Legal opinion: how the Omnibus creates uncertainty on civil liability for companies.

Authored by **Prof. Geert Van Calster**, KU Leuven, chair of Private International Law | May 2025

Executive Summary:

In July 2024 the *Corporate Sustainability Due Diligence Directive* (*CS3D)* entered into force. The CS3D establishes a new standard of responsible corporate conduct (Arts 5-16). This standard is also relevant when a person allegedly suffers damage and claims compensation before the courts of an EU member state. The current CS3D harmonizes the *conditions* for such claims across all Member States [Art 29(1)]. Very importantly article 29(7) – containing an 'overriding mandatory provision' - ensures that this standard of conduct is the *applicable law* and must be applied by all Member State courts. In February 2025 the European Commission tabled proposals to amend the CS3D ('Omnibus proposal'), including the deletion of article 29(1) and (7). This legal opinion analyses how complex the legal landscape would become for companies if the Omnibus proposal were adopted. In case the proposed deletion of article 29(7) were adopted by the Council and the European Parliament, companies would not be able to trust that their conduct is benchmarked against the CS3D obligations. Instead of having a single predicable, harmonized EU-wide regime as provided under the adopted CS3D, the Omnibus proposal would expose companies to each of the different legal regimes worldwide. In theory, they would face 206 different regimes (number of States currently recognised by the United Nations) and any regional divergence that exists in many of them. In essence, regarding civil liability, the Omnibus proposal neither delivers on its declared overall aims of harmonisation nor simplification, but instead significantly increases divergence, complexity and uncertainty for companies by proposing to delete 29(1) and (7).

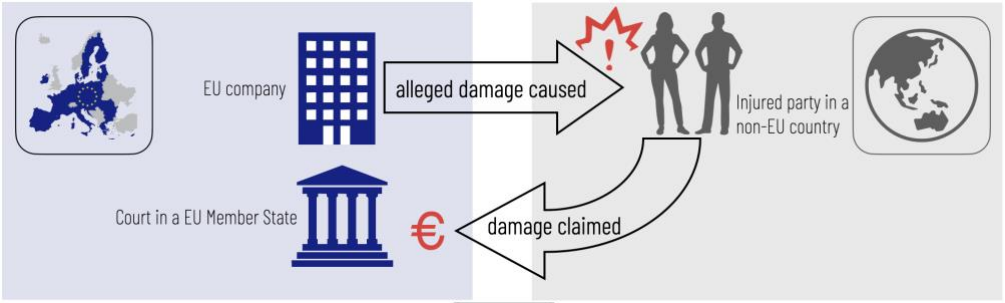
Areas of Law relevant to Civil Liability

The CS3D does not change who can be sued in the EU (*jurisdiction*), but harmonizes liability conditions (*material law*) and *procedural law* and ensures that these rules are indeed relevant in a court case (*applicable law*). The Omnibus would substantially increase complexity and divergences and undermine simplification and harmonisation by deleting article 29(1) and (7).

Applicable Law Rules Deleted by Omnibus: ⚠ Complexity!	**Jurisdiction** Not regulated by the CS3D, no extraterritorial application of EU law!
Material Law Largely deleted by Omnibus: ⚠ Divergence!	**Procedural Law** Mostly untouched by Omnibus

Comparison of applicable law in the two scenarios (adopted CS3D vs Omnibus)

Although one might assume that e.g. German courts always apply German law, that is not the case when damages are allegedly caused in another country. The Omnibus would lead to the disturbing result that courts in EU member states would generally have to apply non-EU law instead of the agreed standards under the CS3D. **Thereby the Omnibus would leave companies in the EU exposed to litigation based on non-EU law even when complying with the CS3D.** In contrast, the current 'overriding mandatory provision' in article 29(7) ensures legal certainty and application of harmonized EU standards. From a business perspective, and from an internal market perspective, it seems vital to preserve this provision in the CS3D.



	Can the company trust the court to apply the CS3D's due diligence obligation as the relevant benchmark against which its conduct is judged?
With **CS3D as adopted**	✓ CS3D provisions = 'overriding mandatory law'
With **Omnibus**	✗ high uncertainty, most likely *foreign* law is applied

The predictability of liability rules in the CS3D and its reversal in the Omnibus proposal

A. Introduction

1. **Global supply chains and 'private international law'.** The globalisation of supply chains or 'global value chains' over the past few decades has brought with it a globalisation of litigation between companies and alleged victims of corporate misbehaviour, whether it be degradation of social, human, or environmental rights. These claims are settled through mechanisms of an area of law known as private international law or 'conflict of laws'. This area of law determines
    a. whether a court may or must hear a claim brought before it ('*jurisdiction*');
    b. what law that court will apply ('*applicable law*');
    c. and when a judgment is issued, whether and how that judgment may be enforced ('*recognition and enforcement*').

