

Webinar

# CS3D - aligning future expectations with current practices

24 October 2024



# Hosts



**Catrine Søndergaard  
Byrne**  
Partner  
PwC Legal



**Anders  
Rasmussen**  
Manager  
PwC Legal



**Rebekka Makne  
Johansen**  
Manager  
Sustainability Assurance &  
Advisory Services



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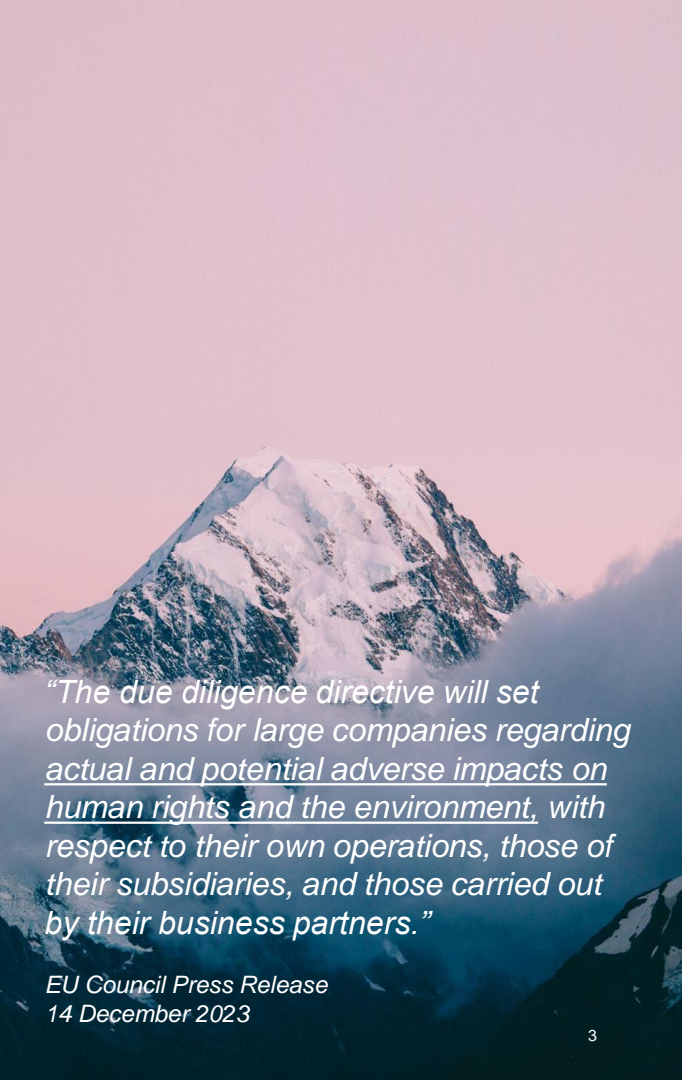
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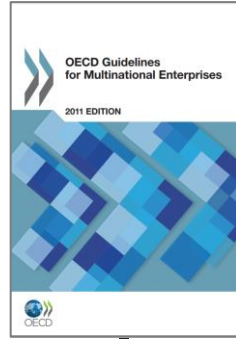
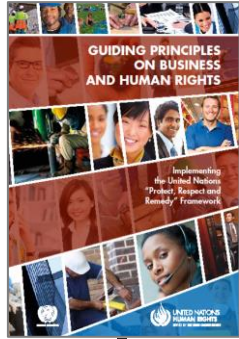
*"The due diligence directive will set obligations for large companies regarding actual and potential adverse impacts on human rights and the environment, with respect to their own operations, those of their subsidiaries, and those carried out by their business partners."*

EU Council Press Release  
14 December 2023

# Introduction to due diligence



# From soft law to hard law



The **UN Guiding Principles on Business and Human Rights (2011)** recognize the responsibility of companies to respect human right and to exercise human rights due diligence.

The **OECD Guidelines for Multinational Enterprises (2011)** extended the application of due diligence to environmental and governance topics.

The **OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (2023)** is an updated version of the 2011 OECD Guidelines setting out practical due diligence steps.

The **Corporate Sustainability Due Diligence Directive (2024)** introduces mandatory due diligence requirements. In addition, it sets out an obligation to adopt and put into effect, a transition plan for climate change mitigation.

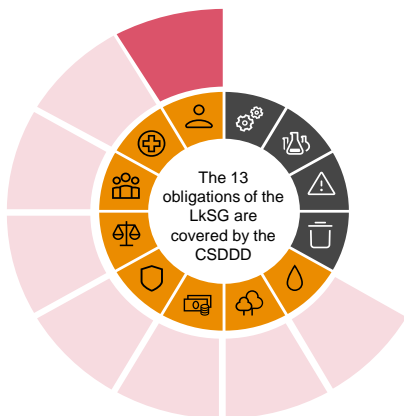
# Sustainability-related due diligence obligations for companies are in force in a growing number of countries

