Shift

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FAQs: on the EU Corporate Sustainability Due Diligence Directive (CS3D)

Rachel Davis (Co-Founder), and Ruben Zandvliet (Deputy Director for Standards), answer companies' frequently asked questions about the new ***Corporate Sustainability Due Diligence Directive.***

Introduction

Since the approval of the Corporate Sustainability Due Diligence Directive (CS3D) by senior officials from EU Member States in Council on 15 March, we've received numerous questions from companies about where it's landed and what it means for businesses' responsibility to respect human rights. With the legislation now weeks away from the finish line, we thought it was a good time to help clear up some of the confusion we've been hearing.

At Shift, as a non-profit organization, we've been committed to advancing business respect for human rights from the get-go – first in our role helping to draft the UN Guiding Principles on Business and Human Rights (UNGPs), and in the decade since their adoption, embedding them into business practice with companies, financial institutions, standard-setters and civil society organizations around the world.

This is the first in a series of free, publicly available resources where we'll be unpacking a few of the common questions – and misconceptions – about the Directive and its relationship with the international due diligence standards, just as we have done for the Corporate Sustainability Reporting Directive. Whether these are your first steps as a company on the sustainability due diligence road, or you're well on your way, we hope these resources will help you take the CS3D confidently in your stride.

1. What is Human Rights Due Diligence and where does it come from?

Human Rights Due Diligence (or HRDD) is the process of identifying, taking action on, tracking and accounting for a company's actual and potential negative impacts on people. It's been around for more than a decade and has been successfully implemented by an increasing number of companies of all different sizes, sectors and contexts. HRDD was first set out in the authoritative international due diligence standards – the UNGPs and the OECD Guidelines on Multinational Enterprises – in 2011. These standards were themselves developed in consultation with business, civil society and government stakeholders over several years. The OECD Guidelines apply the same core concepts to environmental impacts (among other topics) as well.

The Corporate Sustainability Due Diligence Directive introduces a new legal duty for large companies that applies to both human rights and environmental impacts and is grounded in these international standards. The CS3D will therefore help level the playing field for

companies that have already invested in due diligence aligned with those standards. It should also help focus effort on what works (and what doesn't) in carrying out meaningful due diligence based on the practical experience gained by business and civil over the last decade in implementing the international standards.

2. Is the CS3D some new kind of 'European due diligence'?

While we now have a European due diligence directive, this is not 'European' due diligence – it is sustainability due diligence grounded in the existing international standards, as explained above.

The Directive will cover around 5,500 of the most influential European companies who will be expected to take meaningful actions on the most severe sustainability risks in their own operations and value chains. It will also apply to large non-EU companies that are active in the EU.

Implementing the international due diligence standards can also help companies meet other regulatory developments in the EU and beyond – most recently on corporate sustainability reporting, but also on issue-specific due diligence including forced labor – helping create the opportunity for convergence of expectations.

3. Is the CS3D aligned with the international due diligence standards on business and human rights?

The CS3D is substantially aligned with the risk-based approach in the international standards in several key ways:

A) PRIORITIZATION

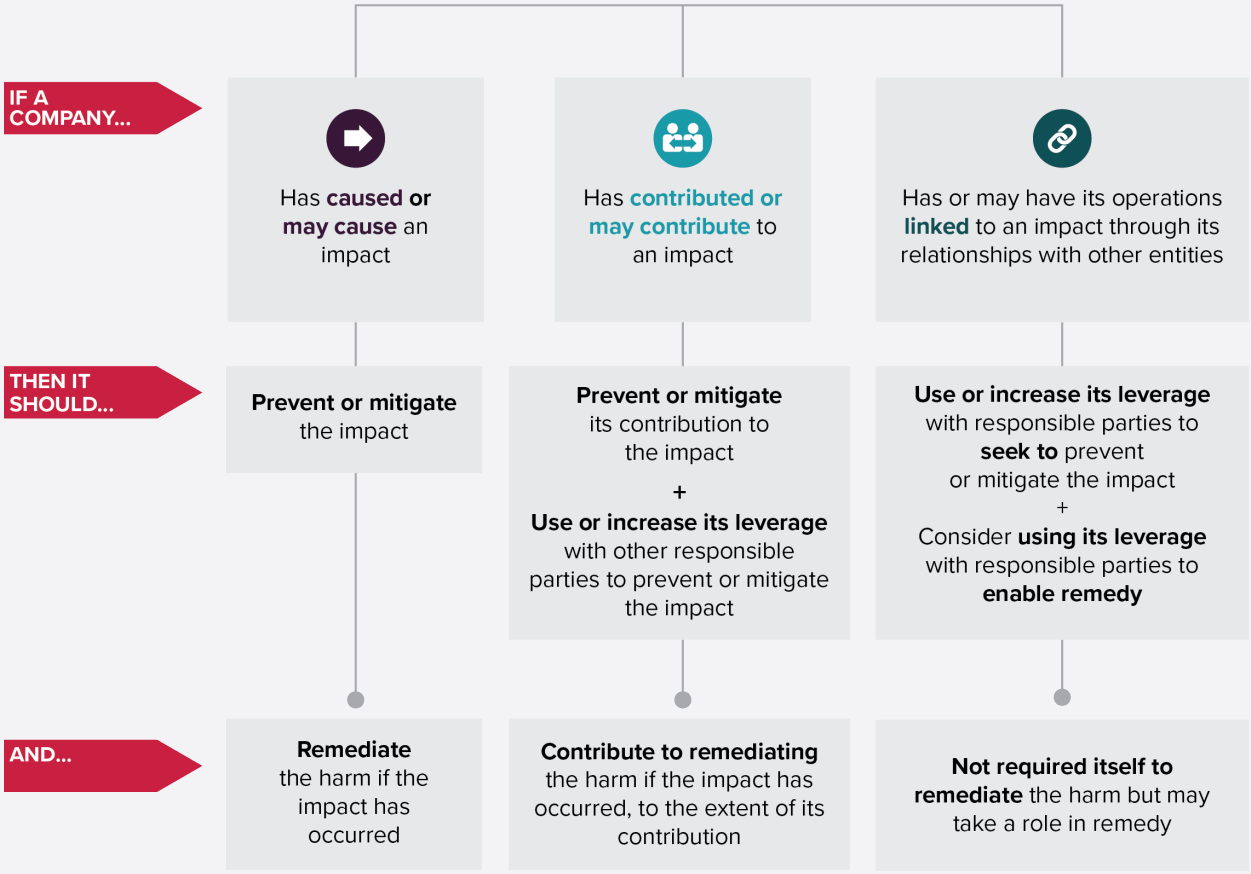
Companies are not expected to control all sustainability risks in their value chains under the Directive. In fact, the CS3D ensures that companies can make due diligence manageable as well as meaningful by focusing attention and resources on the most severe risks to people and the environment, distinct from whether those risks are also material to the company. Focusing on the most severe risks to people, not just what is easiest or most proximate for the company to address, is much more likely to make due diligence efforts impactful for workers and local communities in companies' operations and value chains.

However, the Directive is more limited in its application to downstream value chain relationships than the international standards – more on this in Q8 below.

B) INVOLVEMENT WITH NEGATIVE IMPACTS

The Directive appropriately differentiates between how a company is involved with an impact and what action is expected of it in response. It does this by asking whether there is some kind of causal connection between an action or omission of the company and the impact, or alternatively, whether the impact is caused solely by a business partner in the company's value chain. While using different language than the international due diligence standards, it essentially follows the same framework – sometimes known as the 'involvement framework' or the 'cause/contribution/linkage' framework. This framework in the international standards has

consistently helped bring stakeholders around the table for constructive conversations about what is reasonable in any given situation based on how a company is connected to an impact.



C) LOOKING AT A COMPANY'S OWN CONDUCT AND STRATEGY

For the first time, companies covered by the CS3D will be required to look at their own business decisions and strategies – especially their purchasing practices – and any unintended effects these may have on their business partners. This is vital to ensuring companies don't just outsource their new legal responsibilities to smaller or less-resourced business partners through contractual clauses and then police compliance with them. It's a company's own responsibility to address any tensions between its sustainability expectations of its partners and the business demands it places on them.

D) TAKING MEASURES THAT ADDRESS IMPACTS

Under the CS3D, companies' prevention, mitigation and remediation measures should be appropriate to the nature and severity of the impact a company is trying to address. The Directive requires companies to consider a range of measures, including collaborating with others, to effectively address impacts. This is not about simply blanketing first tier business relationships with questionnaires and audits!