2. A key fact which is not immediately intuitive, but **highly relevant when drafting legislation on global value chains** is that courts regularly apply the laws of a different State to the claim they have been asked to settle. For instance, in *non-contractual claims* (which includes most claims relevant to the current issue), EU harmonisation of the private international law rules in the 'Rome II' Regulation[1] means that **courts generally will apply the law of the place where the damage occurred**. Precisely as a result of global value chains, that law will often be the law of a *non-EU Member State*. Consequently, an EU law on due diligence in the supply chain, unless proper attention is paid to its application to events outside the EU, **risks not being applicable at all** to damage occurring outside the EU.

3. **Liability claims under the CS3D.** The *Corporate Sustainability Due Diligence Directive* or 'CS3D',[2] which entered into force on 25 July 2024, is very aware of the private enforcement of the rights protected by it and of the private international law context of such enforcement.[3] particularly with respect to applicable law. To be noted: Neither *jurisdictional rules* nor *recognition and enforcement* are impacted by the CS3D or Omnibus (in particular it does not provide for any 'extraterritorial' application of EU law as sometimes claimed).

4. Liability claims brought under the CS3D necessarily must relate to issues that come within the subject-matter of the Directive. This subject matter in accordance with Article 1(1), in relevant part are "rules on
    (a) obligations for companies regarding actual and potential human rights adverse impacts and environmental adverse impacts, with respect to their

[1] In particular Regulation 864/2007 on the law applicable to non-contractual obligations ("Rome II") [2007] OJ L199/40.
[2] Directive 2024/1760 of 13 June 2024 on corporate sustainability due diligence, [2024] OJ L https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L_202401760 .
[3] The European Commission noted the relevance of private enforcement in its Impact Assessment: "As regards private enforcement of the due diligence obligation, the policy options, which include civil liability provisions going beyond harm done at the level of the direct supplier, do not go beyond what is necessary. Effective enforcement of the due diligence duty is key to achieving the objectives of this initiative.": European Commission Impact Assessment Report 23 February 2022, https://tinyurl.com/mzxh7chj p.70.

own operations, the operations of their subsidiaries, and the operations carried out by their business partners in the chains of activities of those companies;

(b) liability for violations of the obligations as referred to in point (a);…"

5. The type of obligations regulated by the Directive are so-called 'due diligence obligations' as also referred to in Article 4. These extend beyond planning, reporting, and stakeholder consultation requirements, into a duty to identify and assess actual and potential adverse impacts (Article 8), prevent adverse impacts (Article 10), bringing actual adverse impacts to an end (Article 11), and remedy adverse impacts (Article 12), if so required in a prioritised approach based on the severity of the various risks (Article 9).

B. The Civil Liability Provision of Article 29 CS3D

6. **Material civil liability provision.** The obligations to prevent adverse impacts (Article 10) and to bring any such impacts to an end (Article 11) are supported by Member States' duty included in Article 29 CS3D, to ensure that a company can be held liable. This includes Member States having to ensure a right to full compensation 'in accordance with national law', for victims of damage caused to them as a result of a company's 'intentional or negligent' failure to comply with its Article 10 and 11 obligations. This liability is subject to the conditions that the rights which Articles 10 and 11 are targeted at are included in Annex to the Directive, and are aimed at protecting the natural or legal person bringing the claim, and to the requirement that the damage caused is a result of the company's failure to comply with Article 10 or 11. The rights in Annex include the human and environmental rights upon which many of these claims have been and continue to be brought against companies across the EU.

7. **Procedural requirements.** Article 29 CS3D includes a number of procedural requirements which Member States have to ensure, such as standardised minimum period within which a claim needs to be brought (so-called '*statutes of limitation'*) and provisions on when these periods start to run; costs of proceedings; the availability of injunctive measures; the possibility for injured parties to authorise a NGOs or trade unions to bring a claim; and the disclosure of relevant information.

8. **Applicable law.** Generally, the substantive law that applies to the claim is determined by the general conflict of law rules as already harmonised by the EU. As noted, the most likely claims relevant to the Directive are non-contractual claims and it is the Rome II Regulation which identifies the law that will apply. The Rome II Regulation does not have a specific rule for the type of claims based on the CS3D, other than for environmental claims. However, the Rome II Regulation allows for EU courts to replace the ordinary applicable law with those provisions of their national law which they consider to be of extreme relevance to the type of claim concerned ('*overriding mandatory provisions*', also known as '*lois de police*').[4] This is precisely the route the

[4] Article 16 of the Rome II Regulation formulates this as follows: "Nothing in this Regulation shall restrict the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation."