**Overview  
(non-exhaustive)  
as of August 2024**

- In Force / Adopted
- Voluntary
- Proposal



# CS3D extend due diligence requirements wider than German Supply Chain Act



## Rights of the child

Right to **life**

Prohibition of torture

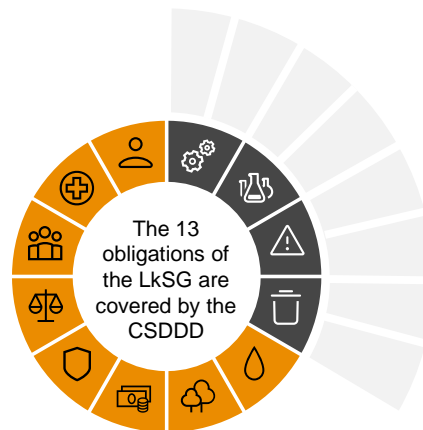
Right to **liberty** and **security**

Prohibition of arbitrary or unlawful interference with a **person's privacy**

The prohibition of interference with the **freedom of thought, conscience and religion**

The prohibition to restrict workers **access to adequate housing**; access to **food** and **sanitation** at the workplace

- Human rights covered by CSDDD, not covered by LkSG
- Human rights covered by CSDDD, indirectly covered by LkSG
- Human rights explicitly covered by CSDDD & LkSG
- Environmental matters covered by CSDDD & LkSG



Obligation to prevent, reduce and control **pollution of the marine environment**

Obligation to prevent **pollution from ships**

Obligation to avoid or minimize adverse impacts on **biological diversity**

Prohibition on import and export and reintroduction of **sea specimen**

Prohibition of import and export of certain **hazardous chemicals**

Protection of the **ozone layer**

Obligation to avoid or minimize adverse impacts on **natural heritage**


Obligation to avoid or minimize adverse impacts on **wetlands**

- Environmental matters covered by CSDDD, not covered by LkSG
- Environmental matters covered by CSDDD & LkSG
- Human rights covered by CSDDD & LkSG

# The CS3d compared to German Supply Chain Due Diligence Act

LkSG (in force since 1 <sup>st</sup> January 2023) 	
1.	Policy statement and establishment of risk management
2.	Risk analyses
3.	Preventive and remedial measures
4.	Effectiveness review
5.	Internal documentation and external reporting
6.	Grievance mechanisms and procedures and remediation

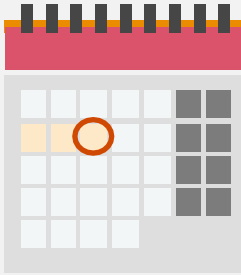


CSDDD (in force since 25 <sup>th</sup> July 2024) 	
1.	Integration of due diligence into corporate policy and risk management systems
2.	Identification of actual or potential negative impacts, prioritization of impacts
3.	Prevention of potential negative impacts, bring actual negative impacts to an end
4.	Evaluation of the effectiveness of strategies and measures and monitoring of due diligence obligations
5.	Communicate how impacts are addressed
6.	Establishment of complaints mechanisms and a notification mechanism, and provide remediation
7.	Meaningful engagement with stakeholders
8.	Transition plan for climate change mitigation





# Timeline and scope for CS3D



The **first companies** will have to report on the matters covered by the CSDDD by publishing an annual statement in **2028**.

If the company already reports in accordance with the CSRD, the CSRD report is sufficient.

July 2027

3 years after entry into force

- **EU companies**  
> 5,000 employees\* and € 1,500 million net turnover (worldwide)
- **Non-EU companies**  
> € 1,500 million net turnover (in the EU)

July 2028

4 years after entry into force

- **EU companies**  
> 3,000 employees and € 900 million net turnover (worldwide)
- **Non-EU companies**  
> € 900 million (in the EU)

