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GREENING THE SUPPLY CHAIN: CSR CLAUSES AND CODES OF CONDUCT IN LIGHT OF THE CORPORATE SUSTAINABILITY DUE DILIGENCE DIRECTIVE (CS3D)

Marharyta Radchenko



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* PhD Candidate at the University of Verona, Chair of Comparative Private Law.

INTRODUCTION

Corporate social responsibility has historically been a voluntary practice. However, in recent years, a clear shift has taken place, particularly in the national legislation of some European States: corporate responsibility as a tool for mitigating environmental and human rights impacts has progressively transitioned from the realm of voluntary commitments to legally enforceable obligations. This transformation did not occur overnight, but is the result of a long regulatory evolution, culminating in the adoption of the European Union (“EU”) Directive on Corporate Sustainability Due Diligence (hereinafter “CS3D” or “Directive”)—a subject of intense debate within the EU in recent years. The impact of this Directive extends beyond European borders. Like previous EU legal instruments, the CS3D will have extraterritorial effects, making it essential for companies outside the EU to understand its requirements; under certain conditions, indeed, non-EU companies operating within the European market will be subject to compliance obligations.

This Article examines the potential implications of the transition from soft law to hard law, with a particular focus on sustainability clauses in commercial contracts and the drafting of codes of conduct. It explores how—and to what extent—the CS3D reshapes contractual governance in supply chains; the challenges associated with its implementation, particularly for small- and medium-sized enterprises (“SMEs”); and the possible unintended consequences of regulatory overreach.

Section I of this Article traces the historical evolution of corporate social responsibility from voluntary initiatives to a mandatory regulatory legal framework. Section II outlines the core obligations imposed by the new CS3D. Section III examines the state of sustainability clauses and codes of conduct before the Directive’s adoption, while Section IV analyzes how they may evolve once the Directive’s mandatory provisions become applicable. Finally, Section V discusses the specific challenges faced by SMEs before concluding with a critical assessment of the Directive’s potential impact.

I. THE BRIEF STORY OF CSR: A LONG PATH FROM VOLUNTARY COMMITMENT TO LEGAL OBLIGATION

The idea that corporations should bear responsibility for the externalities, even the indirect ones, connected with their activities is far from

new. Credit for the first comprehensive discussion of what is now commonly referred to as Corporate Social Responsibility (“CSR”) is typically given to economist Howard R. Bowen. In his seminal work, Bowen argued that companies have responsibilities towards civil society and that business leaders should adopt policies, make decisions, and follow guidelines aligned with societal goals and values.¹

This discussion gained further momentum since the publication of Milton Friedman’s opposing views, which asserted that a business has a single social responsibility: to increase its profits as long as it operates within the “rules of the game,” meaning it engages in open and free competition without deception or fraud.² From that point on, the academic debate—fueled by the alternating dominance of paternalistic and liberal economic theories, as well as the profound social upheavals caused by widely publicized industrial and environmental disasters—has grown exponentially. Although the debate has at times waned and at other times flared up, it has never fully disappeared.³

Simultaneously, as globalization expanded, Multinational Corporations (“MNCs”) gained increasing political influence, reaching a level that allowed them to influence states’ economies and shape international relations. This growing power brought forth new and more formidable challenges to human rights and environmental protection. National corporate laws were ill-equipped to address this issue, as they were built on the premise of a corporate entity operating within a particular national territory as a vertically integrated, hierarchical unit. In contrast, while MNCs retained certain elements of traditional hierarchy, they also exhibited considerable flexibility

¹ HOWARD R. BOWEN, *SOCIAL RESPONSIBILITIES OF THE BUSINESSMAN* (Harper, 1953).

² MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* (Univ. Chicago Press 1962). *See also* Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, at 17 (“In a free-enterprise, private-property system, a corporate executive is an employee of the owners of the business. He has direct responsibilities to his employers. That responsibility is to conduct the business in accordance with their desires, which generally will be to make as much money as possible, conforming to the basic rules of the society and those embodied in ethical custom.”).

³ *See* Archie B. Carroll, *The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organizational Stakeholders*, 34(4) BUSINESS HORIZONS 39 (1991); COLIN MAYER, *PROSPERITY: BETTER BUSINESS MAKES THE GREATER GOOD* (Oxford Univ. Press 2018); Martin Lipton, *The New Paradigm: A Roadmap of an Implicit Corporate Governance Partnership, Between Corporations and Investors to Achieve Sustainable Long-Term Investment and Growth* (2016) International Business Council of the World Economic Forum, <https://www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.25960.16.pdf>.

in their structures, functioning largely as heterarchical, decentralized networks consisting of subsidiaries, distributors, and suppliers spread across multiple jurisdictions. This organizational evolution gave rise to new complexities concerning the allocation of responsibilities within corporate groups.⁴

Starting in the 1970s, many international and regional organizations responded to these challenges by placing the regulation of MNCs' activities on their agendas. However, the dominant view that international law could not directly impose binding obligations on companies⁵—combined with the absence of the political consensus necessary to establish such obligations⁶—persuaded these actors that an alternative approach was preferable. Instead of pursuing formal regulation through hard law, they decided to issue guidelines promoting responsible business practices that companies could adopt on a voluntary basis.

The first significant initiative of this kind can be found in the 1976 OECD Guidelines,⁷ which were followed shortly after by the 1977

⁴ ANNA BECKERS, ENFORCING CORPORATE SOCIAL RESPONSIBILITY CODES: ON GLOBAL SELF-REGULATION AND NATIONAL PRIVATE LAW 9, 11–12 (Hart Publ'g, 2015).

⁵ The possibility of granting MNCs the status of subjects of international law or recognizing their personhood remains an open question. Traditional, rigid theories firmly deny such a status to MNCs. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 66 (Oxford Univ. Press, 7th ed. 2008). However, recently, a gradual shift has been observed toward more moderate approaches. Some contemporary scholars neither explicitly confirm nor deny this status but instead highlight the significant influence MNCs wield on the international stage and acknowledge that, *de facto*, they have become addressees of certain international treaties. *See* MALCOLM SHAW, INTERNATIONAL LAW (Cambridge Univ. Press, 6th ed. 2021). Another perspective argues that the formal legal status of MNCs is ultimately irrelevant, as what truly matters is the effectiveness of international law. For instance, in the realm of human rights, it is argued that no entity—regardless of its legal status—should be permitted to violate such rights or assist states in committing such violations. *See* ROSALYN HIGGINS, PROBLEMS & PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 50 (Clarendon Press 1994); ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 80 (Oxford Univ. Press 2006). On the collateral risks of endowing MNCs with personhood, *see* Jose E. Alvarez, *Are Corporations Subjects of International Law*, 9 SANTA CLARA J. INT'L L. 1 (2011).

⁶ Indeed, in the 1970s, the United Nations ("UN") made the first attempt to establish binding international rules to regulate the activities of multinational corporations (MNCs) with a Draft Code of Conduct on Transnational Corporations. However, human rights were not the focus of this initiative. The UN Centre on Transnational Corporations was created in 1975 to develop such a framework, but due to differing interests among various blocks of countries, the negotiations were formally abandoned in 1992. *See* Karl P. Sauvant, *The Negotiations of the United Nations Code of Conduct on Transnational Corporations: Experience and Lessons Learned*, 16 J. WORLD INV. & TRADE 12, 55 (2015).

⁷ The OECD Guidelines were first introduced in 1976 as part of the Declaration on International Investment and Multinational Enterprises, directed both at OECD countries, urging them to provide a

International Labour Organization Tripartite Declaration Concerning Multinational Enterprises and Social Policy (“ILO Tripartite Declaration”).⁸ In 2000, the UN Global Compact was launched with the aim of bringing together both companies and civil society. This important voluntary initiative was grounded on ten principles⁹ establishing minimum social and environmental standards for corporations, along with providing practical guidance and expertise.

With the proliferation of voluntary initiatives, which unfortunately failed to stem the rising tide of corporate human rights abuses, the question arose whether the time had come to introduce more stringent measures. In 2003, an ambitious project, the UN Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights (“Draft Norms”) was presented.¹⁰ It marked the first comprehensive mandatory instrument,¹¹ which—while acknowledging that states are the primary duty bearers in relation to human rights¹²—established in Article 1 that MNCs, within their sphere of activity and influence, have corresponding legal duties.¹³ Crucially for the future development of the

transparent environment for international investment, and at multinational enterprises, outlining their responsibility to contribute to economic and social progress. The OECD Guidelines have been further developed over the years and revised six times (in 1979, 1984, 1991, 2000, 2011, and 2023), becoming, through these updates, not only a standalone document but one of the most important soft-law frameworks. OECD, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES ON RESPONSIBLE BUSINESS CONDUCT 3 (OECD Publ’g, 2023), <https://doi.org/10.1787/81f92357-en> [hereinafter OECD GUIDELINES].

⁸ ILO Tripartite Declaration has undergone amendments in 2000, 2006, 2017, and most recently in 2022. INTERNATIONAL LABOUR ORGANIZATION, TRIPARTITE DECLARATION OF PRINCIPLES CONCERNING MULTINATIONAL ENTERPRISES AND SOCIAL POLICY 7 (2022), https://www.ilo.org/sites/default/files/wcmsp5/groups/public/%40ed_emp/%40emp_ent/%40multi/documents/publication/wcms_094386.pdf.

⁹ THE TEN PRINCIPLES OF THE UN GLOBAL COMPACT, <https://unglobalcompact.org/what-is-gc/mission/principles> (last visited Jan. 2, 2025).

¹⁰ UN Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).

¹¹ David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT’L L. 901, 903 (2003).

¹² U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2, *supra* note 10, ¶ 1 (“States have the primary responsibility to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including ensuring that transnational corporations and other business enterprises respect human rights . . .”).

