Bundesverband
der Unternehmensjuristinnen
und Unternehmensjuristen

Federal Association of Corporate Lawyers in Germany

Comments on the Open Public Consultation on the Corporate Sustainability Due Diligence Directive (CS3D) Guidelines

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Task Force on ESG
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With reference to the EU Commission's Open Public Consultation on the Corporate Sustainability Due Diligence Directive (CS3D) Guidelines, BUJ strongly supports the following features.

1) Principle-based guidelines

The guidelines should be based on general principles rather than on detailed policies and prescriptive requirements for the integration of due diligence into corporate policies. In particular, they should provide that companies maintain sector-specific, industry-specific and supplier-specific policies and procedures that are tailored to the individual company's risk profile, business model and value chain structure. Policy reviews and updates should depend on the risk situation (e.g. material changes in the company's operations, supply chain or risk landscape) rather than on rigid, fixed-interval review cycles.

A one-size-fits-all approach, as taken by the German Supply Chain Due Diligence Act (*Lieferkettensorgfaltspflichtengesetz, LkSG*), must be avoided. Companies that have already established functioning due diligence processes under existing national frameworks should be able to build on those processes (with hopefully only minimal adaptation), instead of being required to implement an entirely new compliance architecture merely based on EU Commission Guidelines.

Any approach of the guidelines to create obligations beyond the CS3D-requirements thereby feeding into gold plating has to be rejected and refrained from. Companies should be trusted and granted the necessary level of flexibility for the benefit of adopting tailor-made solutions, which correspond best to their structure and business-model.

2) Guidelines to aim at coherence of regulatory ESG-ecosystem

From the perspective of corporate lawyers, a lack of coherence of the regulatory ecosystem into which the CS3D is embedded, is the most problematic issue. Especially the interplay of the CS3D with the Forced Labour Regulation and the European Regulation on Deforestation-free Products (EUDR) causes trouble.

a) CS3D vs. Regulation (EU) 2024/3015 [Forced Labour Regulation (FLR) to be applied as of 14 December 2027]

The FLR's market-access prohibition mechanism (Arts. 7, 11 FLR) directly conflicts with CS3D's engagement and corrective action approach. For forced labour scenarios, both regimes apply simultaneously but prescribe irreconcilable responses:

Under CS3D (Arts. 10-11), companies must engage with suppliers and develop time-bound corrective action plans. Under FLR (Arts. 7, 11), competent authorities may prohibit market entry and order withdrawal of implicated products, means effectively mandating immediate disengagement without any remediation obligation.

This is the most significant cross-regulatory inconsistency in the EU's ESG framework. The CS3D guidelines must provide a sequencing rule and safe harbour for companies caught between these conflicting obligations. Failing to address this would be a significantly missed opportunity.

b) CS3D vs. EUDR

For forest-risk commodity supply chains, both regimes impose separate due diligence obligations. As a duplication of compliance obligation needs to be avoided, the guidelines should explicitly confirm that EUDR compliance measures are acknowledged under the CS3D.

3) Guidelines should promote legal certainty

Complying with the CS3D due diligence obligations – once implemented in national law – confronts companies with diverse practical problems and legal uncertainties. For example, Companies have pinpointed so-called "black-box jurisdictions", where access to relevant information is severely restricted or not possible in practice. What's more, EU competition law creates a significant uncertainty as to whether sharing supply chain ESG data between competing buyers constitutes impermissible market information exchange under Art. 101 Treaty of the Functioning of the European Union (TFEU). In this context, supplier confidentiality is an issue: direct suppliers treat sub-supplier identities and relationships as trade secrets protectable under the EU Trade Secrets Directive. In addition, third-country data laws (e.g. China DSL/PIPL) restrict export of ESG compliance data.

The guidelines should aid in finding solutions to these problems. Safe-harbour rules should be offered in cases that confront companies with the legal or practical impossibility to comply with their due diligence obligations.