July 2029

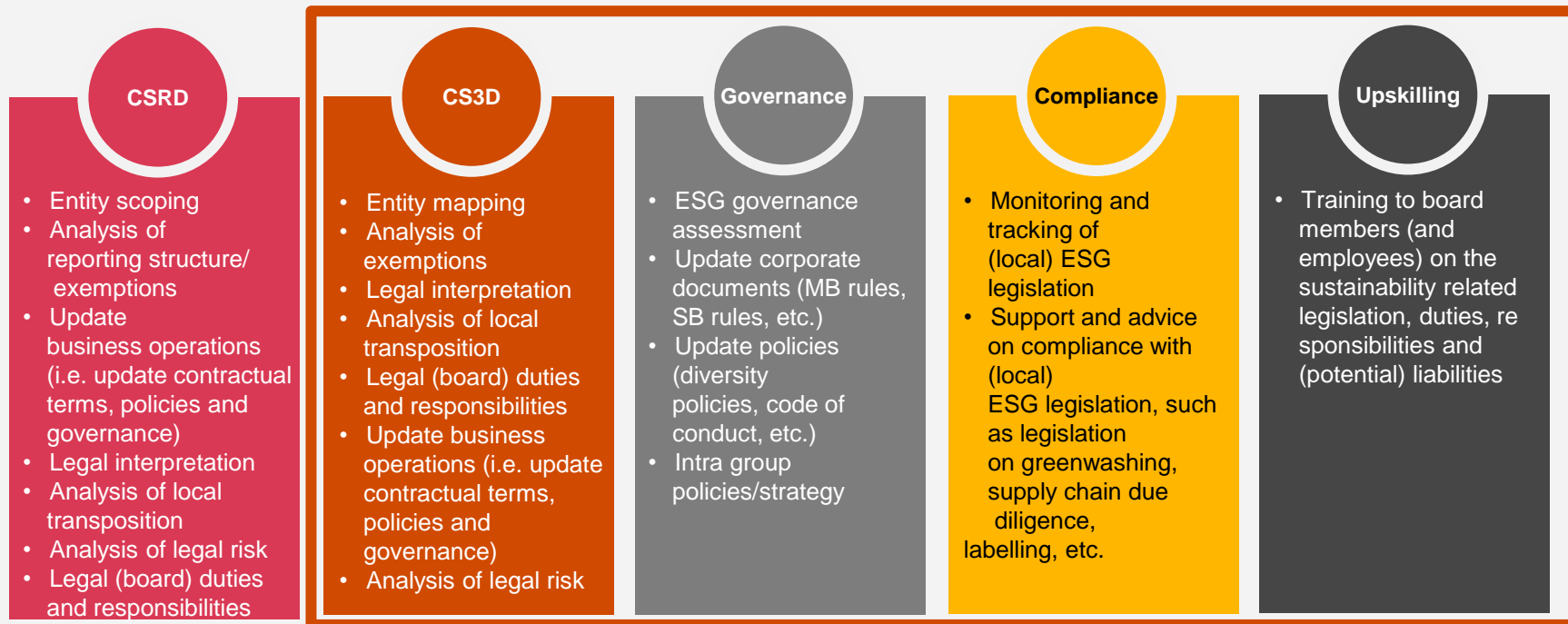
5 years after entry into force

- **EU companies**  
> 1,000 employees and € 450 million net turnover (worldwide)
- **Non-EU companies**  
> € 450 million net turnover (in the EU)
- **Franchise companies**  
€ 80 million (EU) net turnover/  
> € 22.5 million franchises

The **member state** in which the company has its registered **office/branch office** is responsible

\*The number of employees is calculated on the basis of full-time equivalents (FTE) and includes temporary workers, other non-standardised forms of employment, seasonal workers (pro rata) and employees in branch offices.