¹³ *Id.* ¶ 1 (“Within their respective spheres of activity and influence, transnational corporations and other business enterprises have an obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights . . .”); see John G. Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AM. J. INT’L L. 819, 820 (2007).

field, the Commentary to Article 1 of Draft Norms introduced, for the first time in the business and human rights context, what is now generally referred to as Human Rights Due Diligence (“HRDD”).¹⁴ It asserted that MNCs should “use due diligence in ensuring that their activities do not contribute directly or indirectly to human rights abuses and that they do not directly or indirectly benefit from abuses of which they were aware or ought to have been aware.”¹⁵

Unfortunately, the Commentary offered no clear guidance on how HRDD should be effectively implemented in practice. That said, the Draft Norms initiative ultimately failed, facing substantial political opposition from influential states and the business sector, as well as doctrinal critiques pointing to conceptual confusion and factual inconsistencies.¹⁶

¹⁴ Although due diligence is one of the most enduring and extensively discussed legal concepts, its definition remains notably ambiguous due to the varying connotations it assumes depending on the legal context in which it is applied. The origins of due diligence can be traced back to Roman law, where it was understood as a standard of conduct: an individual could be held liable for accidental harm if it resulted from a failure to meet the standard of *diligens pater familias*. While historically rooted in the continental civil law tradition, the concept also influenced the development of the tort of negligence across various legal systems. In the corporate context, due diligence typically refers to an investigative process undertaken by a company to identify and mitigate risks associated with commercial transactions, particularly those that may give rise to legal liability. This concept has become especially significant in the context of mergers and acquisitions. Parallel to its development in domestic private law, the concept of due diligence was embraced also by international law. The earliest attempts to conceptualize due diligence in this context can be attributed to Hugo Grotius, who asserted that sovereigns have a duty to take appropriate measures to prevent injurious acts perpetrated by individuals. Judicial decisions further shaped the evolution of this principle in international law. In the *S.S. Lotus* case (1927), the Permanent Court of International Justice established that “a State is bound to use due diligence to prevent the commission within its dominions of criminal acts against another nation or its people.” Similarly, in the *Corfu Channel* case (1949), the International Court of Justice affirmed that every State has an “obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.” Over time, due diligence has been applied across various substantive areas of international law. Notably, in international human rights law, it has evolved into a standard for assessing State compliance with human rights obligations, particularly concerning the possible impact of private entities. The incorporation of due diligence obligations within the business and human rights framework has naturally sparked further scholarly debate. See Olga Martin-Ortega, *Human Rights Due Diligence for Corporations: From Voluntary Standards to Hard Law at Last*, 32 NETH. Q. HUM. RTS. 44, 51–55 (2014); Jonathan Bonnitcha & Robert McCorquodale, *The Concept of “Due Diligence” in the UN Guiding Principles on Business and Human Rights*, 28 EUR. J. INT’L L. 899, 900 (2017); Vladislav Lanovoy, *Due Diligence in International Law: A Useful Renaissance or “All Things to All People”?*, 35 EUR. J. INT’L L. 1029, (2024).

¹⁵ Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc. E/CN.4/Sub.2/2003/38/Rev.2 (2003).

¹⁶ Ruggie, *supra* note 13, at 821–22.

Learning from previous setbacks and recognizing the enduring appeal of soft-law frameworks, in 2011, the UN Human Rights Council unanimously endorsed the UN Guiding Principles on Business and Human Rights (“UNGPs”), developed by John G. Ruggie, Special Representative for Business and Human Rights.¹⁷

The UNGPs are not designed to create new international legal obligations for states or businesses. Instead, they elaborate existing standards and practices and rearrange them within a single, logically coherent and comprehensive template.¹⁸ The UNGPs are structured around three interrelated pillars: they reaffirm the State’s duty to protect human rights; they establish the corporate responsibility to respect human rights; and finally, they underline the necessity of providing access to remedy, recognizing that even the best efforts cannot entirely prevent abuses.¹⁹ Notably, to avoid a treaty-like wording,²⁰ the “corporate responsibility to respect” is framed not as a duty but as a global standard of expected conduct—a fundamental expectation society places on businesses.²¹

Principle 11 states that MNCs should avoid infringing on human rights and address adverse human rights impacts with which they are involved.²² The operational means to be employed in order to achieve this goal are outlined in Principle 17: companies should conduct HRDD. Ruggie reintroduced this concept, emphasizing that companies cannot “know nor

¹⁷ John Ruggie (Special Representative of the Secretary General), *Guiding Principles on Business and Human Rights: Implementing the UN “Protect, Respect and Remedy” Framework*, 3–4 U.N. Doc. A/HRC/17/31 (Mar. 21, 2011).

¹⁸ *Id.* ¶ 14.

¹⁹ *Id.* ¶ 6.

²⁰ The cautious phrasing—also evident in terms like “infringement of human rights” and “adverse impact” instead of the more legally charged “human rights violation”—reflects a strategy that Ruggie described as “principled pragmatism.” This approach sought to strike a balance between the ambition to promote human rights and the political feasibility of “what works best in creating change.” Ensuring that the principles did not resemble traditional binding legal obligations, the UNGPs succeeded where more rigid, convention-based initiatives, such as the Draft Norms, had previously faltered. *See* Interim report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, para. 81 U.N. Doc. E/CN.4/2006/97 (Feb. 22, 2006).

²¹ U.N. Doc A/HRC/17/31, *supra* note 17, at 13 (explaining that such a standard is rooted in a transnational social norm); *see* John G. Ruggie & John F. Sherman, III, *The Concept of “Due Diligence” in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale*, 28 EUR. J. INT’L L. 921, 923 (2017).

²² U.N. Doc A/HRC/17/31, *supra* note 17, at 13.

show” they are respecting human rights without conducting HRDD.²³ Moreover, unlike the Draft Norms, the UNGPs provide a blueprint for action. According to the principles, MNCs should—through specific policies and processes—identify, prevent, mitigate, and account for the adverse impact on human rights they may cause through their own business activities or to which they are linked through business relationships regarding their products and services. Ruggie further stressed that due diligence should not be interpreted in strictly transactional terms but rather as “a comprehensive, proactive attempt to uncover human rights risks, actual and potential, over the entire life cycle of a project or business activity”²⁴

Most importantly for further discussion in this contribution, the UNGPs highlight the importance of integrating HRDD requirements at the very outset of a business activity or relationship, specifically during the structuring of contracts or other agreements.²⁵ This emphasis on contracts as an essential tool for implementing due diligence, tracking adverse human rights impacts, and ensuring ongoing compliance has been echoed and reinforced by numerous other soft-law frameworks.²⁶

Even though the UNGPs made a significant contribution to the development of corporate HRDD, they, like any soft-law regulations, failed to address situations where companies are unwilling to operate in accordance with voluntary standards. In practice, the implementation of HRDD by the vast majority of the largest global companies has been very poor.²⁷

²³ Ruggie & Sherman, *supra* note 21, at 924.

²⁴ *Id.* (Business and Human Rights: Towards Operationalizing the “Protect, Respect and Remedy” Framework, Report to the UN Human Rights Council (Business and Human Rights Report), para. 25, UN Doc. A/HRC/11/13, 22 (Apr. 2009).)

²⁵ U.N. Doc A/HRC/17/31, *supra* note 17, at 16.

²⁶ See, e.g., OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES ON RESPONSIBLE BUSINESS CONDUCT, *supra* note 7, at 19; OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, 74 (OECD Publ’g, 3d ed., 2016); OECD, *OECD Due Diligence Guidance for Responsible Business Conduct*, 24 (OECD Publishing, 2018); OECD, *OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector*, 26 (OECD Publ’g, 2018).

²⁷ World Benchmarking Alliance, *Corporate Human Rights Benchmark 2019 Key Findings Across Agricultural Products, Apparel, Extractives & ICT Manufacturing Sectors*, 4 (Nov. 2019), <https://assets.worldbenchmarkingalliance.org/app/uploads/2021/03/CHRB2019KeyFindingsReport.pdf> (CHRB assessed the 200 largest global companies, and they revealed consistently low scores across HRDD-related measurements.).

A stronger push was required to move from the realm of voluntary commitment into a legal obligation. Tragically, this shift was triggered by the Rana Plaza disaster on April 24, 2013—the deadliest event in the garment industry’s history.²⁸ Public outrage surged as investigations revealed that numerous international brands, including Primark, Mango, C&A, Benetton, and Walmart, had sourced products from textile factories within the building.²⁹ In response to a considerable NGO and consumer backlash, several—mostly European—clothing brands signed an Accord on Fire and Building Safety with international trade unions.³⁰ This agreement mandated minimum safety standards and required companies to continue sourcing from Bangladesh while assuming financial and organizational responsibility for improving working conditions. Once again, contracts became an essential tool for supply chain management. To induce factories’ compliance with the Accord’s “upgrade and remediation” requirements, participating brands and retailers committed to negotiating commercial terms with their suppliers, which ensure that it is financially feasible for the factories to maintain safe workplaces and comply with prescribed requirements.³¹

Lawmakers and politicians also pledged to take decisive action to improve conditions in global supply chains. This resolve led national legislatures on a challenging path that ultimately resulted in the adoption of mandatory CSR legislation in several jurisdictions. The first significant milestone was the 2017 French Duty of Vigilance Law,³² followed by the

²⁸ The collapse of the multi-story building in Bangladesh claimed 1,138 lives and injured over 2,500 workers.

²⁹ Julfikar Ali Manik & Jim Yardley, *Building Collapse in Bangladesh Leaves Scores Dead*, N.Y. TIMES (Apr. 24, 2013), <https://www.nytimes.com/2013/04/25/world/asia/bangladesh-building-collapse.html>; Michael Posner, *A Decade After the Rana Plaza Disaster, Global Clothing Companies Owe More to Bangladeshi Garment Workers*, FORBES (Apr. 19, 2023), <https://www.forbes.com/sites/michaelposner/2023/04/19/a-decade-after-the-rana-plaza-disaster-global-clothing-companies-owe-more-to-bangladeshi-garment-workers/>.

³⁰ Accord on Fire and Building Safety in Bangladesh, IndustriAll Global Union-UNI Global Union, May 15, 2013.

³¹ *Id.* ¶ 22.

³² Loi n. 2017-399 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre [Relating to the duty of care of parent companies and contracting companies], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 28, 2017; see Sandra Cossart, Jérôme Chaplier & Tiphane Beau de Lomenie, *The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All*, 2 BUS. HUM. RTS. J. 317, 318–20 (2017) (providing an overview of the French law.)

2019 Dutch Child Labor Due Diligence Law³³ and, in 2021, both the German Supply Chain Due Diligence Act³⁴ and Norway's Transparency Act.³⁵ All these legislative efforts share a common ground: despite the varied approaches to embedding CSR in law,³⁶ all of them impose due diligence obligations on MNCs, building on the UNGP's experience. The similarities, however, end there, as all laws have not only different personal scopes but also substantive ones: while the French and German laws extend due diligence requirements to both human rights and environment protection, the Norwegian law does not directly entail environmental due diligence. Meanwhile, the Dutch law, as its name suggests, is focused exclusively on preventing child labor.³⁷

Such a "legal patchwork" created several challenges. First, such a complex problem as regulating the sustainability of global supply chains—particularly when it comes to the links located in the Global South—cannot be solved by the sporadic intervention of a few developed countries. Second, fragmentation leaves room for law shopping and forum shopping: companies subject to stricter national laws can choose between bearing higher costs for

³³ Wet van 24 oktober 2019 houdende de invoering van een zorgplicht ter voorkoming van de levering van goederen en diensten die met behulp van kinderarbeid tot stand zijn gekomen (Wet zorgplicht kinderarbeid), Stb. 2019, 401; see Liesbeth Enneking, *Putting the Dutch Child Labour Due Diligence Act into Perspective: An Assessment of the CLDD Act's Legal and Policy Relevance in the Netherlands and Beyond*, 4 ERASMUS L. REV. 20 (2019) (providing an overview of the Dutch law).

³⁴ Gesetz über die unternehmerischen Sorgfaltspflichten zur Vermeidung von Menschenrechtsverletzungen in Lieferketten (Lieferkettensorgfaltspflichtengesetz—LkSG), BGBl. I, 2959 ff. Lieferkettensorgfaltspflichtengesetz [LkSG] [Supply Chain Due Diligence Act], July 16, 2021, ELEKTRONISCHER BUNDESANZEIGER [EBANZ] (Ger.); see Giesela Rühl, *Cross-border Protection of Human Rights: The 2021 German Supply Chain Due Diligence Act*, in FROM THEORY TO PRACTICE IN PRIVATE INTERNATIONAL LAW 163 (Justin Borg-Barthet et al. eds., Hart Publ'g 2024).