CS3D applies to create clarity and predictability on the applicable law (see paragraph 10 below).

C. Increased predictability for companies as a result of the current CS3D.

9. Article 29 CS3D reduces the unpredictability of the ordinarily applicable rules in a number of ways.

10. **Firstly and importantly, by obliging Member States to treat their implementation of the CS3D as 'overriding mandatory law'** where the law applicable to claims to that effect is not the national law of a Member State (**Article 29(7)** CS3D).

11. Next, the introduction of a minimum statute of limitation, and the introduction of other requirements related to procedure, such as the provision relating to disclosure of evidence, **take away some of the incentives for forum shopping** by claimants[5] in the EU.

12. Further, the substantive obligations of the Directive, coupled with Article 29(1)'s liability requirement, effectively introduce a harmonised corporate duty of care in the supply chain. This **neutralises many diverging and unpredictable approaches to this issue in the various national laws**.

13. Article 29(7) leads to predictability for companies as well as for injured parties. For individuals suffering harm that occurred outside of the EU, it ensures that the Directive's protective provisions and recognition of substantive obligations apply to the claim, regardless of the varying level of protection provided in the otherwise applicable (non-EU) laws. **For companies, Article 29(7) ensures a common standard against which their actions are tested, regardless of where the harm has allegedly occurred. It is the existence of Article 29(7) which ensures that companies know exactly what to do to manage litigation risks: to conduct appropriate due diligence as set out in the CS3D.** Article 29(7) also clarifies that qualification of national implementation as overriding mandatory law is limited to situations where the applicable law is that of a third State. Where it is the law of another EU Member States which applies, the overriding mandatory law mechanism arguably cannot be used.

D. The Omnibus proposals reintroduce uncertainty

14. The European Commission's so-called Omnibus package of 26 February 2025 to amend among others Article 29 of the CS3D,[6] would in essence take away most of the predictability the CSD3D has introduced in international litigation of this kind.

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[5] Claimants often structure their claim and the defendant(s) to it in such a way as to have the case heard before a court that will be of practical or other interest to them. That phenomenon is generally known as 'forum shopping'.

[6] COM(2025) 81 https://tinyurl.com/4u4rnwd7

15. The Commission proposes to delete Article 29(1) and its confirmation of liability for duty of care and the accompanying conditions. If adopted as proposed by the European Commission, the Omnibus would also delete the obligation to classify implementation of the CS3D as overriding mandatory law. The Omnibus, however, would keep all 'procedural' requirements (evidence disclosure, cost limitations, possibility of injunctions, statutes of limitations) other than the rules on representative actions.

16. Were these Omnibus amendments to be adopted, the EU therefore ***firstly*** **would be reintroducing the patchwork of not merely 27 different national regimes** (instead of 1 EU-wide regime) with respect to the core question of the existence of a corporate duty of care. Rather, it would reconfirm that the existence of a corporate duty of care and its conditions are once again left to the substantively applicable law which as noted, often is not that of an EU Member State. Under the Omnibus, companies would therefore be exposed not to 27 regimes, **not even to 206 regimes** (this is the number of States currently recognised by the United Nations), **but rather to the 206 PLUS any regional divergence that exists in many of them.**[7] To give some obvious examples: the United States has 50 tort law regimes; Australia has 6; Nigeria has at least 6 regional variations of tort law; Canada has ten provinces and three territories with some variation of tort law in each; even within the United Kingdom there are variations between Scots and English tort law.

17. A concrete example of existing divergence today, which the European Commission also cited in its initial reasoning for harmonization, is the scope of liability.[8]

18. ***Further****,* the EU would also fully restore the discretion for Member States' courts to apply diverging national regimes under the Rome Regulation's overriding mandatory law provisions. This would give added impetus to claimants to forum shop across courts in the EU and would increase uncertainty for corporations.

19. The European Commission justifies its deletion of the relevant provisions inter alia by suggesting "*While removing the uniform rules on civil liability reduces harmonisation, it ensures respect for existing, national liability regimes – with which companies in scope are familiar - in line with the subsidiarity principle and ensures greater legal certainty on liability risks under a new type of risk-based corporate obligations."*[9]

20. Of note viz. this EC argument is first of all the **crucial acknowledgment by the Commission itself that its proposal *reduces* harmonisation.**

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[7] In application of Article 25 Rome II, "Where a State comprises several territorial units, each of which has its own rules of law in respect of non-contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Regulation.".