# CS3D - governance, compliance and upskilling



**Liability (Directors, Company, Boards etc.)**

**Fines**

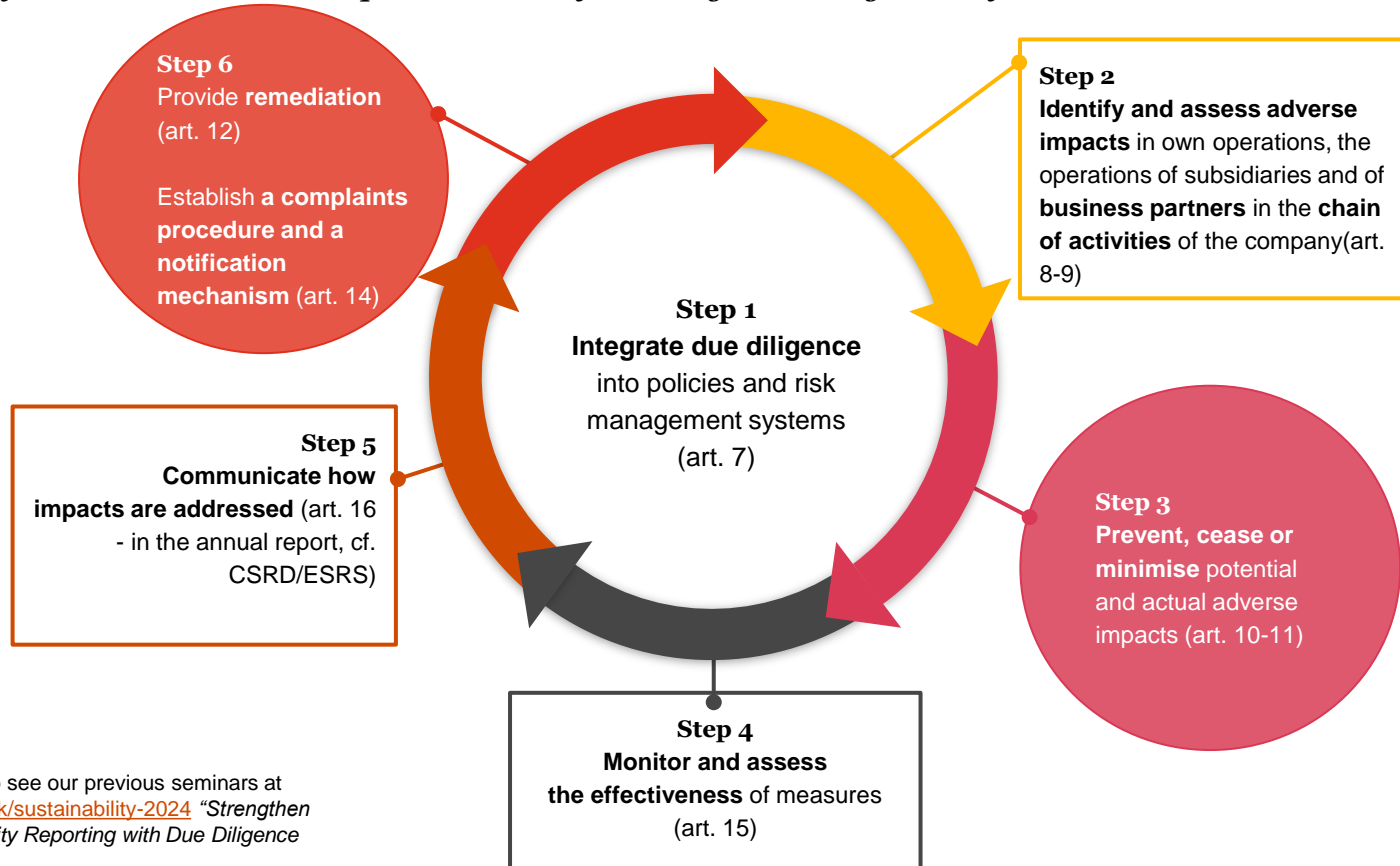
**Business disruption / recalls**

**Reputational risk**

**Financing needs**

# What is due diligence in CS3D?

- *A difficult balance between precision and flexibility - an obligation of means*



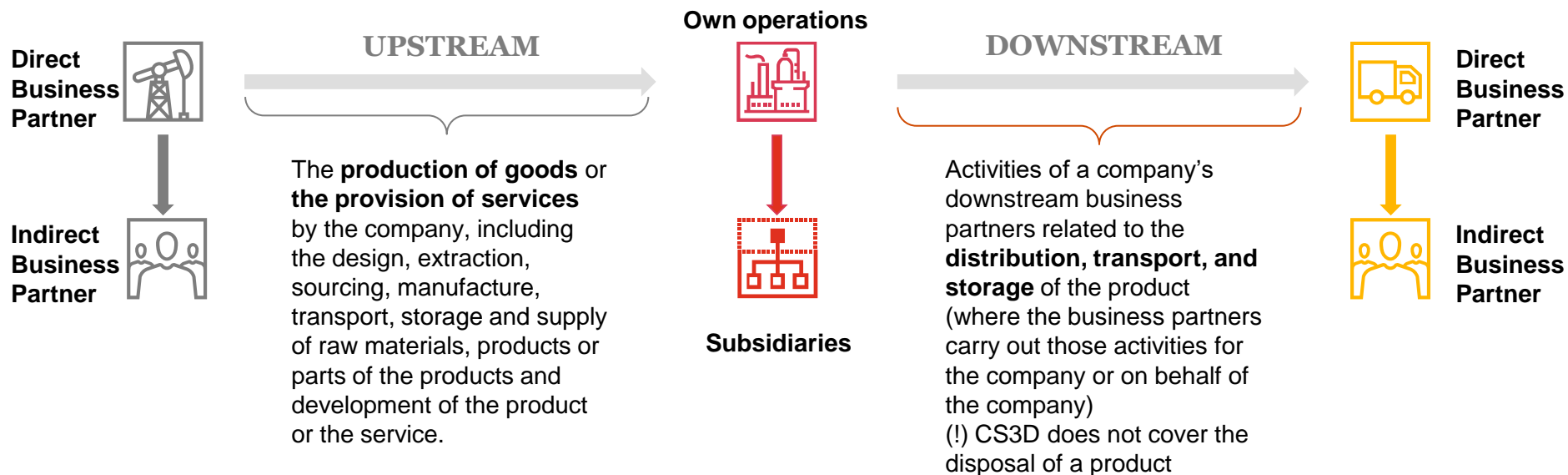
Please also see our previous seminars at  
[www.pwc.dk/sustainability-2024](http://www.pwc.dk/sustainability-2024) "Strengthen  
Sustainability Reporting with Due Diligence  
Processes"

**Key definitions:** “chain of activities” and “appropriate measures”



# What is meant by “chain of activities”?

Companies shall take **appropriate measures** to **identify and assess actual and potential adverse impacts** arising from their own operations or those of their subsidiaries and, **where related to their chains of activities**, those of their business partners (direct and/or indirect if necessary).