³⁵ Lov om virksomheters åpenhet og arbeid med grunnleggende menneskerettigheter og anstendige arbeidsforhold (åpenhetsloven), LOV-2021-06-18-99 [Act on the Transparency of Businesses and Work with Fundamental Human Rights and Decent working Conditions], June 18, 2024 (Nor.) (an official translation in English is available at <https://www.regjeringen.no/contentassets/c33c3faf340441faa7388331a735f9d9/transparency-act-english-translation.pdf>).

³⁶ See Cossart et al., *supra* note 32, at 318–20.

³⁷ For a comparative table, see *European Coalition for Corporate Justice*, CORPORATE DUE DILIGENCE LAWS AND LEGISLATIVE PROPOSALS IN EUROPE (Mar. 2022), <https://corporatejustice.org/wp-content/uploads/2022/03/Corporate-due-diligence-laws-and-legislative-proposals-in-Europe-March-2022.pdf>; for comparative analysis, see Fabienne Jault-Seseke, *A Comparison of the French and German Transparency Laws*, 10 OSLO L. REV. 1 (2024); Markus Krajewski, Kristel Tonstad & Franziska Wohltmann, *Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?*, 6 BUS. HUM. RTS. J. 550 (2021).

HRDD compared to competitors in countries with more lenient/nonexistent due diligence obligations and relocating their main operations to jurisdictions with milder regulatory climates. Third, these disparities in regulation could significantly distort competition over time, something the European Union's ("EU") common market could not afford.

Against this backdrop, on February 23, 2022, the European Commission presented a Proposal for a Corporate Sustainability Due Diligence Directive.³⁸ After two years of intense negotiations marked by setbacks and unexpected turns, defying all odds, the EU Parliament formally adopted the CS3D on April 24, 2024—symbolically coinciding with the tenth anniversary of the Rana Plaza tragedy.³⁹ The Council approved the Directive a month later, and it came into force on July 25, 2024, upon the conclusion of the legislative process.⁴⁰

II. CORE OBLIGATIONS ESTABLISHED BY THE CS3D

The drafters of the CS3D found themselves in a difficult position, having to reconcile different contrasting interests. On the one hand, they needed to establish a minimum level of harmonization in the EU regarding the CSR obligations of companies operating within the internal market. This was essential not only to foster competition by creating a level playing field,⁴¹ but also to ensure that businesses contributed *effectively*, as a united front, to sustainable development, a just transition, human rights, and environmental protection.⁴² On the other hand, they had to draft legislation that was robust enough to be effective yet acceptable to EU Member States, considering MNCs' lobbying. Moreover, as the drafters recognized the influence of leading MNCs over their supply chains and encouraged them to leverage this power⁴³ to implement higher compliance standards, they needed to put

³⁸ *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937*, COM (2022) 71 final (Feb. 23, 2022) [hereinafter *Proposal*].

³⁹ Directive 2024/1760 of the European Parliament and of the Council of 13 June 2024 on Corporate Sustainability Due Diligence and Amending Directive 2019/1937 and Regulation 2023/2859, 2024 O.J. (L series) 1, 1 n.2 [hereinafter CS3D].

⁴⁰ *Id.* art. 38 at 53.

⁴¹ *Id.* recital 31 at 7.

⁴² *Id.* recital 16 at 3–4.

⁴³ *Id.* recital 50–52 at 12–13.

boundaries in place to prevent abuses of power, such as shifting the burden of compliance entirely onto smaller actors in the supply chain.⁴⁴ Lastly, the legislation needed to be sophisticated enough to address the complexities of global supply chains while remaining clear and practical for companies to follow. This balance was crucial to prevent the Directive from becoming a dead letter.

Therefore, in an effort to harmonize the various competing positions, the European lawmakers had to reach compromises. The reliance on the Directive—which requires transposition into national law⁴⁵ as the legal instrument choice—is one such compromise. This approach reflects a traditional strategy employed by the EU when regulating complex and sensitive issues: establish a minimum common framework through a Directive, thereby creating the foundation for a future regulation that would be more stringent and directly applicable across Member States.

A further indication of the compromises that have been reached in the lawmaking process relates to the *rationae personae* scope of the CS3D and its step-by-step implementation. After extensive negotiations, the personal scope of the Directive was narrowed down.⁴⁶ The Directive applies to companies with more than 1,000 employees on average and a net worldwide turnover exceeding EUR 450 million.⁴⁷ Alternatively, the CS3D applies to companies that do not meet these thresholds but are the ultimate parent company of a group that does.⁴⁸ Additionally, the Directive applies to companies or parent companies of a group with a net worldwide turnover exceeding EUR 80 million, provided they enter into franchising or licensing agreements in the Union with royalties exceeding EUR 22.5 million.⁴⁹

Most importantly, the CS3D has extraterritorial reach. The same turnover criterion applies to companies established under the legislation of

⁴⁴ *Id.* recital 46 at 12.

⁴⁵ *Id.* art. 37(1) at 52 (directing Member States to transpose CS3D by July 26, 2026.).

⁴⁶ Compare Proposal, *supra* note 38, art. 2 at 46–47, with CS3D, *supra* note 39, art. 2 at 25–26 (The initial Proposal set much lower thresholds: companies with 500 or more employees and a net worldwide turnover exceeding EUR 150 million. Additionally, companies with more than 250 employees and a net worldwide turnover of over EUR 40 million were also subject to the Proposed Directive obligations if at least 50% of this turnover was generated in “high impact” sectors (for example, garment, agriculture, extraction sector)).

⁴⁷ CS3D, *supra* note 39, art. 2(1)(a) at 25. Article 2(1)(a).

⁴⁸ *Id.* art. 2(1)(b).

⁴⁹ *Id.* art. 2(1)(c) at 26.

third-world countries with the sole distinction that foreign companies must meet this threshold within the EU.⁵⁰ Consequently, this Directive is of interest not only to EU-based companies but also to all entities conducting significant business in the EU market.⁵¹ Once again, the EU leverages the so-called “Brussels Effect”⁵² to advance its ambitious CSR agenda and achieve more impactful outcomes.

However, as previously mentioned, the CS3D will not be implemented in its entirety from the outset but will be gradually phased in. Starting on July 26, 2027, the Directive will apply only to companies with 5,000 employees and a net worldwide turnover of EUR 1.5 billion. On July 26, 2028, the threshold will expand to include companies with more than 3,000 employees and a turnover of EUR 900 million. Finally, on July 26, 2029, the Directive will come into full effect.⁵³ The request for gradual implementation was made by the businesses consulted during the drafting process, giving them ample time to prepare for compliance.

What will in-scope companies be required to comply with? The Directive introduces a general obligation to conduct risk-based Human Rights and Environmental Due Diligence (“HREDD”)⁵⁴ within the companies’ own operations, those of their subsidiaries, and their business partners when related to the companies’ chain of activities. This overarching HREDD obligation entails a series of legally binding actions.

First, companies are required to map their chain of activities and conduct an in-depth assessment of the business operations involved to identify actual and potential adverse impacts on the environment and human rights.⁵⁵ If addressing all identified impacts is not feasible, companies are required to

⁵⁰ *Id.* art. 2(2) (Third-country companies are not required to meet the employee threshold criterion).

⁵¹ Moreover, the direct applicability of the CS3D is not the only way in which foreign companies will be impacted. For instance, foreign companies positioned within the supply chains of leading EU-based MNCs or foreign parent companies whose EU subsidiaries meet the Directive’s thresholds will also be affected. The first case will be further explored later on.

⁵² See ANU BRADFORD, *THE BRUSSELS EFFECT: HOW THE EUROPEAN UNION RULES THE WORLD* 25, 25–26 (Oxford Univ. Press 2019).

⁵³ CS3D, *supra* note 39, art. 1(a)–(e).

⁵⁴ *Id.* art. 5(1) (it is worth noticing that CS3D also introduces another general obligation—which is not the focus of this discussion—requiring companies to adopt and implement to the best of their ability a transition plan for climate change mitigation. This plan should aim to progressively align the company’s business models and strategy with the goals of the Paris Agreement and net-zero economy).

⁵⁵ *Id.* art. 8.

prioritize these impacts based on their severity and likelihood.⁵⁶ Following this, they must take appropriate measures to prevent potential adverse impacts⁵⁷ and bring to an end actual adverse impacts,⁵⁸ addressing issues in the order of their established priority. When a company has caused or contributed to an actual adverse impact, the company is required to ensure appropriate remediation.⁵⁹

To enhance companies' oversight of their chain of activities and improve their capacity to assess risks, the Directive also mandates mechanisms that promote two-way communication between companies and stakeholders. Companies must engage meaningfully with stakeholders through consultations⁶⁰ and provide fair, transparent, and accessible complaint procedures for individuals with legitimate concerns about actual or potential adverse impacts.⁶¹ Additionally, companies must publish an annual statement on their websites detailing their activities related to obligations arising out of the Directive.⁶²

The obligations established by the CS3D are clearly modeled on the UNGPs and subsequent soft-law frameworks that expanded upon the due diligence process initially outlined by John Ruggie. Indeed, the UNGPs, the OECD Guidelines,⁶³ and the OECD Guidance for Responsible Conduct⁶⁴ are explicitly cited in the Directive's preamble.⁶⁵ In some instances, the CS3D directly references soft-law frameworks as authoritative sources for additional guidance or interpretation.⁶⁶ In other cases, it highlights that

⁵⁶ *Id.* art. 9.

⁵⁷ *Id.* art. 10.

⁵⁸ *Id.* art. 11.

⁵⁹ *Id.* art. 12.

⁶⁰ *Id.* art. 13.

⁶¹ *Id.* art. 14.

⁶² *Id.* art. 16.

⁶³ OECD Guidelines, *supra* note 7.

⁶⁴ OECD Due Diligence Guidance for Responsible Business Conduct, *supra* note 26.

⁶⁵ EUR. PARL. DOC. (SEC P9_TA(2023)0209) x, (CS3D, Recitals 5, 6 and 14, describing existing international due diligence standards and frameworks).

⁶⁶ *Id.* (recital 20 specifies that the CS3D due diligence process should encompass the steps outlined in the OECD Guidance, while Recital 37 clarifies that companies may refer to the UN Guiding Principles Reporting Framework for additional guidance when assessing adverse human rights impacts. Similarly, Recital 59 explains that establishing a "fair, publicly available, accessible, predictable and transparent procedure for dealing with the [stakeholder's] complaints" should be interpreted in accordance with Principle 31 of the UNGPs.).

certain obligations are designed “in line with international frameworks,”⁶⁷ or clarifies that specific definitions within the CS3D—albeit phrased differently—correspond to terms employed in these international frameworks.⁶⁸ Therefore, in these cases, companies may rely on the extensive experience of soft-law tools for interpretation and implementation.