[8] See ia the following extract from COM(2022) 71: "*In the absence of common rules, divergent national liability regimes may lead to different outcomes depending on whether there is ownership control (as regards subsidiaries) or factual control (either through direct contracts or where control could be exercised by the company through contractual cascading or other leverage in indirect business relationships). This fragmentation would lead to distortions of competition in the internal market as a company located in one Member State would be subject to damages claims due to harm caused in its value chain whilst a company with the same value chain would be exempt from this financial and reputational risk because of diverging national rules."*

[9] COM(2025) 81 https://tinyurl.com/4u4rnwd7

21. **Further, all remaining elements of this justification by the Commission are faulty**.

Firstly, the 'subsidiarity principle' entails that the EU does not take action unless it is more effective than action taken at the national, regional or local level. The Commission's argument on this point undermines its recourse to the very legal basis of the CS3D, which is both the free movement of establishment, and the Internal Market. It is the very existence of different national regimes, which would otherwise hinder the functioning of the internal market, which justifies the use of Article 114 TFEU as a legal basis. The European Commission acknowledged so much in various parts of its legislative proposal that led to the CS3D.[10]

Next, the suggestion that the deletion "*ensures respect for existing, national liability regimes – with which companies in scope are familiar - in line with the subsidiarity principle and ensures greater legal certainty on liability risks"* belies reality. The scope for the 'familiar', national regime to be pushed aside, is increased as a result of the deletion of Article 29(7). A Member State court using Article 16 Rome II, may consider its implementation of the CS3D as being of overriding mandatory law; equally, it may decide its implementation should *not* so override the normally applicable law. Moreover, a Member State court in this new formulation may set aside not just the laws of a third State, but also the laws of another Member State, something which as noted is ruled out in the current formulation of Article 29(7).

22. **In conclusion**, the European Commission's assertion, that the proposed changes in the Omnibus in relation to civil liability (Article 29) would improve legal certainty is highly questionable. In this legal opinion I explored how complex the legal landscape would be with these proposed deletions. Much more complex than the adopted CS3D. The CS3D provides for a substantively higher level of legal certainty and harmonisation across the EU. The original CS3D harmonizes the effects of the newly introduced due diligence duties on liability (Article 29(1)) and ensures that this standard of conduct is the applied standard (Article 29(7)) if push comes to shove and a company has to defend itself in court.

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[10] See ia the following extract from COM(2022) 71: "*the differences between national rules on sustainable corporate governance and due diligence obligations have a direct impact on the functioning of the internal market, and that impact is likely to increase in the future. (...) It is foreseeable that these distortions and impacts would become more serious with time as more and more Member States will adopt diverging national laws or may even lead to a race to the bottom in forthcoming due diligence legislations. Distortions are also relevant for civil liability in case of harm caused in a company's value chain. Some national legal frameworks on due diligence include an express civil liability regime linked to the failure to execute due diligence, while others expressly exclude a specific civil liability regime. A number of companies have been brought before courts for causing or failing to prevent adverse impacts at the level of their subsidiaries or value chains. Such cases are decided based on differing rules today."*

About the author

An alumnus of the College of Europe, Bruges (promotion Stefan Zweig), Professor Dr Geert van Calster is full professor (professor ordinarius) in the University of Leuven where for 11 years (2009-2020) he served as Head of Leuven Law's department of European and international law.

At Leuven he holds the chairs of Private international law; the law of (investment and commercial) arbitration (co-chair); and international trade and investment law.

Geert is on the indicative list of WTO Panelists and serves, appointed by the EU, on a variety of dispute settlement panels in EU FTAs including CETA and the UK-EU Trade and Co-operation Agreement.

Prof van Calster is also visiting professor and senior fellow at Monash University's Law faculty (Melbourne) and Senior Fellow of Melbourne University Law School. He was visiting fellow at St Catherine's College, Oxford University, Michaelmas Term 2024-25 and is Visiting Fellow at the European University Institute, Florence, Spring and Summer Term 2024-25. He was previously i.a. a visiting lecturer at Oxford University, visiting professor at King's College, London, adjunct professor at American University and visiting professor at the China-EU School of Law in Beijing. He is also an independent practitioner at the Belgian Bar. He was called to the Bar in 1999 after having worked as of counsel to a City law firm since 1995.

Geert is the author of a leading handbook on European Private International Law (Bloomsbury publishing) and involved in a variety of business and human rights claims across EU and non-EU jurisdictions (many of them reported on www.gavclaw.com).