The CSDDD: Good Law or Bad Law?

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1. INTRODUCTION

The Corporate Sustainability Due Diligence Directive (CSDDD) will come! This was far from clear after the legislative process had turned into a rousing rollercoaster ride. When the Trilogue agreed on a final version in December 2023, all lights seemed green. But after fierce resistance from German enterprises, the FDP – a junior partner of the coalition government – pulled a powerful lever under the coalition agreement and forced Germany to abstain in the final vote of the Permanent Representatives Committee. This surprising move encouraged resistance from other Member States, most notably Italy. All of a sudden, the CSDDD was likely to fail. But in yet another twist, the Belgium Presidency brokered a 'patchwork compromise'[1] that took the decisive hurdle of the Permanent Representatives Committee on 15 March 2024. So all is well that ends well? Not necessarily so. There are yet some critical remarks to be made.

2. THE SCOPE OF THE CSDDD AND THE BURDENS ON BUSINESS

The Directive on Corporate Sustainability Due Diligence is in essence a supply chain law along the lines of the French *Loi de vigilance* and the more detailed German *Lieferkettengesetz*. It adds on a 'Combating climate change' provision (Article 15) that differs in scope and enforcement. The provision is reasonably aligned with the duty to report a transition plan under Directive 2013/34/EU. The motto: Action instead of reporting. But my guess is: As long as we allow airlines, car manufacturers and oil companies to become 'green champions' by planting trees, Article 15 CSDDD will be of little consequence. But if we take sustainability seriously, e.g., by bringing planetary boundaries into the equation,[2] it is not for board rooms but for Parliaments to act. I cannot see those issues solved via transition plans.

The core obligations under the CSDDD are to prevent human rights violations and environmental destruction along the supply chains of European enterprises. The general clause is enshrined in Article 4, while the specific due diligence duties follow suite in Articles 5–11. In a nutshell, the company shall integrate a risk-based due diligence into business policy and risk management (Article 5) in order to identify, assess (Article 6) and prevent or remedy (Articles 7, 8) potential or actual adverse impacts. It shall monitor the effectiveness of this system (Article 10), put notification and complaints procedures in place (Article 8), engage with stakeholders (Article 9) and disclose all those efforts (Article 11).

These instruments are far-reaching. The human rights due diligence extends into every corner of the planet. The administrative burdens to implement all these instruments will be huge. To comply with the similar obligations under the German Lieferkettengesetz, the Volkswagen AG had to install a new department with seventy employees. The smaller the business, the heavier the weight will be felt.

The final compromise tries to disperse this reservation by increasing the threshold for the application of the CSDDD. It covers only enterprises with more than 1000 employees, as is the current law in Germany (§1 I 3 LkSG), and that fulfil the additional requirement of more than 450 Mio EUR net turnover. But this restriction of the scope will not solve the problem of 'trickling down'. Enterprises subject to the due diligence duties under the CSDDD shall pass the burden on to smaller business in their supply chain via their Terms and Conditions. That is the reason why the lower thresholds would not have mattered so much. Conversely, the higher threshold is less of a relief. The problem is well known from the first year of the German LkSG. It raises difficult issues of contract law. Many small businesses will not be able to comply.

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1 Jessica Schmidt, Editorial, NZG 2024, 417.

2 Compare Sjåfjell et al., *Securing the Future of European Business: SMART Reform Proposals*, Nordic & European Company Law, LSN Research Paper Series 20–08 (3 Aug. 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3595048; Sjåfjell, 'A general corporate law duty to act sustainably' in Birkmose et al., *Instruments of EU Corporate Governance: Effecting Changes in the Management of Companies in a Changing World* (2023).

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They have to choose: either lie and tick the box or be out of business.

Another instrument to mitigate the burdens of the due diligence is Article 6a that expressly allows prioritization of risks. This might actually have worked if the enforcement of the due diligence duties was solely overseen by public bodies bound to the principle of proportionality. But we will have mandatory civil liability as well (Article 22 – we will come back to that). Just try to imagine a European court telling the families of the avocado picker that fell off the tree or the construction worker buried under the scaffolding that the life of their beloved ones was low priority. My prediction is that this defence will not fly in the court room. Rather, the judges, well equipped with the benefit of hindsight, will lecture the company on how it should have gotten its priorities right. The business judgment rule will not help because it never applies in tort law. The problem is aggravated by the fact that the duties vis-à-vis remote indirect business partners under CSDDD are not on hold until actual notice, as is the case under §9 III LkSG.