However, the Directive also deliberately adopts certain definitions that differ from those used in soft-law instruments to underline their distinct meaning and scope. For instance, the term “chain of activities” is employed by the Directive, as opposed to the more conventional term “supply chain,” to describe the range of business operations within which the company is obliged to conduct HREDD. While the definition of “supply chain” varies depending on the standpoint—legal, economic, social—the common understanding is that it refers to a network of individuals and companies providing the materials, components, tools, and services necessary to produce and deliver goods to the final consumer. Therefore, supply chains are ordinarily divided into two segments: upstream, encompassing all activities related to sourcing materials and delivering them to the manufacturer, and downstream, covering all activities associated with delivering finished products from the manufacturer to the end consumer.⁶⁹

The introduction of the “chain of activities” concept in the EU Directive is a result of yet another compromise between factions advocating for an all-encompassing definition of the supply chain and those favoring a narrower

⁶⁷ *Id.* recital 39.

⁶⁸ *Id.* (recital 45 and 53 further specify that “adverse impacts that the companies cause by themselves” correspond to the concept of “causing” in international frameworks; “adverse impacts jointly caused with subsidiaries and business partners” align with “contributing” in the international frameworks, while adverse impact caused only by the business partner” is “being directly linked to” in the international frameworks. This choice to use the notion of “causing” rather than the notions used in international frameworks was made to prevent misinterpretation with existing legal terminology in national systems).

⁶⁹ In order to provide a fuller picture, it is worth noticing that alongside the term “supply chain” the notion of “global value chain” exists. These terms are often used interchangeably, particularly in the legal literature. See Klaas Hendrik Eller, *Is ‘Global Value Chain’ a Legal Concept?*, 16 EUR. REV. CONTRACT LAW 3, 3–24 (2020); Anna Beckers, *Global Value Chains in EU Law*, 42 YEARBOOK OF EUROPEAN LAW 322, 322–346 (2023). However, in the business literature, the notion of the “value chain” is used in a broader sense. While the value chain concept builds on the supply chain framework, it also emphasizes the ways in which value is added throughout the chain—not only to the product or service but also to the actors involved, with particular focus on end-user customers. See SustainAbility, United Nations Environmental Programme & UNGC, *Unchaining Value: Innovative Approaches to Sustainable Supply* 2 (2008), https://d306pr3pise04h.cloudfront.net/docs/news_events%2F8.1%2Funchaining_value.pdf (last visited Jan. 2, 2025).

scope for HREDD obligations. Under the CS3D, the “chain of activities” covers a company’s upstream business partners’ activities related to the production of goods or the provision of services,⁷⁰ while only partially including the downstream activities of the company’s business partners. Specifically, downstream activities covered by the Directive are limited to the distribution, transport, and storage of products when carried out for or on behalf of the company.⁷¹ Notably, the Directive explicitly excludes downstream activities related to product disposal.⁷² Similarly, activities of downstream business partners related to the company’s services are also excluded. As a result, for regulated financial undertakings, the Directive applies only to the upstream segment of their chain of activities, leaving the downstream segment outside its scope.⁷³

Another important step taken by the EU legislature to limit the scope of the due diligence obligation was the explicit emphasis on the risk-based nature of the HREDD process. In practical terms, companies are not required to monitor everything everywhere and all at once; instead, they should focus their efforts on those “links” in the chain of activities where adverse impacts are most likely to occur. Furthermore, the company’s due diligence activities should be commensurate with the severity of the adverse impacts identified.

The concept of risk-based due diligence was first introduced in the 2011 OECD Guidelines.⁷⁴ Later, the OECD also provided a list of risk factors, meant to operate as a warning to companies and indicate areas where the due diligence scoping exercise must be prioritized and undertaken with utter care. These include sector-specific and product-related risks, geographic risks, and enterprise-level risks.⁷⁵ Drawing inspiration from these frameworks, the CS3D similarly requires companies to consider such risk factors⁷⁶ when identifying and assessing actual or potential adverse human rights⁷⁷ or

⁷⁰ CS3D, *supra* note 39, art. 3(g)(i), recital 25, (upstream chain of activities includes the design, extraction, sourcing, manufacture, transport, storage, and supply of raw materials, products, or parts of the products and the development of the product or the service).

⁷¹ *Id.* art. 3(g)(ii), recital 25.

⁷² *Id.* recital 25.

⁷³ *Id.* recital 26.

⁷⁴ OECD, Guidelines for Multinational Enterprises 10 ¶ 4 (OECD Publishing, 2011).

⁷⁵ OECD, Due Diligence Guidance for Responsible Business Conduct 62 (2018).

⁷⁶ CS3D, *supra* note 39, art. 3(1)(u).

⁷⁷ *Id.* art. 8(2), recital 41.

determining the appropriate measures to prevent or mitigate them.⁷⁸ The decision to explicitly clarify the risk-based approach in the Directive was a prudent choice, particularly given the absence of such clarification in the German Supply Chain Act, which ultimately led to overcompliance by companies and proved to be a bureaucratic nightmare.⁷⁹

It should also be noted that the HREDD obligation is one of means, not of results. Accordingly, the CS3D does not mandate companies to ensure, under all circumstances, that adverse impacts will never occur or that they will always be eliminated. Instead, it acknowledges that, in certain situations, achieving such outcomes may be beyond the companies' capacity.⁸⁰ This inevitably affects the way in which civil liability for companies' noncompliance with the Directive is construed. A company can be held liable for damage caused to a natural or legal person when a series of conditions are met. First, a company must have intentionally or negligently failed to meet its obligation *to take appropriate measures* either to prevent potential or end actual adverse impacts on human rights or the environment.⁸¹ In other words, companies are not liable for failing to prevent or end adverse impacts, but they are required to make their best effort to do so. Annex I of the Directive specifies the human rights whose violation constitutes an "adverse human rights impact" and outlines the prohibitions and obligations whose breach leads to an "adverse environmental impact."⁸² Secondly, as a result of this failure, damage must have occurred to a natural or legal person's interests.⁸³ Finally, a company cannot be held liable if the damage was solely caused by its business partners in the chain of activities,⁸⁴ thereby recognizing the limits of a company's influence over external entities.

The CS3D prescribes a range of measures that companies should take, where relevant, to fulfill their obligations. When effectively implemented, these measures may absolve them of liability in cases where adverse impacts nonetheless occur. These include measures addressing the company itself, its

⁷⁸ *Id.* art. (3)(2)(o), recital 40.

⁷⁹ See Axel Voss, LINKEDIN, https://www.linkedin.com/posts/axel-voss-a1744969_coreper-cs3d-duediligence-activity-7168575333057691648-fjEz/ (last visited Jan. 2, 2025).

⁸⁰ CS3D, *supra* note 39, recital 19.

⁸¹ *Id.* art. 29(1)(a).

⁸² *Id.* Annex I.

⁸³ *Id.* art. 29(1)(b).

⁸⁴ *Id.* art. 29(1).

business model, internal operations, and strategies; measures that require business partners' collaborative efforts to align practices and improve outcomes; and targeted investments or support to assist partners in meeting the required standards.⁸⁵

For the purposes of this Article, the analysis will focus on measures for managing supply chains through contractual tools, specifically examining Articles 10(2)(b), 11(3)(c), 10(4), and 11(5). According to these provisions, companies should seek to obtain contractual assurances from a direct business partner that it will comply with the companies' code of conduct, including by seeking corresponding contractual assurances from its own partners, insofar as the activities of said partners are part of the chains of activities of the companies. Furthermore, in cases where the "ordinary" measures outlined in Articles 10(2) and 11(3) prove insufficient, the company may seek contractual assurances from an indirect—Tier 2—business partner, to achieve compliance with the company's code of conduct, or a corrective action plan.

The reason for focusing on contractual supply chain management is twofold. First, contractual assurances emerge as one of the most significant tools provided under the Directive. If contractual relationships serve as the glue that binds the chain of activities—or, more broadly, the supply chain—it seems logical to use carefully drafted contractual clauses to drive positive changes from within. One might argue that this perspective oversimplifies the issue, as the complexity of supply chains as a socio-economic phenomenon extends beyond a mere set of interconnected contracts. It could also be contended that neither classical contract governance approaches nor traditional contract law can fully accommodate the intricate nature of supply chains. However, while legal scholars work to free the concept from being confined—and inevitably misinterpreted—within traditional legal concepts, debating whether a new, unique legal concept should be established to address this issue,⁸⁶ the reality is that, here and now, the contractual tool remains the most feasible option and practical starting point.

⁸⁵ *Id.* arts. 10 & 11, (arts. 10(2) and 11(3) of the Directive for the "ordinary" measures required, arts. 10(3) and 11(4) for additional measures, arts. 10(5) and 11(6) for measures specifically applicable when SMEs are involved, and arts. 10(6) and 11(7) for "last resort" measures).

⁸⁶ See, e.g., Klaas Hendrik Eller, *Is 'Global Value Chain' a Legal Concept?*, 16 EUR. REV. CONTRACT LAW 3, 3–24 (2020); Lyn K.L. Tjon Soei Len, *Hermeneutical Injustice, Contract Law, and*

The second reason for focusing on contractual governance is that few other viable tools seem available beyond fostering agreements among individual actors to raise human rights and environmental standards across the entire supply chain. Examining other measures proposed by the Directive highlights their limitations. For instance, providing targeted and proportionate support to SMEs by facilitating capacity building, training, or upgrading management systems⁸⁷ is valuable but has its constraints. Relation-specific investments in the first tiers of the supply chain are relatively common, particularly among actors with significant market power and value. However, challenges within supply chains frequently occur at the more remote, “peripheral” tiers, where targeted investments become less feasible. Indeed, companies often outsource overseas to reduce costs, not to increase investments. Furthermore, in today’s volatile economy, where businesses must remain agile and ready to shift sourcing due to factors such as pandemics, sanctions, conflicts, or other disruptions, long-term investments that presume stable relationships may not align with shareholder priorities. The same can be said about changing business strategies and adjusting business models.

Naturally, the approach of relying on contractual assurances is not immune from criticism, which will be explored in greater detail in the following pages. For now, it is worth highlighting one important point: while this approach is the most accessible and flexible, it is also the one most prone to being reduced to mere window dressing. This makes it indispensable to engage in the diligent drafting of contractual clauses to ensure their effectiveness.

III. CODES OF CONDUCT AND CSR CLAUSES: THE CURRENT STATE OF AFFAIRS

To understand how the CS3D’s mandate companies to seek contractual assurances from their business partners—ensuring compliance with the company’s code of conduct and cascading this obligation downstream—will influence existing practices established under soft-law guidelines, it is first

Global Value Chains, 16 EUR. REV. CONTRACT LAW 139, 139–59 (2020); Vibe Ulfbeck & Ole Hansen, *Sustainability Clauses in an Unsustainable Contract Law?*, 16 EUR. REV. CONTRACT LAW 186, 186–205 (2020).

⁸⁷ CS3D, *supra* note 39, arts. 10(2)(e) & 11(3)(f).

necessary to evaluate the current landscape. This section will address three key aspects of that landscape. First, it will clarify what the term “code of conduct” encompasses. Second, it will examine the current practices of incorporating CSR obligations into commercial contracts. Third, it will analyze the specific language commonly employed by parties to embed such obligations.

A. CSR Codes: A Much-Needed Disambiguation

When delving into matters of sustainable supply chain management, one encounters a diverse array of terminology employed by academics and corporate groups describing different tools for implementing CSR into daily business operations.