# What is meant by “appropriate measures”?

Companies need to take appropriate measures with respect to the



“Appropriate measures” are measures that are capable of achieving the objectives of due diligence by **effectively addressing adverse impacts in a manner commensurate to the degree of severity and the likelihood of the adverse impact, and reasonably available to the company, taking into account the circumstances of the specific case, including the nature and extent of the adverse impact and relevant risk factors.**”

# Considerations to determine appropriate measures

Whether the potential/actual adverse impact may be caused by:

- The **company exclusively**
- **Jointly** by the company and its subsidiary or business partner
- Only by the **company's business partner** in the chain of activities

Whether the potential adverse impact may occur in the operations of the subsidiary, direct business partner or indirect business partner

The ability of the company to influence the business partner causing or jointly causing the potential adverse impact (leverage)

# Examples of appropriate measures



## Own operations

Develop and implement a corrective/preventive action plan

Make modifications or adjustments to the company's business plan, strategies and operations

Make necessary financial or non-financial investments, adjustments or upgrades to facilities, processes or infrastructure



## Upstream and downstream activities

Seek contractual assurances, establish corresponding clauses and verify compliance (independent third-party verification)

Engage with business partners and enable capacity building, training, guidance, financial support etc.

Provide support to direct or indirect business partners that are SMEs

Provide remediation in the event of an actual impact

.....





**Deep dive on step 3:**  
contracts as part of effective due  
diligence



Step 1

Step 2

Step 3

Step 4

Step 5

Step 6

# What CS3D says about contracts

## Preventing potential adverse impacts (article 10(2), litra b)

Companies shall, where relevant, be required to

“seek **contractual assurances** from a **direct business partner** that it will ensure compliance with the **company’s code of conduct and, as necessary, a prevention action plan**, including by establishing corresponding contractual assurances from its partners, to the extent that **their activities are part of the company’s chain of activities**”

## Bringing actual adverse impacts to and end (article 11(3), litra c)

Companies shall, where relevant, be required to

“seek **contractual assurances** from a **direct business partner** that it will ensure compliance with the **company’s code of conduct and, as necessary, a corrective action plan**, including by establishing corresponding contractual assurances from its partners, to the extent that **their activities are part of the company’s chain of activities**”

Article 10(2) and article 11(5) give companies the possibility to seek **contractual assurances** from **indirect business partners**



Step 1

Step 2

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Step 6

# The use of contractual clauses as part of effective due diligence

CS3D article 10 and 11, emphasizes the importance of contractual clauses as a part of effective human rights and environmental due diligence.



Responsible contracting is a part of the company's obligation to take **appropriate measures** to ensure sufficient due diligence.



Contractual assurances are essential and a critical tool for **implementing human rights and environmental standards** across chains of activities.



The contractual assurances should **share the responsibility for due diligence and facilitate ongoing cooperation** between the parties.



[www.responsiblecontracting.org/files/ugd/fcee10\\_b583a26ebc14492994b4eb99a1931c64.pdf](http://www.responsiblecontracting.org/files/ugd/fcee10_b583a26ebc14492994b4eb99a1931c64.pdf)



Step 1

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Step 3

Step 4

Step 5

Step 6

# Responsible contracting and valuable experiences

## Significant negotiation points in practice

### *Unreasonable or stringent terms*

Contract that include terms that are practically difficult or impossible to comply with.

### *Supplier liability for subcontractors*

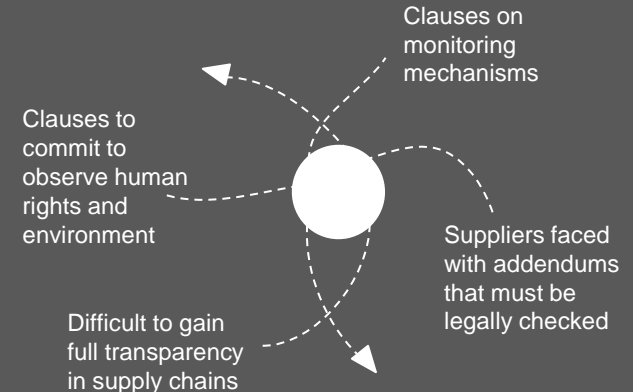
Difficult to ensure that subcontractors comply with customers' Code of Conduct, because suppliers are not in control of third parties.

### *Audit requirements*

Contracts that impose audit requirements as verification are burdensome for suppliers

## German Act on Corporate Due Diligence Obligations in Supply Chains

A part of the due diligence obligations in the German Supply Chain Act is to **seek contractual assurances** with respect to human rights-related and environmental related expectations.





Step 1

Step 2

Step 3

Step 4

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Step 6

# Do's and don'ts when seeking contractual assurances from business partners

## Do's



Design contracts that share the responsibility for due diligence.

Commit to cooperate to address adverse impacts in a on-going, risk-based and dynamic manner.

Commit to fair commercial terms that can support effective human rights and environmental due diligence.

Ensure that due diligence obligations and related cost are fairly distributed based on the companies resources.

Commit to jointly prioritize remediation or corrective actions ahead of suspension or termination of partnership.

## Dont's



Use contracts simply to transfer due diligence responsibilities to business partners.

Use contracts to establish one-sided obligations and strict liability approaches that treat any imperfections as a breach.

Use contracts to formalise unfair commercial terms that can aggravate adverse impacts.

Overwhelm suppliers with unreasonable due diligence expectations.