4) Guidelines should both improve and simplify the due diligence processes of corporate users

Essentially two developments would significantly aid companies in their due diligence efforts.

a) Creating and improving databases and an 'ESG Risk Register' as meaningful tools for scoping of risk areas

Publicly available databases including information on human rights and environmental risks at national level would create a useful tool for companies to carry out the scoping requirement of Article 8 CS3D. Especially, an EU Supplier ESG Risk Register as a public good covering high-risk sectors and geographies established by the EU Commission would make a difference. In addition, EUDR country benchmarking data and REACH registration information under Regulation (EC) 1907/2006 are valuable cross-regulatory data sources that CS3D guidelines should explicitly recognise for scoping purposes, enabling companies to build on pre-existing regulatory compliance data. In addition, the guidelines should recognise established certification schemes as creating a rebuttable presumption of compliance, placing the burden of proof on supervisory authorities to demonstrate inadequacy.

In order to enhance their efficiency and cost-effectiveness, certification schemes could be supplemented by targeted engagements with local stakeholders or expert organizations through industry initiatives to bundle resources and leverage.

b) Establishing an official register for industry- and multistakeholder-initiatives

In terms of industry- and multistakeholder-initiatives, companies are confronted with the following challenges.

(1) Existing audit protocols do not fully cover the scope of the CS3D Annex (significant gaps particularly for environmental impact categories).

(2) Existing geographical gaps in high-risk regions where schemes have limited on-the-ground presence.

(3) A lack of cross-recognition between schemes creates a duplicative audit burden for suppliers assessed simultaneously by multiple buyers.

(4) Most schemes exclude downstream activities within CS3D's 'chain of activities' definition.

The EU Commission should publish an official registry of 'fit-for-purpose' initiatives under CS3D criteria, providing legal certainty for companies relying on sector scheme results. This single measure would deliver the greatest possible level of legal certainty and a significant reduction of compliance costs for companies in scope of the CS3D.

5) Guidelines should clarify that CS3D imposes an obligation of means, not of result

Companies must be assessed and benchmarked against whether they have established and applied appropriate, risk-based and proportionate due diligence processes, not on the mere occurrence of an adverse impact. The guidelines should therefore clarify that the CS3D does not create a de facto strict-liability regime. Liability exposure must remain tied to procedural compliance failures instead of outcomes in order to preserve legal predictability for companies and to ensure that the obligation of conduct (*"Bemühenspflicht"*)-nature of the Directive is faithfully reflected in supervisory practice.

6) Guidelines should recognise local regulation, permits and enforcement as relevant risk-reducing factors

Robust local regulation, permits, authorisations or inspection systems for business activities should be recognised as a relevant risk-reducing factor in the company's risk assessment. The guidelines should clarify that supervisory authorities must take such local frameworks into account, unless there is clear evidence of unaddressed harm or structural enforcement failure. Ignoring functioning local regulatory systems would lead to disproportionate compliance burdens and would undermine the risk-based architecture of the CS3D.

7) Guidelines should respect corporate law realities at group level

Parent companies cannot direct subsidiaries in all operational matters. The guidelines should recognise the legal limits to group control and avoid imputing responsibility to a parent company solely on the basis of shareholding. Guidance that disregards established corporate law distinctions between parent and subsidiary entities risks creating unlimited group-wide liability and undermining fundamental principles of corporate law across the Member States. The CS3D obligations should be read in conformity with existing corporate law frameworks.

8) Guidelines should address the needs of indirectly affected companies

In practice, compliance obligations are frequently transferred through supply-chain contracts to companies not in scope of the CS3D. This phenomenon creates a *de facto* extension of the Directive and potentially undermines the legislator's intention to limit due diligence obligations to companies of a specific size. The guidelines should address this scenario and provide solutions for companies not in scope of the CS3D to deal with comprehensive due diligence information requests.

A 'safe harbour'-mechanism could deem those companies to be sufficiently cooperative where they (i) provide information reasonably available, (ii) adhere to an appropriate supplier code of conduct, and (iii) support reasonable preventive or corrective measures related to identified risks. At the same time, companies directly affected by the CS3D must be assured that they are complying with their obligations by designing or adapting requirements for business partners in a risk-based and proportionate manner, taking into account their size, resources and position in the value chain.

Such a mechanism is bound to protect companies below the CS3D's scope from additional contractual obligations imposed onto them or enforced against them.

It should explicitly be clarified that the responsibility for compliance remains with the company subject to the CS3D and cannot be transferred to a business partner that is not itself subject to the Directive.