In the last decade, the legal doctrine primarily discusses a broad category of self-regulatory instruments collectively known under the name of CSR codes. These are commonly understood as documents developed and issued by MNCs to articulate their commitment to human rights, labor standards, and environmental protection while also specifying their responsibilities towards stakeholders and society at large.⁸⁸ However, in practice, such documents appear under a variety of names and forms,

⁸⁸ See BECKERS, *supra* note 4, at 13; ANNA LOUISE VYTOPIL, CONTRACTUAL CONTROL IN THE SUPPLY CHAIN: ON CORPORATE SOCIAL RESPONSIBILITY, CODES OF CONDUCT, CONTRACTS AND (AVOIDING) LIABILITY 64 (Eleven International Publ'g, 2015); Anna Beckers & Mark T. Kawakami, *Why Domestic Enforcement of Private Regulation Is (Not) the Answer: Making and Questioning the Case of Corporate Social Responsibility Codes*, 24(1) IND. J. GLOB. L. STUD. OF INT'L BUS. POL'Y 1, 3 (2017); Jan M. Smits, *Enforcing Corporate Social Responsibility Codes Under Private Law: On the Disciplining Power of Legal Doctrine*, 24(1) IND. J. GLOB. L. STUD. OF INT'L BUS. POL'Y 99, 101–02 (2017).

including, among others, codes of conduct,⁸⁹ codes of ethics,⁹⁰ social and environmental policies,⁹¹ business principles,⁹² and standards.⁹³

This difference in terminology does not reflect identifiable specificities within the category of the CSR codes, making it very difficult to distinguish between different types of documents that outline ethical guidelines for responsible business conduct.⁹⁴ Up until now, CSR codes have been voluntarily drafted, allowing companies the freedom to name and structure them as they wish. Attempts have been made to trace patterns linking specific CSR code names to certain content in terms of objectives, subjects to which the document is applicable, and the type of clauses embedded. For example, a code of ethics is typically defined as a formal document that outlines corporate ethical views and standards, serving as a moral compass to guide decision-making within the company.⁹⁵ In contrast, codes of conduct are often seen as a list of detailed commitments and obligations to conduct

⁸⁹ LVMH SUPPLIER AND BUSINESS PARTNER CODE OF CONDUCT, <https://www.lvmh.com/en/ethics-and-compliance/lvmh-supplier-code-of-conduct> (last visited Jan. 2, 2025).

⁹⁰ ENI CODE OF ETHICS, <https://www.eni.com/content/dam/enicom/documents/ita/governance/codice-etico/eni-code-of-ethics.pdf> (last visited Jan. 2, 2025). Compare ENI CODE OF ETHICS, with ENI SUPPLIER CODE OF CONDUCT. However, ENI has also published a SUPPLIER CODE OF CONDUCT, which—apart from differences in layout and an acceptance section requiring the business partner's signature for acknowledgment—has almost identical content. The document is available at <https://www.eni.com/content/dam/enicom/documents/ita/governance/codice-etico/supplier-code-of-conduct-march-2020.pdf> (last visited Jan. 2, 2025); FINCANTIERI, SUPPLIERS' CODE OF ETHICS, <https://www.fincantieri.com/globalassets/governance/etica-impresa/suppliers-CODE-OF-ETHICS.PDF> (last visited Jan. 2, 2025); ATS SUPPLIER CODE OF ETHICS, https://atsautomation.com/wp-content/uploads/sites/9/2020/06/2_15_001-ATS-Supplier-Code-of-Ethics.pdf (last visited Jan. 2, 2025).

⁹¹ See H&M GROUP, H&M GROUP'S SOCIAL POLICIES, <https://hmgroup.com/wp-content/uploads/2023/03/HM-Group-Social-Policies-2023.pdf> (last visited Jan. 2, 2025).

⁹² See THE SHELL GROUP, SHELL GENERAL BUSINESS PRINCIPLES, https://www.shell.com/who-we-are/our-values/_jcr_content/root/main/section/revealer/revealer_item.multi.stream/1678867064476/9e830f88e7f5f7b80734ce8ff26659e8926a75e8/shell-general-business-principles-2014-new.pdf (last visited Jan. 2, 2025).

⁹³ See IKEA, IWAY (IKEA WAY OF RESPONSIBLY PROCURING PRODUCTS, SERVICES, MATERIALS, AND COMPONENTS) STANDARD, https://www.ikea.com/global/en/images/IWAY_Standard_General_Section_Edition_60_6238ea7ef9.pdf (last visited Jan. 2, 2025); see also STARBUCKS, STANDARDS OF BUSINESS CONDUCT, <https://content-prod-live.cert.starbucks.com/bibina/v2/asset/137-92642.pdf> (last visited Jan. 2, 2025).

⁹⁴ See Mark S. Schwartz, *The Nature of the Relationship between Corporate Codes of Ethics and Behavior*, 32 J. BUS. ETHICS 247, 248 (2001).

⁹⁵ Mark S. Schwartz, *A Code of Ethics for Corporate Code of Ethics*, 41 J. BUS. ETHICS 27, 28 (2002).

business operations in a determined way.⁹⁶ Policies, on the other hand, are viewed as high level and less detailed frameworks. However, these distinctions are fairly imprecise and represent more of an effort to structure business practices than a strict taxonomy;⁹⁷ frequently, regardless of the name assigned, CSR codes tend to share similar elements or exhibit characteristics that align more closely with a different type of CSR document than the name might suggest.⁹⁸

The purpose of the following sections are to examine the current practice of implementing CSR codes to extend a company's CSR standards to their supply chains through contractual mechanisms, with the aim of assessing how this practice will be affected by the CS3D. Consequently, our focus will be on CSR codes, which regardless of the specific name assigned to them by companies—establish the responsibilities of companies, their subsidiaries, and business partners in the supply chains toward society in the area of human rights and the environment. For the sake of simplicity and greater clarity, we will refer to these as Codes of Conduct (“CoCs”), in line with the terminology used in the Directive itself.

B. Matters and Subjects Covered by the Codes of Conduct

In the absence of a legal obligation to draft CoCs and the lack of binding standards governing their content prior to the introduction of the CS3D, existing CoCs have exhibited significant variation in the matters they address and the risks they account for. This heterogeneity can be attributed to several factors.

⁹⁶ Amanda Nieweler, *Code of Conduct vs Code of Ethics: A Comparative Analysis*, WHISTLEBLOWER SECURITY: BLOG (Apr. 19, 2017), <https://blog.whistleblowersecurity.com/blog/code-of-ethics-and-code-of-conduct-whats-the-difference>.

⁹⁷ Scholars primarily emphasize one clear distinction within the realm of CSR codes: the differentiation between public and private codes. Public CSR codes refer to the soft-law frameworks previously discussed in Section I or those developed by another international political institution, trade unions, and NGOs. Private CSR codes, instead, are those developed by corporations themselves, a practice that emerged in the 1990s. This trend was driven by two main factors: the increasing proliferation of public codes and the pressing need to respond to corporate scandals that garnered significant media attention, coupled with the shifting societal expectations imposed on corporations. See Beckers, *supra* note 4, at 21–22.

⁹⁸ See *supra* notes 87–91; see also WORLD BANK GROUP, COMPANY CODES OF CONDUCT AND INTERNATIONAL STANDARDS: AN ANALYTICAL COMPARISON (PART 1, 2003).

Primarily, the scope and depth of CoCs have often been shaped by a company's willingness—or reluctance—to tackle specific adverse impacts. In some cases, companies may have deliberately omitted certain aspects to avoid potential liability for noncompliance or to minimize the operational burden associated with conducting thorough due diligence. A hesitancy to confront suppliers' noncompliance may have stemmed from concerns about disrupting business operations or straining supplier relationships. Hence, companies frequently relied on catch-all clauses in their CoCs, which would include a bundle of issues from corruption to human rights.⁹⁹ On the one hand, these clauses enabled companies to project an image of commitment to sustainability and ethical business practices. On the other hand, the lack of specificity in these provisions often served to insulate companies from recognizing the CoCs clauses as enforceable obligations, even when their content was incorporated into commercial contracts.¹⁰⁰

The content of a company's CoC was also often influenced—appropriately so—by sector-specific characteristics, the nature of its products, the geographical location of its supply chain, and its exposure to particular risks. For instance, industries heavily reliant on low-skilled labor or the extraction of natural resources tend to prioritize labor rights or environmental issues more explicitly in their CoCs.¹⁰¹ Furthermore, the design of CoCs may have differed based on the production regime within which a company operates. It has been argued, for example, that the contrasts between the European and the American production regimes incisively change the character of corporate codes.¹⁰²

Most contemporary CoCs address both human rights and environmental adverse impacts. However, empirical observations suggest that labor-related

⁹⁹ See Kasey McCall-Smith & Andreas Rühmkorf, *From international law to national law: The opportunities and limits of contractual CSR supply chain governance*, in LAW AND RESPONSIBLE SUPPLY CHAIN MANAGEMENT: CONTRACT AND TORT INTERPLAY AND OVERLAP 15, 32 ff. (Vibe Ulfbeck, Alexandra Andhov & Kateřina Mitkidis eds., Routledge 2021).

¹⁰⁰ *Id.*

¹⁰¹ Sarah Vandenbroucke, *Codes of Conduct, a Tool to Regulate Supply Chain Labor Practices?*, in PANTA RHEI: RECHT EN DUURZAAMHEID [PANTA RHEI: LAW AND SUSTAINABILITY] 31 (Yvonne Erkens, Cees de Groot & Chris van Oostrum eds., 2023).

¹⁰² Gunther Teubner, *Corporate Codes in the Varieties of Capitalism: How Their Enforcement Depends on the Differences Among Production Regime*, 24 IND. J. GLOB. LEGAL STUD. 81, 91 (2017).

issues typically receive greater attention than environmental concerns.¹⁰³ A common feature across nearly all CoCs is the unequivocal prohibition of forced labor and child labor. Beyond these core principles, many CoCs incorporate provisions on other labor law issues, such as health and workplace safety, prohibition of harassment and abuse, prohibition of discrimination, and the provision of fair wages.

In contrast, environmental matters are frequently addressed in a less detailed and comprehensive manner. Many CoCs include broad, aspirational statements encouraging business partners to minimize environmental harm or comply with relevant regulations, without specifying concrete measures or accountability mechanisms. That said, some CoCs adopt a more robust approach, integrating explicit clauses on emissions reduction, pollution control, waste management, sustainable packaging, and environmentally responsible transport.¹⁰⁴

Regarding the personal scope of the CoCs, the prevailing practice limits their applicability to Tier-1 suppliers. However, some CoCs adopt a more expansive approach. Many require Tier-1 suppliers to incorporate analogous standards into their contracts with Tier-2 suppliers, thereby creating a cascading accountability mechanism. A smaller subset goes further, compelling Tier-1 suppliers to disclose the identities of all sub-suppliers involved in the production process. Even fewer mandate that Tier-1 suppliers permit audits or assessments of lower-tier suppliers. Only a minority of CoCs—those reflecting the most rigorous standards—extend their provisions to regulate the entire supply chain.¹⁰⁵

¹⁰³ See GARE SMITH & DAN FELDMAN, COMPANY CODES OF CONDUCT AND INTERNATIONAL STANDARDS: AN ANALYTICAL COMPARISON 6 (2003), <https://documents1.worldbank.org/curated/en/416281468096001385/pdf/346620v10CompanyCodesofConduct.pdf>; Elodie Béthoux, Claude Didry & Arnaud Mias, *What Codes of Conduct Tell US: Corporate Social Responsibility and the Nature of the Multinational Corporation*, 15 CORP. GOVERNANCE: AN INT'L REV. 77, 77 (2007).