Aggravate adverse impact through use of immediate or too quick zero-tolerance termination rights



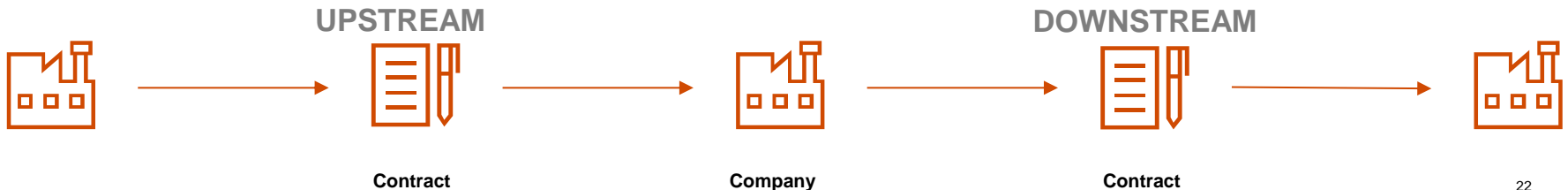
# No prevention or correction from business partner?

Disengagement is a "last resort" measure - before disengaging, companies must:

- Try other measures
- Adopt and implement an improved action plan
- Compare the negative impacts of disengagement with the adverse impacts it aims to address
- When disengaging, prevent or minimise the adverse impacts of disengagement, and give reasonable notice to the business partner

CS3D emphasis companies' obligation to prioritize cooperation and collaboration with its business partners, mitigating the risk of disengagement when designing and implementing appropriate measures. This includes:

- Potential contractual assurances by indirect business partners
- Independent third-party compliance verifications of business partners' management of appropriate measures

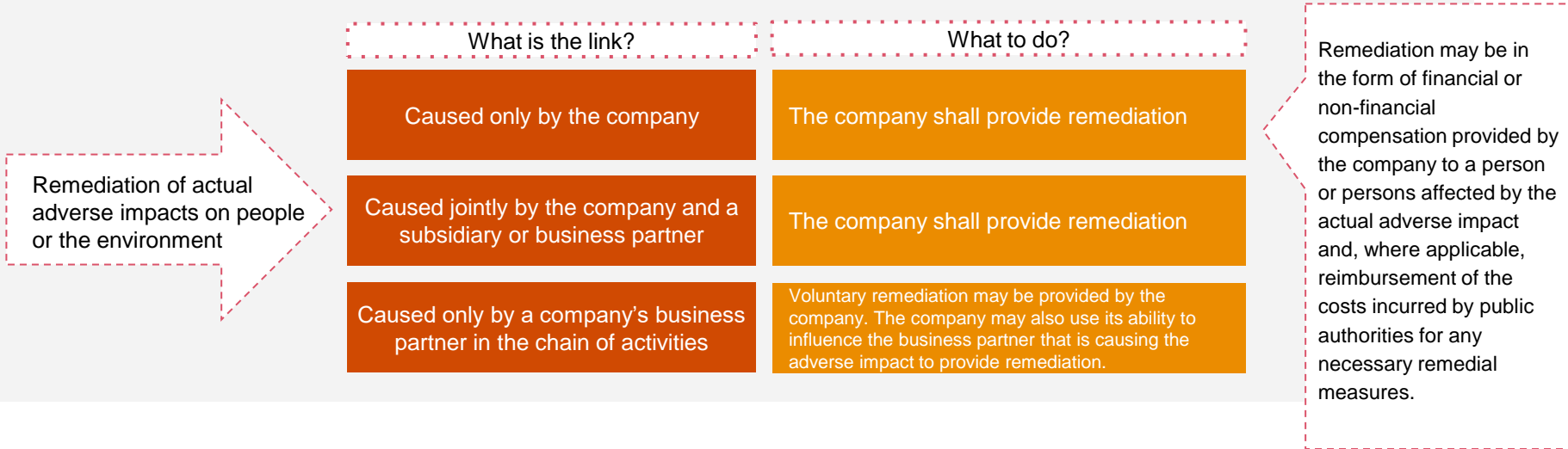


**Deep dive on step 6:**  
Provide remediation, establish  
a complaint procedures and  
notification mechanism



# Provide remediation

The term 'remediation' means restoring the affected person or persons, communities or environment to a situation equivalent or as close as possible to the situation they would have been in had the actual adverse impact not occurred, proportionate to the company's implication in the adverse impact.







# Complaints procedure and notification mechanisms

## Complaints procedure

The complaints procedure is used to submit **legitimate concerns** regarding **actual** or **potential adverse impacts** in regards to the company's

- Own operations
- Subsidiaries operation
- Business partners operations in the company's chains of activities.