3. THE EXTENSION OF LIABILITY FOR TORTS OF THIRD PARTIES

The CSDDD introduces a 'best efforts duty' for enterprises to prevent or mitigate human rights violations or environmental damages. This term seems too global and conceals the fact that there are three different layers of duties at work. The duty of the company not to violate human rights itself, the duty of the company to make its subsidiaries comply, and finally the duty of the company to bring its business partners (chiefly suppliers) to comply. The first two limbs raise no objection. However, the CSDDD must be criticized that it introduces an oversight liability for the torts of independent business partners that is at odds with general principles of European private law. This argument will be set out in the following.

For starters, the company itself is rightly bound to comply with human rights and environmental law because this is in line with general tort law.[3] We should only note that on closer looks, these obligations are not merely 'best efforts duties'. If I crashed your car, would you want to hear me say that I had given my best efforts to avoid the accident, but unfortunately … .?

The liability for subsidiaries seems justified as well. Separate legal personality and limited liability should never completely exclude the responsibility of parent companies that instruct and supervise their subsidiaries. This was rightly recognized by the UK Supreme Court in *Okpabi v. Shell* and *Vedanta v. Lungowe*.[4] The CSDDD follows this.

Nevertheless, even this justified extension produces questionable effects. In a recent German case, the parent company was advised that the LkSG required sending delegates to the production subsidiary in a central European Member State because of labour law violations it had learned of via the complaint system. Really? Do we now need German company executives to implement labour laws across the EU because other European jurisdictions are so feeble that they just cannot deal with it? This is not what the CSDDD is meant to do. But it is what it will do. On a side note: there are works council agreements that oblige the compliance department of the company to go after every single complaint made via the system in person. Good times for bonus miles collectors.

The duty of oversight gets truly doubtful with respect to suppliers. The CSDDD does not understand that normal companies are no supervisory bodies nor apt gatekeepers. What is a company supposed to do if it acquires steel from a perceived high risk country, such as Turkey? Send questionnaires? Ok, but what if the answers are not satisfactory? Travel there? And how to act on the scene? Present yourself as the friendly business partner smiling, drinking tea, having a walkabout in the central production site, shaking the hands of the employee of the month, finish the evening lightly in a restaurant in Kadikoy? Or play hardball, investigate, interrogate, sniff around, sneak behind the scenes, maybe plant surveillance devices like internal revision? How shall companies of little more than 1000 employees be able to execute this kind of due diligence on an international level?

This shows that the pendulum has swung too far. The potential liability for acts committed by independent third parties that is imposed by the CSDDD is not justified. The company is not responsible (unless you think that buying cheap makes it a partner in crime – but then ask yourself: would higher payments end in the pockets of the employees?). The company does not have control over the tortfeasor. It only has factual influence via the business relation. The commandment to use this influence in order to improve the human rights situation is morally sound. But the translation into hard law faces massive difficulties. These are merely masked, but not solved by the term of the 'best efforts duty'. Tort law construes all duties from the clear starting point to avoid any harm (car accident example). By contrast, best efforts duties like in the case of the Turkish steel supplier drown companies in a fog of legal uncertainty.

4. THE CIVIL LIABILITY RULE (ARTICLE 22)

The main criticism is the civil liability prescribed under Article 22. The provision seems hastily stitched together from the diverging Trilogue position papers. For starters, there was no case made for the necessity of civil liability. Germany intentionally excluded it (§3 III 1 LkSG[5]). Nevertheless, the BAFA[6] is

3 The human rights laws made binding by the LkSG basically reflected general tort law, *see* Schall/Merkel in Schall/Theusinger/Pour Rafsendjani, *LkSG* 19–38 (2023), Anh. §3 mn.