¹⁰⁴ *Id.* at 12–15.

¹⁰⁵ ECOVADIS & AFFECTIO MUTANDI, SUSTAINABILITY CLAUSES IN COMMERCIAL CONTRACTS: THE KEY TO CORPORATE RESPONSIBILITY 23 (2018), https://www.eticanews.it/wp-content/uploads/2018/07/ecovadis_contrat_clauses_RSE_20.06.2018_eng_v5-1.pdf.

C. Methods of Incorporation of CSR Obligations into Commercial Contracts

As discussed in Section 1 of this Article, soft-law frameworks have long encouraged companies to articulate clear expectations for their suppliers and to integrate these expectations into contractual agreements—well before the introduction of the CS3D. Over time, business practice has crystallized various methods for embedding CSR obligations into commercial contracts, all of which ultimately rely on the inclusion of a CSR clause in some form. These clauses can be defined as contractual provisions addressing social and environmental concerns that are not directly related to the core subject matter of the contract.¹⁰⁶

CSR clauses may be incorporated directly into the main body of a commercial contract, explicitly outlining in a more or less detailed manner the supplier's obligations regarding CSR standards. Alternatively, they may be embedded in the general terms and conditions, applying broadly across all agreements between the contracting parties, which would contain the reference to them.¹⁰⁷ However, since commercial contracts and supplier general terms and conditions are typically subject to confidentiality agreements and are not publicly available, detailed insights into their specific drafting and enforcement remain limited. In this regard, real-case studies or model contract clauses can provide useful guidance.¹⁰⁸

¹⁰⁶ KATEŘINA PETERKOVA MITKIDIS, SUSTAINABILITY CLAUSES IN INTERNATIONAL BUSINESS CONTRACTS 75 (2015).

¹⁰⁷ BECKERS, *supra* note 4, at 48; Vibe Ulfbeck, Ole Hansen & Alexandra Andhov, *Contractual Enforcement of CSR Clauses and the Protection of Weak Parties in the Supply Chain*, in LAW AND RESPONSIBLE SUPPLY CHAIN MANAGEMENT: CONTRACT AND TORT INTERPLAY AND OVERLAP 46, 48 (Vibe Ulfbeck, Kateřina Mitkidis & Alexandra Andhov eds., 2021).

¹⁰⁸ For concrete and actual examples of CSR clauses, see Carlo Mastellone, *Sostenibilità e contratti commerciali internazionali [Sustainability and International Trade Contracts]*, in CONTRATTI DEL COMMERCIO INTERNAZIONALE E SOSTENIBILITÀ [INTERNATIONAL BUSINESS CONTRACTS AND SUSTAINABILITY] 1, 23–26 (Fabrizio Marella & Carlo Mastellone eds., 2024). For empirical studies, see VYTOPIL, *supra* note 88, at 123–24. For model clauses, see DAVID V. SNYDER, SUSAN A. MASLOW & SARAH DADUSH, BALANCING BUYER AND SUPPLIER RESPONSIBILITIES: MODEL CONTRACT CLAUSES TO PROTECT WORKERS IN INTERNATIONAL SUPPLY CHAINS, VERSION 2.0, at 19–37 (2021), https://www.americanbar.org/content/dam/aba/administrative/human_rights/contractual-clauses-project/mccs-full-report.pdf.

See also Eur. Working Grp. for Responsible and Sustainable Supply Chains, *Zero Draft for Consultation: The European Model Clauses (EMCs) for Responsible and Sustainable Supply Chains* (July 2024), https://www.responsiblecontracting.org/_files/ugd/fcee10_538d4de3351d4b699cd1c47e81ba8f22

CSR clauses—whether included in the main contract or in the general terms and conditions—may not fully address the supplier’s CSR obligations but rather serve as a reference point. This reference may be made to international soft-law instruments,¹⁰⁹ often referred to in the literature as public CSR codes,¹¹⁰ or to the company’s CoCs,¹¹¹ regardless of the specific name or format they take. In some cases, the CoCs outline general CSR principles and then refer to specific policies related to particular sectors of sustainability compliance, creating extended chains of (cross-) references.¹¹²

A less common practice is to create a separate umbrella CSR agreement, which establishes the mutual rights and obligations of the parties to be signed alongside the main supply contract or multiple contracts or orders.¹¹³ As an alternative, it has been suggested that the supplier could accept the CSR commitments contained in the CoCs by electronically confirming this when accessing the buyer’s webpage.¹¹⁴ However, this approach could be problematic in some jurisdictions with respect to the recognition of the acceptance and subsequent formation of the contract.

To provide a complete picture, it should be noted that some scholars have explored the possibility of construing at least minimal CSR obligations as parts of agreements, even in the absence of explicit or implied references to a CoC in the contract, as such minimum obligations are widely known in international trade and regularly observed by the parties to contracts of this type.¹¹⁵ There also has been extensive debate—fueled by some national court decisions taken on both sides of the Atlantic¹¹⁶—on whether a corporate code

.pdf (these clauses are currently undergoing public consultation, with the official version (EMCs 1.0) expected to be published in 2025).

¹⁰⁹ McCall-Smith & Rühmkorf, *supra* note 99, at 31.

¹¹⁰ See BECKERS, *supra* note 4, at 14.

¹¹¹ McCall-Smith & Rühmkorf, *supra* note 99, at 29; Ulfbeck, Hansen & Andhov, *supra* note 107, at 49.

¹¹² See, e.g., H&M, *supra* note 91.

¹¹³ See ENI, *supra* note 90, at 47.

¹¹⁴ See Ulfbeck, Hansen & Andhov, *supra* note 107, at 49.

¹¹⁵ See Ingeborg Schwenzer & Edgardo Muñoz, *Sustainability in Global Supply Chains Under the CISG*, 23(3) EUR. J.L. REFORM 300 (2021) (advocating for the possibility of supplementing a contract with sustainability standards impliedly via Article 9(1) and (2) of the UN Convention for the International Sale of Goods); see also, Cristina Poncibò, *The Contractualisation of Environmental Sustainability*, 12 EUR. J. L. REFORM 300, 319 (2016).

¹¹⁶ See, e.g., *Doe v. Wal-Mart Stores, Inc.*, 572 F.3d 677 (9th Cir. 2009); *Rahaman v. J.C. Penney Corp.*, 2016 WL 2616375 (Del. Super. Ct. 2016); *Verbraucherzentrale Hamburg v. Lidl Dienstleistung*

can be deemed binding and enforceable if it remains a mere unilateral public declaration, without being incorporated into the contract or general terms, nor acknowledged by the supplier in any way.¹¹⁷ However, since our focus is on the contractual governance of the supply chain, these cases fall outside the scope of our analysis.

D. Terminology

The enforceability of a CoC hinges not only on the range of issues it addresses but also—and often more critically—on how its provisions are phrased. In the absence of any mandatory rules, companies can deliberately draft clauses using either mandatory language or aspirational terms. For example, phrases such as “the company encourages its suppliers to contribute” and “the company expects its suppliers to commit”¹¹⁸ leave room for the interpretation as to whether there is an actual obligation laid down on the business partner. In contrast, more decisive and explicit terms, such as “suppliers shall ensure,” set clear and enforceable expectations.¹¹⁹ Such linguistic choices may reflect strategic decisions; precise, actionable words create legally binding obligations, while vague or non-committal phrasing allows companies to avoid enforceability, even if the CoC is nominally incorporated into contracts.

However, while the absence of precise, binding language may initially appear as a sound strategy, it introduces significant legal and operational risks for buyer companies. First, it may prevent buyers from fully discharging liability if an adverse event occurs, as the company would be unable to demonstrate that extended efforts have been made in order to prevent harm in the supply chain. If the court finds the CSR clause too vague to be legally binding, it may declare the term void, preventing the company from even

GmbH & Co. KG, statement of complaint filed in the Heilbronn district court, Ger., Apr. 6, 2010, case settled Apr. 14, 2010; *Kasky v. Nike, Inc.*, 45 P.3d 243 (Ca. 2002).

¹¹⁷ See BECKERS, *supra* note 4, at 58–59; see also, Anna Beckers, *Legalization Under the Premises of Globalization: Why and Where to Enforce Corporate Social Responsibility Codes*, 24(1) IND. J. GLOB. LEGAL STUD. 15 (2017).

¹¹⁸ See, e.g., FINCANTIERI, *supra* note 90, at 11–12; LVMH, *supra* note 87, at 8. Often, “weak” phrasing cohabitates with the more stringent one depending on the concrete issue addressed.

¹¹⁹ See, e.g., INDITEX, CODE OF CONDUCT FOR MANUFACTURERS AND SUPPLIERS 4–5, https://www.inditex.com/itxcomweb/api/media/8cd88d29-0571-43d5-a6c3-a6c34671e4c1/inditex_code_of_conduct_for_manufacturers_and_suppliers.pdf?t=1655306501225 (last visited Jan. 2, 2025).

demonstrating an attempt to mitigate risks. Second, ambiguous drafting generates interpretative uncertainties, increasing the risk of disputes with business partners.

Another common approach in CoCs is to include a clause requiring compliance with relevant national laws—such as environmental regulations, workplace safety, and fair wage standards—obligations that already exist independently of the contract.¹²⁰ At first sight, this may appear superficial and futile. Indeed, preventing adverse impacts cannot be achieved merely by reinforcing compliance with the law. However, this approach has a key legal effect: incorporating such a clause transforms regulatory noncompliance into a contractual breach, enabling enforcement through contractual remedies. This can be particularly valuable in jurisdictions where governmental enforcement of environmental or labor laws is weak, as is often the case in developing economies.

Beyond the wording itself, the layout of the CoC can also subtly impact its perception and effectiveness. Unlike formal legal documents, many CoCs resemble promotional brochures, featuring elaborate graphic design and marketing-oriented language. Furthermore, they often lack standard legal formatting, such as numbered articles and subparagraphs. While the layout alone does not affect enforceability, these stylistic choices can reinforce the perception that a CoC serves primarily as a corporate social responsibility statement rather than a binding contractual instrument.

IV. VOLUNTARY NO MORE: HOW CoCs AND CSR CLAUSES MUST CHANGE AFTER THE CS3D

The main change CS3D will bring to the status quo will be that the voluntary practice of adopting CoCs will become mandatory. In fact, CoCs will need to become part of a broader framework that in-scope companies will have to adopt, if they have not already done so, a due diligence policy.¹²¹ Such a policy should be developed, first and foremost in consultation with the company's employees and their representatives and should outline the company's approach to due diligence, including its long-term strategy.