Complaints can be **submitted** by

- Natural or legal persons
- Civil society organisation
- Trade unions
- Legitimate representatives

## Notification mechanisms

The notification mechanisms is used to submit **information** or **concerns** regarding **actual** or **potential adverse impacts** regarding the company's

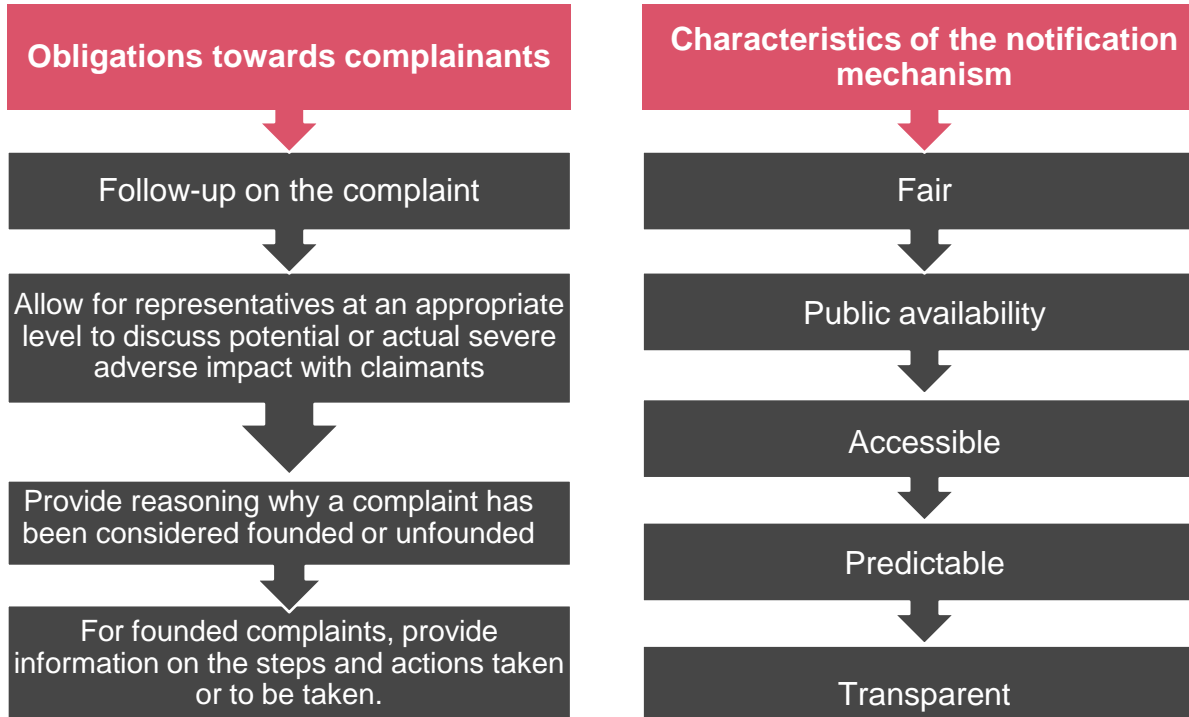
- Own operations
- Subsidiaries operation
- Business partners operations in the company's chains of activities

Notification can be submitted by persons or entities.

Information and concern can be submitted **anonymously** or **confidentially**



# Complaints procedure and notification mechanisms





Step 1

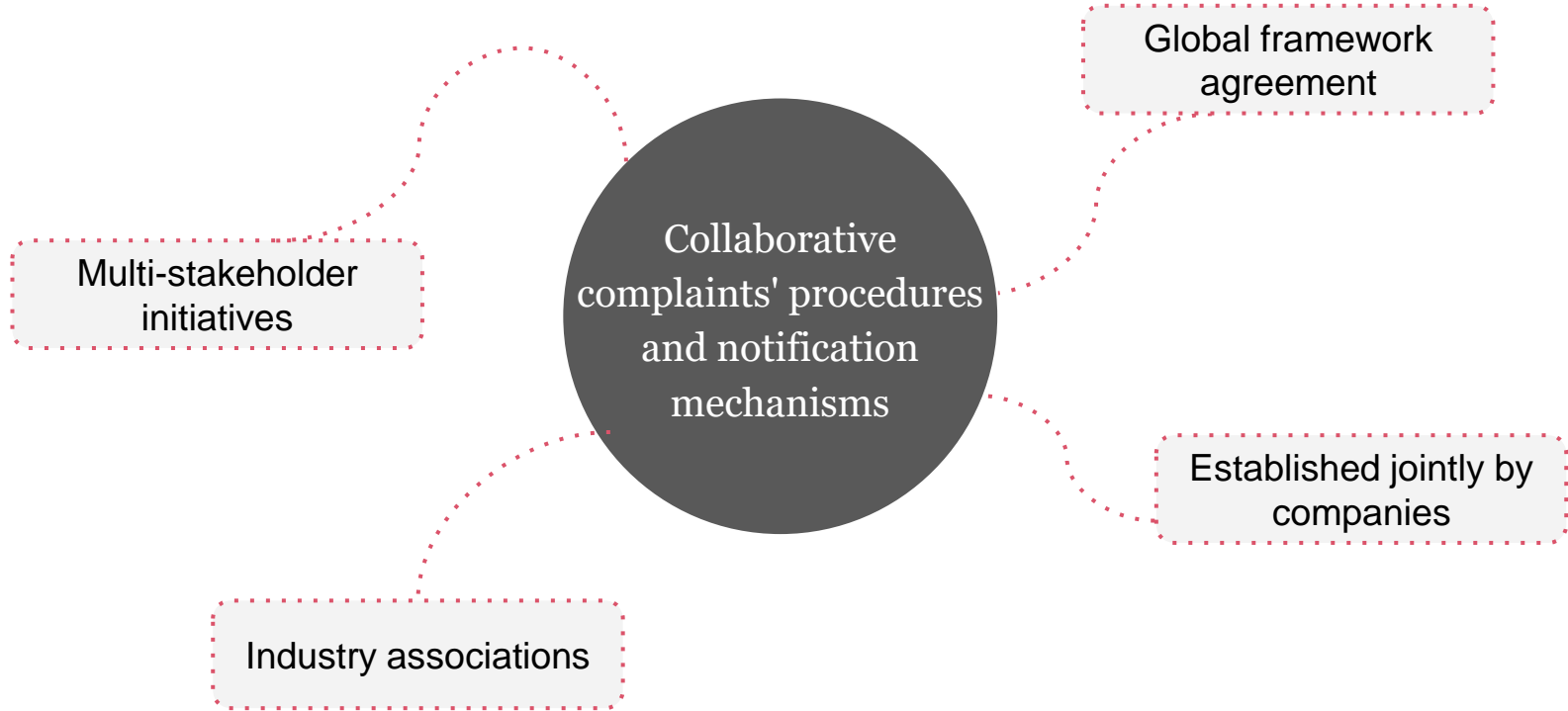
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Step 1

