Consultation response

Integrating extraterritoriality into CS3D guidance

AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled more than €4 trillion in 2023, directly supports more than 4.6 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

Executive summary

The European Commission's forthcoming guidance on the Corporate Sustainability Due Diligence Directive (CS3D) should:

- allow companies to voluntarily prioritise chains of activities with a meaningful connection, which should be further defined in the guidance, to the EU or based on a global risk-based approach in cases where companies have global integrated supply chains;
- recognise that companies may face conflicting or overlapping legal requirements between EU and third-country legislation, particularly in relation to information gathering, audits, data transfers, supplier disengagement and cooperation with authorities;
- clarify how companies should document and manage circumstances in which third-country law restricts or prevents a due diligence measure;
- recognise interactions with competent local authorities, regulatory inspections, permits, licences and other official approvals as potentially relevant sources of due diligence information; and
- protect companies from liability where they have followed a reasonable, documented and good-faith process, including where another stakeholder might have prioritised risks or selected due diligence measures differently.
- If these measures are included in the guidance, they would help the CS3D deliver meaningful and effective due diligence, rather than an exhaustive mapping of every global business relationship. Flexibility, proportionality and legal certainty can help companies progressively develop credible global systems while directing resources towards the most significant risks and the areas where they have the greatest ability to achieve positive outcomes.

Introduction

The Commission's upcoming CS3D guidance should explicitly address the directive's potential for extraterritorial implications. Rather than excluding non-EU activities from due diligence, this would give companies a proportionate and practical means to implement their obligations across complex global operations. In addition, this approach is fully consistent with the Omnibus simplification agenda and the recommendations in the Draghi report. If the Commission addresses extraterritoriality in this way, it can enhance, rather than detract from, Europe's competitiveness. This paper recommends a proportionate approach to global chains of activities, a recognition of legal risks and voluntary flexibility.

Proportionate approaches to global chains of activities

Companies operating internationally may have thousands of suppliers, business partners and contractual relationships across multiple jurisdictions. Attempting to assess and address every part of these global chains is impractical and could divert resources away from the areas where companies can achieve the greatest direct impact.

The guidance should therefore recognise that companies may reasonably prioritise chains of activities that have a clear EU nexus or can continue to take a risk-based global approach in alignment with the United Nations Guiding Principles on Business and Human Rights, depending on which approach makes the most sense for the company.

Relevant considerations when prioritising chains of activities with an EU nexus could include whether an activity:

- Supports products or services placed on the EU market;
- Is connected to the company's EU operations; and
- Has a direct and material connection to affected stakeholders in the EU.

The guidance should also provide flexibility for companies to apply other reasonable prioritisation methodologies that may be more effective and consistent with their business model. Companies should be allowed to voluntarily use an EU-nexus approach, a risk-based global approach, a spend- or leverage-based approach or a hybrid of these methodologies, provided the process is documented, reasonable and applied in good faith.

Recognition of legal risks

Companies conducting activities outside the EU increasingly face overlapping and potentially contradictory legal frameworks. A measure that may be considered appropriate under the CS3D – such as requesting detailed supply chain information, conducting an on-site audit, transferring information to an EU-based parent company, suspending a supplier relationship or cooperating with an EU investigation – may be restricted or prohibited under the law of the country in which the activity takes place.

For example, China's State Council Decree No. 834 on industrial and supply chain security restricts certain supply chain investigations and information-gathering activities by foreign entities and establishes mechanisms for investigating conduct considered harmful to China's industrial or supply chain security. Decree No. 835 establishes a framework for countering foreign measures considered to constitute improper extraterritorial jurisdiction. Taken together with China's existing data, national security, export control, anti-sanctions and blocking frameworks, these measures may place companies in situations in which compliance with one jurisdiction's requirements creates exposure under another jurisdiction's laws.

Other third countries are also signalling increasing resistance to the extraterritorial effects of EU legislation. The Gulf Cooperation Council states have jointly expressed concern regarding the cross-border implications of the CS3D and related EU sustainability legislation, including their potential effects on the competitiveness and continued operation of Gulf companies in the EU market. Qatar has also publicly warned of possible consequences for its commercial and energy relationship with the EU. Although these statements do not, in themselves, constitute the adoption of China-style blocking legislation, they indicate a credible risk that third countries may consider similar defensive or counter-extraterritorial measures if conflicts with EU requirements intensify. This includes the US, where lawmakers have similarly proposed legislation aimed at preventing certain US companies from complying with laws like the CS3D.

The Commission's guidance should expressly recognise these conflict-of-law risks and not expect companies to breach applicable third-country laws to comply with the CS3D. Where a company cannot undertake a particular due diligence measure because of a local legal prohibition, the relevant supervisory authority should consider:

- the nature and clarity of the applicable local restriction;
- the steps taken by the company to verify and document the restriction;
- the company's ability to influence the relevant business partner of activity; and
- whether the company escalated the matter internally and periodically reassessed the legal and factual circumstances.

The guidance must clarify the extent to which interactions with local authorities and permits or approvals issued in third countries under comprehensive labour, human rights and/or national environmental regulation may be used as sources of due diligence. Regulatory inspections, environmental and operating permits, licenses, official certifications, administrative decisions and documented engagement with competent authorities can provide relevant evidence concerning the conditions under which an activity is conducted, Such evidence may be particularly important where local law restricts independent audits, access to facilities, direct stakeholder engagement or the cross-border transfer of operational information.

Reliance on official permits or interactions with authorities should be considered relevant and reasonably available information, particularly where:

- the authority is legally competent to supervise the activity concerned;
- the permit or approval addresses the risk begin assessed;
- the company has no substantiated reason to doubt the reliability of the information;
- no credible and sufficiently specific contrary information is available; and
- the company documents the basis and limitations of its reliance.

This approach would recognise the realities of operating in sovereign third countries while preserving the risk-based character and objectives of the CS3D.

Voluntary flexibility

The ability to prioritise activities with an EU nexus should be voluntary rather than imposed as a mandatory methodology. The nature of a company can fundamentally affect how it identifies and manages impacts across its chains of activities.

A company with an integrated global supply chain may not be able to distinguish easily between products, components or services destined for the EU and those intended for other markets. Conversely, a company organised through separate regional entities may be able to identify EUrelated chains with greater precision. Companies may also differ significantly in their size, sector contractual structure, access to information, leverage over business partners and exposure to particular risks.

A single mandatory sequencing model would therefore be inappropriate. It could require companies to redesign established global due diligence systems, duplicate existing processes or artificially separate interconnected supply chains. The guidance should instead allow each company to determine, in good faith, whether an EU nexus approach is appropriate for its operations.

Conclusion

Explicit guidance on extraterritoriality would make CS3D implementation more workable and effective. A voluntary approach allowing companies to approach chains of activities connected to the EU would help direct resources towards areas of greatest relevance while recognising the diversity of global business models.

The CS3D's goal should be meaningful due diligence, not an immediate and exhaustive mapping exercise. Flexibility, proportionality and legal certainty can help companies focus their efforts where they can make the greatest difference.