¹²⁰ See Ulfbeck, Hansen & Andhov, *supra* note 107, at 47.

¹²¹ CS3D, *supra* note 39, art. 7(2)(a).

Additionally, it should describe how due diligence is embedded into the company's other policies and risk management systems.¹²²

In the context of said framework approach, CoCs should establish concrete rules and principles to be followed throughout the company and its subsidiaries and, where relevant, by the company's direct or indirect business partners.¹²³ They should apply across all relevant corporate functions and operations, including procurement, employment, and purchasing decisions.¹²⁴

The relationship between the due diligence policy and CoCs resembles the distinction that some scholars have drawn between CoCs and codes of ethics: while the former outlines corporate ethical views and standards, the latter lays down concrete rules and commitments.¹²⁵

By assigning such significant responsibilities to private entities, the EU legislature has solidified the status of MNCs as regulators of global corporate governance and supply chains, effectively transforming them into "quasi-legislators."¹²⁶ Since the CS3D does not provide strict or detailed guidelines on how to draft CoCs, companies are granted considerable discretion to "legislate" themselves, with only some rules available scattered throughout the articles and recitals.

The requirement that CoCs should articulate concrete rules and principles to follow¹²⁷ suggests that the longstanding practice of addressing due diligence through a single, catch-all CSR clause within commercial contracts or general terms and conditions will no longer suffice. A similar limitation seems to apply to the mere citation in the CSR clause of public CoCs, best practices, or other soft-law standards. While the Directive

¹²² *Id.* recital 39.

¹²³ *Id.* art. 7(2)(b).

¹²⁴ *Id.* recital 39.

¹²⁵ *Supra* Section III(a).

¹²⁶ Jaap Baaij & Alex Geert Castermans, *The potential of contractual assurances to advance supply chain due diligence* 11 (Eur. Univ. Inst., Robert Schuman Ctr. for Advanced Stud., Glob. Governance Programme Working Paper 2023/28), <https://hdl.handle.net/1814/75509>, and Sarah Vandenbroucke, *The Evolution of Codes of Conduct to Ensure Labor Rights in Global Supply Chains*, 118 AJIL UNBOUND, 297, 298, <https://doi.org/10.1017/aju.2024.45>; see also Mario Stella Richter & Maria Lucia Passador, *Corporate Sustainability Due Diligence: Supernatural Superserious* (Dec. 3, 2022, last revised Mar. 4, 2024), <http://dx.doi.org/10.2139/ssrn.4293912>, and Eugenio Barcellona, *La sustainable governance nelle proposte di riforma del diritto europeo: a proposito dei limiti strutturali del c.d. stakeholderism*, 1 RIV. SOC. 1, 32–36 (2022) (on the appropriateness of granting company directors the discretion to make quasi-political choices in pursuing the "common good").

¹²⁷ CS3D, *supra* note 39, art. 7(2)(b), recital 39.

strongly encourages alignment with established international frameworks, companies cannot simply make broad references without further elaboration. Instead, they must substantiate how these principles translate into concrete obligations within their specific operational context, taking into account their industry, geographic location, and the particular risks they face. Beyond serving as a necessary precondition for holding a business partner liable in the event of noncompliance, drafting detailed and verifiable obligations in advance can also preemptively mitigate legal uncertainty. By addressing all potential aspects of sustainability obligations upfront, companies may avoid the complexities that could arise in case of a dispute when determining the applicable law—or resolving inconsistencies between potentially conflicting laws—governing the CSR clause through which the CoC is incorporated.

Moreover, since the due diligence obligation extends to human rights as well as the prohibitions and obligations outlined in the Annex to the CS3D,¹²⁸ companies must assess and address the risks of adverse impacts across all these areas. This does not imply, as previously discussed,¹²⁹ that companies are expected to monitor every possible risk across all operations simultaneously. Rather, from the broad spectrum of potential adverse impacts related to Annex rights and obligations, only those risks that are realistically relevant to a company's specific chain of activities will be incorporated into its CoC. However, this also means that companies can no longer, as has often been the case, focus disproportionately only on some issues (such as labor rights) while neglecting other critical concerns that may arise within their chain of activities. Beyond the subject matter, the CS3D resolves uncertainty and heterogenous practice on the personal scope of the CoCs: it should apply to all companies' subsidiaries, and the companies need to attempt to obtain Tier 1 business partners' consent to abide by it and to carry it down the chain to Tier 2 and Tier *n* business partners.¹³⁰

Therefore, a systematic interpretation of the CS3D suggests that CSR clauses in commercial agreements should now serve as a mechanism for integrating comprehensive, tailor-made CoCs into contracts. Moreover, they should be leveraged to further customize CoCs, ensuring they are specifically adapted to the unique circumstances of each business partner.

¹²⁸ *Id.* art. 3(1)(b)-(c), recital 32.

¹²⁹ *See supra* Section II on the meaning of risk-based due diligence.

¹³⁰ CS3D, *supra* note 39, art. 10(2)(b), art. 11(3)(c), recital 46, recital 54.

One of the primary aspects such customization should address is the implementation of concrete measures for verifying business partners' compliance with the CoC, as required by the Directive.¹³¹ While the CoC may already outline certain verification procedures, including those suggested by the Directive itself such as independent third-party verification or verification through industry or multi-stakeholder initiatives, it stands to reason that the CSR clause should translate these general provisions into precise, actionable mechanisms specifically adapted to the structure and operations of the business partner.

Another key matter to consider in CSR clauses is the method and frequency of sustainability-related disclosures from business partners to the company. These disclosures will form a crucial part of the data that the companies will use in the risk-based analysis. This aspect of CSR clauses is equally important since CS3D in-scope companies are also covered by the obligations of the Corporate Sustainability Reporting Directive ("CSRD"),¹³² which is already in force in the EU and requires covered undertakings to report certain sustainability information, including sustainability-related risks the company faces in connection to its operations.

Moreover, sustainability-related data gathered in this manner may also be a reason for the company to update its policies. Indeed, the CS3D stipulates that the due diligence policy—and, by extension, the CoC as its integral component—must be updated without undue delay following significant changes (extraordinary updates) and reviewed, with necessary updates, at least every twenty-four months (ordinary updates).¹³³ This requirement implies that CSR clauses must also incorporate adjustment mechanisms, as any new provisions eventually introduced through such updates into the company's CoC would fall outside the scope of the initial agreement between the parties.

¹³¹ *Id.* art. 10(5), 11(6).

¹³² See Directive 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, 2022 O.J. (L 322/15) 15. While the personal scope of this Directive overlaps with that of the CS3D, the CSRD applies more broadly, covering not only large companies but also SMEs with transferable securities listed on an EU-regulated market. Like the CS3D, the CSRD also has extraterritorial reach.

¹³³ CS3D, *supra* note 39, art. 7(3).

Finally, CSR clauses can include business incentives tied to partners' human rights and environmental performance,¹³⁴ rewarding the investments they must make to meet agreed-upon sustainability standards. These incentives may take the form of price premiums, favorable payment terms, commitments to long-term contracts, or exclusive business opportunities. Additionally, the reward system can be structured in phases, with benefits granted upon reaching specific, predefined milestones.

In any case, to further support companies and facilitate their compliance with CS3D obligations, the EU Commission is set to issue guidance on voluntary model contractual clauses by January 26, 2027.¹³⁵

V. THE PECULIAR CASE OF DEALING WITH SMEs: PROBLEMS BEYOND MERE COC DRAFTING

The idealistic spirit of the CS3D emerges clearly from the emphasis on the importance of meaningful engagement with business partners in the chain of activities, of reaching agreements with full mutual consent, and of placing fair, reasonable, and non-discriminatory requirements. These are the corollaries to the principle of shared responsibility: the Directive establishes that HREDD responsibilities should be appropriately allocated between in-scope companies and their business partners.¹³⁶ While the Directive hopes that in-scope companies will take the lead and disseminate sustainability standards throughout their chains of activities, they must not exploit their dominant position to contract out of their own obligations. Shifting the entirety of responsibility onto business partners through contractual provisions that impose unrealistic compliance with CoC requirements would go against CS3D's vision.

This principle acquires a specific significance with regard to MNC transactions with Small and Medium Enterprises ("SMEs"). The Directive mandates companies to take certain measures, where necessary, when seeking contractual assurances from SMEs, whether they are a direct or indirect business partner. First and foremost, acting with due diligence entails ensuring, during the negotiation process, that a smaller business partner possesses the capacity to effectively adhere to the proposed standards.

¹³⁴ *Id.* recital 45.

¹³⁵ *Id.* art. 18

¹³⁶ *Id.* recital 46, recital 54.

Companies should avoid the common yet problematic practice of burying CSR-related provisions within an extensive network of cross-referenced documents—sometimes spanning hundreds of pages—sent to contracting parties in a single set. This approach increases the risks of SMEs signing contracts with obligations that they may not fully grasp. In cases of necessity, in-scope companies must provide targeted and proportionate support, taking into account the SME's resources, expertise, and operational constraints.

This support may encompass a range of measures, including facilitating access to capacity-building initiatives, offering training, and assisting in the development of management systems. Moreover, where compliance with a CoC would jeopardize an SME's financial viability, companies are expected to extend proportionate financial assistance. This may take various forms, such as direct financing, low-interest loans, guarantees of continued sourcing, or support in securing external funding.¹³⁷

This requirement can arguably be considered as an overly optimistic one. On the one hand, the realities of global supply chains are well known. A longstanding challenge, especially for SMEs, arises from the significant disparity in bargaining power between large buyers and their smaller suppliers. Many of these suppliers are economically dependent on a handful of purchasing companies, while buyers often face little difficulty in replacing them. This dynamic fosters intense competition among suppliers, often driving prices downward. As a result, buying companies frequently exert substantial pricing pressure, forcing many suppliers to accept contracts at rates so low that they fail to even cover basic production costs.¹³⁸ Within this context, it is highly improbable that a company, acting purely out of goodwill, would voluntarily absorb the financial burden of implementing measures aimed at enabling its smaller business partners to comply with mandated sustainability standards.

This concern is further amplified by a significant regulatory gap: the Directive fails to establish any concrete safeguards for SMEs within an in-scope company's chain of activities should the latter impose sustainability obligations that are financially unsustainable for the SMEs. The only solution available to such enterprises would be the outright rejection of the contract—a luxury many SMEs simply cannot afford. Beyond this, the only realistic

¹³⁷ *Id.* art. 10(2)(e), 11(3)(f).

¹³⁸ Martijn Scheltema, *The Proliferation of Contractual Assurances in Environmental and Human Rights Due Diligence in Supply Chains*, 4 *TJDSCHRIFT VOOR COMPLIANCE* 177, 178 (2022).

scenario in which a SME could challenge the unfairness of CSR clauses would arise in the context of legal proceedings under Article 29 of the CS3D, triggered by actual harm. In such a case, the lead company's due diligence failures could be contested for disregarding the risks faced by SMEs—risks that were merely “mitigated” through the contractual imposition of unattainable sustainability standards, essentially shifting the entire burden onto the smaller business partner.