In particular, companies will have to do more to help their SME business partners. This includes adopting fair contractual terms and providing capacity-building support – and potentially financial support – on sustainability due diligence. Requiring covered companies to look at the

effects of their own purchasing practices is one of the key ways in which the Directive should help positively address the pressures currently experienced by SMEs in the value chains of large European companies.

4. What is the role of administrative supervision in the enforcement of the CS3D?

At the moment, companies are expected under the international standards to assess the quality of their due diligence efforts. But it's not yet common for companies to routinely assess whether their efforts are actually producing better outcomes for people or having unfair effects on smallholders in their supply chain, for example. With the introduction of the Directive, these will be the questions companies should ask themselves – and that national administrative supervision can help encourage them to ask.

Enforcement through administrative supervision, as an accompaniment to civil liability, offers important opportunities to help improve company practice over time. The enforcement approach in the Directive is therefore not just about penalizing companies where they get things wrong and (rightly) requiring them to provide remedy in those cases, but also about incentivizing better quality due diligence over time. It encourages national authorities to take such an approach by focusing on the 'appropriateness' or effectiveness of the company's efforts to tackle specific impacts.

5. What does civil liability in the CS3D apply to? What does this mean for companies?

Civil liability under the Directive will depend on the existence of some kind of causal link between a company's actions or omissions and a harm. This concept already exists in many national legal systems, and is often a relatively high bar to meet in practice. In that sense, the CS3D helps provide legal certainty about when companies may be held liable for impacts in their value chains. The Directive also provides much-needed clarification on how Member States should meet their existing human rights duties to ensure access to justice for individuals and groups who are harmed, intentionally or negligently, by business conduct.

6. What about Member States – what are they required to do?

The CS3D requires governments to adopt measures to help companies implement their responsibilities. The EU and its Member States will need to play an active role in supporting companies through what the Directive calls 'accompanying policy measures.' These include guidance, help-desks and support for credible industry and multistakeholder initiatives. It also provides that Member States may provide financial support for SMEs and support stakeholders' ability to exercise their rights under the Directive.

At the same time, there are other important tools that governments should be using to both require and reward better quality sustainability due diligence from companies. These include all forms of state financing to business, trade promotion support and public procurement. The international standards expects that states will work on greater policy coherence across all these areas and the CS3D will bring new impetus to these expectations.

7. As a company, what can I do now?

A) FAMILIARIZE YOURSELF WITH EXISTING GUIDANCE

Companies will have plenty of time to get their houses in order for implementation of the CS3D if they start work now. Within three years from the Directive's entry into force, the first group of large companies will have to implement it. Within another two years, the remaining companies will be required to do so. As noted above, the Directive also provides that companies will get authoritative implementation guidance from the European Commission. But because the Directive is based on the existing international due diligence standards, the good news is that companies don't need to wait for this – there is plenty of publicly available guidance already, including examples of due diligence in practice across a broad range of sectors and issues. For official guidance on implementing the international standards, companies can look to existing publications from the Office of the UN High Commissioner for Human Rights on the UNGPs and from the OECD on the OECD Guidelines.

B) INVEST IN INTERNAL SUSTAINABILITY CAPACITY

So, companies can use existing resources to begin understanding what they need to do under the CS3D. And, with the growth in EU and national legal requirements that are grounded in the international due diligence standards, this is an excellent time to seek out the existing expertise of internal human rights and sustainability colleagues where they have already been working to implement the international standards and to invest in further in-house capacity to set companies up for the years to come.

C) ACTIVELY PARTICIPATE IN CREDIBLE INITIATIVES

Companies are not expected to figure this out all by themselves. Working with credible industry and multistakeholder initiatives to support aspects of their due diligence process will be particularly helpful for companies that are just beginning the process of identifying salient risks in their sector, or want access to tools or guidance, or to a shared grievance mechanism. For companies that are already taking action on impacts, such initiatives may help them to coordinate with others around the use of leverage to drive better outcomes – although they can never replace an individual company's responsibility for due diligence, as the Directive also makes clear.

8. What about impacts in downstream business relationships – are these still covered by legislation?

For now, the CS3D's requirements are very limited in how they apply to impacts arising from companies' activities downstream – for example, they exclude impacts connected to the use, sale and disposal of products and services. However, companies will still be expected to be transparent about how they are managing severe impacts in these parts of their value chain in line with the international due diligence standards under existing EU sustainability reporting standards under the Corporate Sustainability Reporting Directive, and in the face of pressure from investors and others to better manage these risks that will not go away.