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Step 6

# Difference between grievance mechanisms and whistleblower schemes

## Grievance mechanisms

Focused on resolving a dispute between the grievance holder and the entity (e.g. harassment in the workplace, or forced labour in the value chain)

Personal interest on the controversy is expected

Confidentiality is encouraged, but follow up to the case may require information to identify the complainant

Driven by international soft law standard (UNGP's, OECD guidelines) and ESRS 'S' requirements

## Whistleblowing Schemes and Speak Up Policies

Primarily seek to identify issues that may present a legal reputational or commercial risk to the business (e.g. bribery and corruption)

Personal interest is not required

Confidentiality is privileged, including established protections against retaliation

Driven by national and EU law (EU Whistleblowing Directive and ESRS 'G' requirements)

# Sanctions and liability



# Sanctions



## Sanctions

Supervisory authorities:

- Will monitor whether companies comply with their obligations under the CS3D
- Can launch inspections and investigations, issue orders and prohibitions
- Can impose penalties on non-compliant companies. Penalties may be of up to **5 %** of the company's net worldwide turnover. Penalties must be *effective, proportionate and dissuasive*.

**Compliance will be a component of award criteria for public contracts.**

# Liability



## 1. Causation

Adverse impacts caused only by the company.

## 2. Contribution

Adverse impacts caused jointly by the company and a subsidiary or business partner.

## 3. Direct linkage (no liability)

Adverse impacts caused only by a company's business partner in the chain of activities.



## Liability

- If a company intentionally or negligently fails to comply with the obligation to prevent, mitigate, bring to an end or minimise adverse impacts and, as a result of such failure, damage is caused to a natural or legal person the company can be held liable.
  - Adverse impact on a right, prohibition or obligation covered by CS3D (listed in the Annex).
- If the damage was caused only by a business partner in the chain of activities, a company cannot be held liable (otherwise, jointly and severally liable).
- The CSDDD allows five years to bring claims, and includes measures to make proceedings less difficult or costly for claimants.
- Victims should have the right to full compensation for the damage caused in accordance with national law and in line with such common principle

# Key takeaways to prepare for CS<sub>3</sub>D





# Key takeaways to prepare for CS3D



## 1 Build knowledge internally, upskill key functions and understand the directive

- Upskill the teams that will have to be mobilised to implement the due diligence processes. This is essential for long-lasting impact and success of human rights and environmental due diligence.



## 2 Obtain a comprehensive understanding of the issues related to the environment and human rights along the chains of activities and embed the outcomes in policies and practices, incl. engagement with stakeholders

The assessment should:

- Distinguish between impacts caused, contributed to, and directly linked to (involvement framework);
- Distinguish between impacts that could and could not be prevented (potential impacts vs actual impacts).



## 3 Deploy a smart mix of measures to implement effective due diligence

- Most companies already have codes of conduct, contractual assurance and audits. Review these measures and decide whether they are in fact effective.
- Shift the focus from a 'tick box' culture to a rightsholder and outcome-focused approach.

# Register for the upcoming webinars

at [pwc.dk/sustainability-2024](https://pwc.dk/sustainability-2024)

**Make a positive difference for the nature**

20 November 2024

**How to create value through value chain transparency**

11 December 2024



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Catrine Søndergaard  
Byrne  
*Partner*

T: + 45 24 48 92 99  
E: catrine.sondergaard.  
byrne@pwc.com



Anders Rasmussen  
*Manager*

T: + 45 40 27 41 87  
E: anders.rasmussen  
@pwc.com



Rebekka Makne Johansen  
*Manager*

T: + 45 31 50 15 61  
E: rebekka.makne.johansen  
@pwc.com