitutes an unwarranted discrimination, de facto excluding many non-governmental organisations representing members of local communities located outside the EU affected by adverse impacts. Many victims outside the EU have no reasonable means to access on their own the justice systems of an EU Member State to obtain the compensation to which they are entitled under Article 29. In addition, they are often not represented by organisations outside their third country of residence. Consequently, such a limitation should be removed so that it does not result in denial of justice for many victims which the Directive aims to protect.

Fourth, the effectiveness of the civil liability mechanism provided for in Article 29 will depend significantly in practice on the allocation of the burden of proof between the company liable and the victim. The burden of proving a breach of due diligence obligations is one of the main obstacles to victims' access to justice. Evidence of a company's (non-)compliance with its due diligence obligations is mainly based on internal documents that make it possible to assess the existence and appropriateness of the measures internally adopted by the company to identify and address adverse impacts. The unavailability of such information to victims outside the company means that the latter are deprived of their right to obtain compensation for their damage.

This obstacle may not be entirely lifted by the possibility given to victims under Article 29(3)(e) to seek an order for disclosure of evidence. Obtaining such an order would require additional court proceedings (and therefore costs) before being able to initiate a civil liability action. This may be prohibitive for many victims, especially those established outside

the EU, who may not have the necessary resources. Moreover, victims may not necessarily know exactly the type of evidence needed and at the disposal of the company, and therefore be able to 'draw' a list of evidence of which they seek the disclosure.

Fifth, as explained above, the civil liability regime under the Directive allows full compensation for the damage, as well as the possibility to obtain against the company definitive injunctive measures to cease infringements of its obligations. When the damage results from the breach of the obligation to bring an adverse environmental impact to an end, this should include injunctions to comply with Articles 11, 12(1) and 3(2)(t), by providing remediation through the restoration of the victim and the environment to a situation equivalent to the situation they would have been in had the adverse impact not occurred. Restoring the environment can take various forms, including the direct restoration of the environment, or the provision of funds to other public or private actors specialised in environmental remediation that are better placed to restore the environment, or the reimbursement of the costs incurred by public authorities for any necessary remedial measures.

However, by limiting injunctive measures only to measures to cease infringements of a company's obligations, Article 29(3)(c) does not cover injunctions to provide remediation (including the restoration of the environment) when the adverse impact is caused only by the company's business partner. This is because in such a situation Article 12 only provides for voluntary remediation. Again, this excludes the proper redress of harms resulting from breaches of a company's due diligence obligations with respect to the adverse environmental impacts arising from its value chains. This will notably occur when a company fails to take appropriate measures to prevent a potential adverse environmental impact arising from the operations of its business partner, with the consequence that this impact become actual: even though a harm to the environment has occurred and causes a damage to a person, the company Article 29(3)(c) does not foresee injunctions to restore the environment.

Sixth, in situations where the company that may be held liable under Article 29 does not have its statutory seat, central administration or principal place of business in a Member States, the applicable EU rules of conflict of jurisdictions will not establish the jurisdiction of the courts of a Member State. This is because the criteria of domiciliation in a Member State under Article 4(1) of Regulation (EU) 1215/2012 (the "Brussels 1" Regulation) will not be met. In practice, this means that the civil liability regime envisaged by Article 29 will not apply at all. This would exclude most companies subject to the Directive under Article 2(2) from the scope of civil liability and result in a two-speed system of enforcement advantaging companies from third countries over EU companies. Such a loophole can however be avoided by adopting a specific conflict of jurisdictions rule at national level, which will apply by virtue of Article 5(1) of the Brussels 1 Regulation.

Fortunately all the limitations identified above can be corrected by Member States when transposing the Directive. Articles 4(2) and 29(6) and Recitals 31 and 88 expressly allow Member States to adopt more ambitious civil liability rules, providing for liability in situations not covered by or providing stricter liability than the Directive. A stricter liability regime should be understood as a civil liability regime that provides for liability also in cases where the application of the liability rules under the Directive would not result in the liability of the company.

An enhanced civil liability regime would play an important role as an incentive mechanism in ensuring strong and widespread compliance with the Directive by companies subjected to it. At the same time, it would enable as broadly as possible victims to obtain compensation of the damages they have incurred, thereby serving a basic requirement of justice.

Recommendations for transposition

In order to fully achieve these objectives, Member States should consider the following when transposing the CS3D into national law:

- **Recommendation n°15: Explicitly recognising that human rights and environmental non-governmental organisations or trade unions can bring claims for damages caused to collective interests, the defence of which they have as their object,** and that such claims are not limited to the situation where these organisation or unions they have been authorised to act on behalf of a victim under Article 29(3)(d). Such a possibility already exists in national civil liability regimes.
- **Recommendation n°16: Providing for the possibility for a victim to seek compensation for a loss of chance** to ensure a company's civil liability for damages caused exclusively by a business partner is not excluded altogether. This would make a company liable to compensate a percentage only of the damage resulting from the adverse impact caused by a business partner, calculated on the basis of the probabilities that this damage could have been avoided had the company properly performed its due diligence obligations. It is also recommended to extend the joint and severable liability provided for in Article 29(5) to situations where a company has not "caused" the damage, but is liable for a loss of chance to avoid the damage exclusively caused by a business partner.
- **Recommendation n°17: Ensuring that a victim can authorise non-governmental organisations representing members of local communities located outside of the EU** to act on their behalf and that such possibility under Article 29(3)(d) is not subject to more stringent conditions.
- **Recommendation n°18: Providing for a reversal of the burden of proof in favour of the victim.** This possibility is expressly provided for by Recital 81 of the Directive. This reversal of the burden of proof would pertain to the existence of a breach of the due diligence obligations and could be based on a prima facie system whereby: (i) the claimant would have to establish that the information contained in the report published by the company pursuant to Article 16 is not sufficient to demonstrate that the company has properly fulfilled its due diligence obligations; (ii) the company would then have the burden of proving that it had fulfilled its obligations.
- **Recommendation n°19: Providing for injunctive measures to restore the environment** including in situations where the adverse environmental impact is caused only by the company's business partner.
- **Recommendation n°20: Adopting a conflict of jurisdiction rule,** which will apply by virtue of Article 5(1) of the Brussels 1 Regulation, **granting national courts jurisdiction over civil liability claims against non-EU companies under the Directive.** This rule should give jurisdiction to a Member State's courts when one of the following criteria is met: the company has a branch in the Member State; or, if the company does not have a branch in the EU, the company generated in the Member State the highest net turnover in the EU in the financial year preceding the last financial year; or the damage or the event giving rise to it occurred in the Member State. These criteria are in line with both the rules of geographic enforcement set out in the Directive (see Article 2(7)) and the conflict of jurisdictions rules traditionally applicable to non-contractual civil liability (see Article 7(2) of the Brussels 1 Regulation).

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