4 *Vedanta Resources Ltd v. Lungowe* [2019] UKSC 20; *King Emre Okpabi v. Royal Dutch Shell* [2021] UKSC 3.

5 Note: this does not exclude liability for human rights violations under general provisions, §3 III 2 LkSG.

6 The *Bundesamt für Ausfuhrkontrolle* is the competent authority to supervise compliance with the LkSG by companies.

highly active and runs a tight regime to which German companies duly submit – last not least to avoid public relation disasters. Might public enforcement have sufficed to implement the CSDDD, too?

The negligence rule including *culpa levissima* is apt for companies and their subsidiaries, but over the top for the duty to oversee the suppliers. Bear in mind that even in heartbreaking cases like the factory fire in Karatchi,[7] the main delinquents are typically NOT the European companies. The Commission proposal of a safe harbour was blown off the table in the Trilogue without any feasible alternative to reduce the liability risk. Article 22(1) actually states that companies are not liable if the damage is not caused by them ('only by their business partner') – as if anyone had ever been liable without causation.

But there is a lot more: Rendering the liability applicable from a conflicts law perspective is a task that the EU should not have delegated under Article 22(5) but fulfilled itself by extending Article 7 Rome II Regulation to all human rights violations. The mandatory introduction of summary proceedings by Article 22 (2a)(1)(c) overlooks that they are alien to many civil law jurisdictions and have been much criticized as prone to mistakes ('mini trial') by the UK Supreme Court.[8] The demand for pretrial discovery under Article 22(2a)(e) is an ill-fitting transplant from common law that should not be necessary because civil lawyers reverse the burden of proof where apt. The interference with national limitation laws under Article 22(2a)(1)(a) is out of proportion. Unlike the law of Pakistan, I assume that European jurisdictions will halt the limitation period while negotiations about the claim are taking place.[9] This should have taken the European regulator but a few hours to verify. All in all, Article 22 reads like both like a wish list of NGOs and a vote of no confidence against the Member States.

5. CONCLUSION

The CSDDD is good bad law. Well-meant and justified in principle, but far from well made. The 'German vote', i.e., the abstention in the final vote despite the prior agreement in the Trilogue, was outlandish but had a fair point. The FDP has raised some viable criticism that the European institutions should have considered themselves but failed to do so. In my personal opinion, what was really needed was a clear path for victims to sue parent companies for serious crimes ('atteintes graves' under the French *Loi de vigilance*) committed by their subsidiaries, from Bhopal via Deepwater Horizon to Rana Plaza. The UK Supreme Court has shown the way to go. But instead, we created an overreaching compliance monster with an array of unexpected and unforeseeable side effects, based on a slightly disrespectful attitude to Southern nations that was already displayed by the Ruggie principles.[10] And I have not even discussed the very real danger of losing markets to players much worse than Western companies acting in the limelight of our democratic civil societies and the negative effects of that for the people we want to protect. Could it be that the CSDDD is more concerned with the emotional needs of our urban cosmopolitan elites than the material needs of the people in the Global South? Yes, we want to be good, I adamantly subscribe to that and credit the originators of the CSDDD for it. But we should be aware that our duly diligent enterprises might be viewed as post-colonial patronisers rather than welcomed as patron saints in other parts of the world.

7 The Kik-case, LG Dortmund, BeckRS 2019, 388.

8 *Vedanta Resources Ltd v. Lungowe* [2019] UKSC 20, para. 9 (per Lord Briggs); *King Emre Okpabi v. Royal Dutch Shell* [2021] UKSC 3, paras 20–21 (per Lord Hamble).

9 That was the actual problem why the claim against Kik failed, cf. LG Dortmund, BeckRS 2019, 388, para. 23: 'Anders als in den meisten anderen Rechtsordnungen hätten bloße Verhandlungen über den Anspruch weder verjährungshemmende noch sonst die Verjährung berührende Wirkung'. [= Unlike in most other legal systems, mere negotiations about the claim would have no effect on the limitation period or otherwise affect the limitation period. – DeepL].

10 *UN Guiding Principles on Business and Human Rights (UNGP)* (UN doc A/HRC/17/31) (2011), https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.