Another possible strategy for in-scope companies to avoid the substantial costs and investments mandated by the Directive could be even more detrimental, or at the very least, have more widespread negative consequences. The approach in question would involve offshoring: in an attempt to mitigate the risk of adverse impacts arising within their supply chains—whether due to concerns about civil liability or fears of reputational damage—companies might choose to withdraw their business from developing nations, exacerbating the economic challenges faced by these states by lowering their *per capita* income.¹³⁹ Regrettably, this scenario is not merely a theoretical concern. Early studies examining the effects of the German Supply Chain Act have shown a twenty percent reduction in imports from high-risk countries such as Pakistan and Bangladesh within the textile industry since the law's implementation.¹⁴⁰ Additionally, more than one in eight companies have opted to source products or establish production in countries with higher human rights and environmental protection standards.¹⁴¹

In light of the above, it is clear that the effectiveness of the Directive, as well as the contractual governance approach embedded within it, hinges not only on the precise drafting of the CoCs but also on the genuine willingness to commit to a sustainable transition, rather than merely shielding oneself with well-crafted policies.

¹³⁹ Stephan Schmid & Chris Thomale, *Private Enforcement in the EU Corporate Sustainability Due Diligence Directive—A critical comparative law and economic analysis of the Final Compromise*, OXFORD BUS. L. BLOG (May 22, 2024), <https://blogs.law.ox.ac.uk/oblb/blog-post/2024/05/private-enforcement-eu-corporate-sustainability-due-diligence-directive>.

¹⁴⁰ *Id.*

¹⁴¹ GALINA KOLEV-SCHAEFER & ADRIANA NELIGAN, DUE DILIGENCE—EFFECT OF SUPPLY CHAIN REGULATION: DATA-BASED RESULTS ON THE EFFECTS OF THE GERMAN SUPPLY CHAIN ACT 4 (Institut der deutschen Wirtschaft, Report No. 8/2024, 2024), <https://www.iwkoeln.de/studien/galina-kolev-schaefer-adriana-neligan-data-based-results-on-the-effects-of-the-german-supply-chain-act.html>.

CONCLUSION

The introduction of the CS3D was met with many criticisms, one being that the Directive's vague standards and complex wording contribute to legal uncertainty.¹⁴² However, as the analysis of the evolution of corporate social responsibility demonstrates, the CS3D represents a culmination of a long journey from a voluntary realm to hard law. The CS3D does not introduce particularly innovative obligations; rather, it codifies requirements that have long been present in various soft-law frameworks and recommendations. Its key contribution lies in enshrining these standards into a binding legal document.

The very choice of the Directive to rely—among other things—on contractual governance is not new. The importance of contractual tools in supply chain management has been central at least since John Ruggie published the Protect, Respect and Remedy Framework. While the Directive does not provide an exhaustive roadmap for drafting CSR clauses and CoCs, it does offer a useful starting point for companies to review and enhance their existing CSR-related policies. The key is to systematically interpret the Directive's obligations—including those concerning contractual assurances—in light of the international framework that many large undertakings are already familiar with, as evidenced by numerous studies showing its longstanding implementation into corporate policies.

The critiques related to the higher costs for involved companies and, hence, setbacks in terms of competitiveness, the concern that companies would rather withdraw from troubled supplier markets than deal with them, the risk that the companies would merely “tick the boxes,” however, are all sound. These concerns have persisted long after the rollercoaster negotiations and adoption of the Directive, to the extent that on February 26, 2025, the

¹⁴² AOIFE HANLEY, FINN OLE SEMRAU, FRAUKE STEGLICH & RAINER THIELE, THE CUMULATIVE EFFECT OF DUE DILIGENCE EU LEGISLATION ON SMES, Study requested by the European Parliament's INTA committee 25 (EP/EXPO/A/COMMITTEE/FWC/2019-01/LOT5/R/10 EN, Sept. 2023), [https://www.europarl.europa.eu/RegData/etudes/STUD/2023/702597/EXPO_STU\(2023\)702597_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2023/702597/EXPO_STU(2023)702597_EN.pdf) (last visited Aug. 29, 2025); Ciro G. Corvese, *La sostenibilità ambientale e sociale delle società nella proposta di Corporate Sustainability Due Diligence Directive (dalla insostenibile leggerezza dello scopo sociale alla obbligatoria sostenibilità della due diligence)*, 3 BANCA IMPRESA SOCIETÀ 391, 411–412 (2022).

European Commission introduced the Omnibus I Package (“Omnibus”).¹⁴³ The package was presented as a measure to streamline and simplify various EU sustainability-related regulations—many with the ink still not dry—to boost Europe’s competitiveness.¹⁴⁴

Among its various initiatives, the Omnibus included a so-called “Stop-the-Clock” proposal to postpone both the transposition deadline and the application of the CS3D.¹⁴⁵ The proposal was deemed so important that the Members of European Parliament decided to fast track the vote, treating it as a matter of urgency.¹⁴⁶ They ultimately approved it, granting Member States a one-year extension to transpose the CS3D into national law and deferring by one year the deadline for its first-wave application.¹⁴⁷ This decision—highly criticized¹⁴⁸—created further disruption and legal uncertainty for businesses that had already begun investing substantial time and resources in the development of due diligence strategies.

The Omnibus also proposed to narrow the due diligence obligation to direct business partners (Tier 1).¹⁴⁹ In-scope companies would therefore be required to assess adverse impacts only in relation to such partners, except where “plausible information” justifies deeper inquiry. Such an approach, however, risks undermining the Directive’s original objective, which can be summarized as preventing another “Rana Plaza” from occurring. Tier-1

¹⁴³ The documents of the Omnibus I Package are available at the European Commission’s website: https://commission.europa.eu/publications/omnibus-i_en (last visited Aug. 29, 2025).

¹⁴⁴ *European Commission presents its compass to boost Europe’s competitiveness in the next five years*, EUR. COMM’N (Jan. 29, 2025), https://ec.europa.eu/commission/presscorner/detail/en/ac_25_385 (last visited Feb. 2, 2025).

¹⁴⁵ Proposal for a Directive of the European Parliament and of the Council amending Directives 2006/43/EC, 2013/34/EU, (EU) 2022/2464 and (EU) 2024/1760 as regards certain corporate sustainability reporting and due diligence requirements, COM/2025/81 final. The document contained also a proposal to postpone the application of some reporting requirements contained in the CSRD (see note 132).

¹⁴⁶ *Sustainability and due diligence: MEPs fast-track vote on postponed application* (Apr. 1, 2025), <https://www.europarl.europa.eu/news/it/press-room/20250331IPR27545/sustainability-and-due-diligence-meps-fast-track-vote-on-postponed-application>.

¹⁴⁷ Directive (EU) 2025/794 of the European Parliament and of the Council of 14 Apr. 2025, 2025 O.J. (L series) 1.

¹⁴⁸ See, e.g., the call for long-term policy stability in the Investor joint statement on Omnibus Legislation (Feb. 4, 2025), <https://www.unpri.org/download?ac=22691> (last visited Aug. 29, 2025).

¹⁴⁹ Commission Staff Working Document 35, SWD(2025) 80 final, accompanying the documents COM(2025) 80—COM (2025) 8, https://commission.europa.eu/document/download/1da93ca2-7911-4e1f-9ce6-cecd09a85250_en?filename=SWD-Omnibus-80-81_En.pdf.

business partners of in-scope companies are typically not the points in the supply chain where the highest risks of adverse impacts are concentrated.¹⁵⁰

In addition, the Omnibus suggested removing the harmonized regime of civil liability for breaches of due diligence obligations at the EU level,¹⁵¹ thereby reintroducing the fragmentation that the Directive originally sought to overcome. If harmonized conditions for civil liability claims are abolished, their harmonized overriding mandatory status would also disappear. This would mean not only that each Member State could establish its own rules on civil liability, but also that, whenever a national liability regime is not granted overriding mandatory status, EU courts would be required to apply the *lex loci damni*. The result would be a state of complete unpredictability: for companies, uncertainty as to which national law will govern the scrutiny of their conduct; and for victims—often non-EU parties—uncertainty as to whether the applicable *locus damni* law offers adequate protection.¹⁵²

The final text remains under negotiation. However, the Council's and EU Parliament's proposals already provide some indications that are far from reassuring. While the Commission's proposal did not alter the Directive's scope, the Council's negotiating mandate, agreed on 25 July 2025, proposed to raise the thresholds to 5,000 employees and €1.5 billion in net turnover.¹⁵³ Considering that the original scope of the CS3D proposed in 2022 was already significantly watered down, this further cut might even call into question the overall value of the Directive. On the other hand, European

¹⁵⁰ See, e.g., the study analyzing seven major EU supermarket supply chains: David Ollivier de Leth, *Save Your Tiers for Another Day: Omnibus Restriction Excludes most Supermarket Suppliers in Risk Countries* SOMO (Apr. 22, 2025), <https://www.somo.nl/save-your-tiers-for-another-day/> (last visited Aug. 29, 2025).

¹⁵¹ *Supra* note 149, at 39.

¹⁵² See for major detail Geert Van Calster, Legal Opinion: How the Omnibus Creates Uncertainty on Civil Liability for Companies (May 2025), <https://online.flippingbook.com/view/521406910/>; *How Omnibus Risks Opening a Major Gap in the Enforcement of the Corporate Sustainability Due Diligence Directive*, EAPIL (June 17, 2025), <https://eapil.org/2025/06/17/how-omnibus-risks-opening-a-major-gap-in-the-enforcement-of-the-corporate-sustainability-due-diligence-directive/>.

¹⁵³ *Simplification: Council agrees position on sustainability reporting and due diligence requirements to boost EU competitiveness* (June 23, 2025), <https://www.consilium.europa.eu/en/press/press-releases/2025/06/23/simplification-council-agrees-position-on-sustainability-reporting-and-due-diligence-requirements-to-boost-eu-competitiveness/> (last visited Aug. 29, 2025).

Parliament's Rapporteur, Jörg Warbon, presented his draft report, where the obligation to adopt a transition plan was removed.¹⁵⁴

In sum, while the current text of the CS3D is far from perfect and justifiably subject to significant criticism, the amendments put forward do not appear to address these shortcomings in a constructive manner. Instead, they risk diluting the Directive's ambition to such an extent that its overall impact may become negligible. Narrowing the scope of application to a handful of very large companies, limiting due diligence to Tier-1 suppliers, and postponing implementation deadlines may indeed alleviate the regulatory burden for in-scope undertakings and indirectly shield SMEs from excessive demands. Yet this relief is not the result of a more carefully reasoned or effective strategy; rather, it reflects a step backwards that sacrifices the Directive's transformative potential. The danger is that, by retreating from its original aim of reshaping corporate conduct in the most critical and risk-exposed segments of global supply chains, the Directive may end up offering little more than symbolic compliance without meaningful change on the ground.

¹⁵⁴ European Parliament, Draft Report on the proposal for a directive of the European Parliament and of the Council amending Directives 2006/43/EC, 2013/34/EU, (EU) 2022/2464 and (EU) 2024/1760 as regards certain corporate sustainability reporting and due diligence requirements 22–23, 44 (2025/0045 (COD)), https://www.europarl.europa.eu/doceo/document/JURI-PR-774282_EN.pdf (last visited Aug. 29, 2025).